

**COMBINED WRITTEN STATEMENT OF
THE HONORABLE M. MARGARET McKEOWN
UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT**

AND

**THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS**

ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

**BEFORE THE
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

**“WORKPLACE PROTECTIONS FOR FEDERAL JUDICIARY EMPLOYEES:
FLAWS IN THE CURRENT SYSTEM AND THE NEED FOR STATUTORY CHANGE”**

March 17, 2022

INTRODUCTION

I am Judge Margaret McKeown, a United States Circuit Judge for the Ninth Circuit. I am accompanied by Judge Julie A. Robinson, a United States District Judge for the District of Kansas. We are members of the Workplace Conduct Working Group established under the leadership of Chief Justice Roberts, who in 2018, called for swift action to address workplace concerns. Thank you for the invitation to be here today on behalf of the Judicial Conference of the United States.

The federal Judiciary is committed to the well-being of its employees and to an exemplary workplace by ensuring a safe, respectful, and professional environment free from discrimination, harassment, abusive conduct, and

retaliation. Over the past four years, the Working Group has, in consultation with Judiciary employees, law clerks, outside experts, and interested groups recommended more than thirty changes to the Judiciary’s policies and procedures—all of which have been adopted by the Judicial Conference.

These include increasing the scope of employee protections, strengthening the obligations of judges and Judiciary employees to report misconduct or take other appropriate action, and improving the processes for reporting and addressing reports of misconduct. Every Judiciary employee has clear and multiple avenues to obtain confidential advice, report misconduct, and seek and receive remedial action.

These improvements are a result of leadership – a key imperative for creating a safe workplace. Engaged leadership by chief judges and the heads of each court unit sends a powerful signal to our community that everyone must support a safe and civil workplace.

JUDICIARY EMPLOYEES HAVE PROTECTIONS

To begin, Judiciary employees are protected from discrimination (based on, race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age (40 years and over), and disability); sexual, racial, and other discriminatory harassment; retaliation; as well as abusive conduct.

The Judiciary provides expanded protections against abusive conduct, based

on the Working Group’s finding that while inappropriate conduct is not pervasive, incivility, disrespect, or abusive behavior is more common than sexual harassment. Abusive conduct is defined as “a pattern of demonstrably egregious and hostile conduct not based on a protected category that unreasonably interferes with an employee’s work and creates an abusive working environment.”

Judiciary employees are protected by at least ten employment laws and policies:

- Title VII, Civil Rights Act of 1964, as amended and codified in 42 U.S.C. §§ 2000e-2- 2000e-3, 2000e-16(a);
- Age Discrimination in Employment Act of 1967, as codified in 29 U.S.C. §§ 623 and 633a;
- the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102, 12111-12114, as amended by the Americans with Disabilities Act Amendments Act of 2008;
- the Rehabilitation Act of 1973;
- Family and Medical Leave Act of 1993;
- Uniformed Services Employment and Reemployment Rights Act of 1994;
- Worker Adjustment and Retraining Notification (WARN) Act, codified at 29 U.S.C. § 2101;
- Occupational Safety and Health Act of 1970, as amended;
- the Employee Polygraph Protection Act of 1988 (EPPA), codified at 29 U.S.C. §§ 2001-2009;
- and whistleblower protections.

Judiciary whistleblower protections require that any Judiciary personnel with authority to take, direct others to take, recommend, or approve any personnel action may not use such authority to take or threaten to take an adverse employment action against an employee because of any disclosure of specified information. These protections make clear that retaliation against a person who reveals or reports wrongful conduct is itself wrongful conduct.

IMPROVEMENTS

Second, we have improved workplace protections and procedures. Revised Model Employment Dispute Resolution (EDR) plans are in place for courts and federal public defender organizations. The Model EDR Plan included enhanced policy protections, covers all paid and unpaid employees, provides specific informal avenues for reporting and addressing wrongful conduct, and provides a more streamlined formal complaint process that allows for more time to file a formal claim. A new Model Federal Public Defender Organization (FPDO) EDR Plan was developed and approved by the Judicial Conference, designed to address the issues unique to the FPDO community, including: the distinct employment relationship between the federal public defenders and their employees; their role as legal representatives with ethical obligations to clients on whose behalf they appear in court; and the need to mitigate concerns regarding access to sensitive information.

The Code of Conduct for United States Judges makes clear that “a judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct.” Codes of Conduct confidentiality obligations were updated to remove barriers to reporting and to emphasize the responsibility of all judges and Judiciary employees to “take appropriate action upon receipt of reliable information indicating a likelihood” of misconduct. Confidentiality provisions for law clerks were revised to clarify that they do not prohibit reports of misconduct by judges, supervisors, or any Judiciary employee. Improved guidance ensures that judges and employees understand that confidentiality obligations should never prevent any employee – including a law clerk – from revealing abuse or reporting misconduct by any person.

Judicial Conduct and Disability (JC&D) rules clarify that discrimination, harassment, abusive behavior, and retaliation are cognizable misconduct and added that a bystander judge’s failure to report is also cognizable misconduct. Specifically, JC&D Rules and Commentary (1) require Judges to report or disclose misconduct; (2) expressly prohibit sexual and other discriminatory harassment (intentionally discriminating on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability), abusive conduct, and retaliation; (3) exempt reports of misconduct from

confidentiality rules; (4) clarify eligibility to file a JC&D complaint; (5) improve transparency through expanded disclosure provisions; and (6) authorize the Judicial Conference and judicial council of a judge who is the subject of a complaint to conduct systemic evaluations affirming they have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote “the expeditious conduct of court business.”

EXPANDED NETWORK OF TRAINED PROFESSIONALS

A network of trained professionals, including local, circuit, and national workplace specialists, are now available to provide confidential guidance and assistance to all Judiciary employees. These professionals are expert in matters of workplace conduct and are outside of the traditional court chain of command to support and provide services to both employees and employing offices. The national Office of Judicial Integrity (OJI) at the Administrative Office of U.S. Courts, Directors of Workplace Relations (DWR) in each circuit, and EDR Coordinators in each employing office and court are all able to assist employees with a broad range of workplace conduct concerns.

The OJI was established to, among other duties, provide independent, confidential advice on workplace conduct; outreach to future, current, and former Judiciary employees and law clerks; and analyze workplace issues and trends. Workplace conduct committees and DWRs provide circuit-wide guidance and

oversight of workplace conduct matters. The DWRs, among other duties, offer workplace conduct training; give confidential guidance to employees and managers about conduct issues; provide advice, training and assistance to court EDR Coordinators; and assist with workplace conduct investigations, mediation, and dispute resolution.

New requirements in the Model EDR Plan have helped to ensure that every court and employing office has at least two trained and certified EDR coordinators to give employees additional avenues to report issues and seek advice. An online training course must be taken and passed by EDR coordinators in order to become certified, and over 400 individuals have been certified to date. The EDR Handbook provides detailed explanations for each of the EDR options for resolution, step-by-step directions for each process, information about the remedies available under the EDR Plan, proactive and responsive steps for safeguarding the rights and protections afforded under the EDR Plan, and more.

This multi-layer network of dedicated personnel – at the national, circuit, and local court levels – is available to provide confidential and impartial advice and guidance to Judiciary employees, managers, and judges. Together, they support and facilitate EDR processes; coordinate training programs; propose and assist in the implementation of policy initiatives; and collaborate on best practices to foster consistency across the circuits and courts

CLEAR AND MULTIPLE AVENUES TO REPORT

Next, we have streamlined our procedures and made it easier for employees to seek confidential help and report misconduct, while enhancing impartiality and protecting confidentiality. We took to heart the EEOC's advice regarding the importance of multiple avenues for reporting. Employees are free to contact whomever they feel most comfortable with and often coordinate with more than one resource, within or outside their employing office, including local court and circuit-level positions, as well as managers, unit executives, human resources staff, or judges. Employees can also report anonymously through an online reporting portal.

In addition to multiple avenues to report, we have expanded the paths for employees to raise concerns, choosing the option(s) that best fit their needs and comfort level – informal advice, assisted resolution, or formal complaint.

Robust informal processes provide valuable flexibility for employees to address workplace concerns, while retaining the option of filing a formal complaint. In some circumstances, an employee may seek informal advice – confidential guidance on an employee's rights and options. "Assisted Resolution" provides an interactive and flexible option to address concerns, without the need for rules, deadlines, or other fixed parameters. This might include facilitated discussions with the source of the conduct, voluntary mediation, preliminary

investigations including interviewing witnesses, and/or seeking a mutually agreeable resolution.

The incorporation of informal advice and assisted resolution has provided additional opportunities for reporting as indicated by the increased use of these processes and has allowed issues to be resolved more quickly. The DWRs report that more time is spent on confidential informal advice than anything else, and that these interactions involve a range of workplace issues, not just harassment. Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were uncomfortable coming forward or were limited to filing a Formal Complaint.

The formal complaint process has been revised in recent years to be more approachable and provides well-defined procedures through which workplace conduct issues are heard by an impartial federal judge. The formal complaint process includes mechanisms for the investigation of allegations and holding hearings for disputed issues. Parties have the right to be represented by counsel and a resulting decision can be appealed to the Circuit Judicial Council.

When misconduct allegations involve a judge, employees have the option to file a complaint through either of both the EDR process and the JC&D process, providing mechanisms for seeking both employment-based remedies and specific accountability for judicial misconduct, respectively.

TRAINING

Fifth, we have emphasized training at all levels to ensure employees are aware of their rights and protections. EDR training sessions, orientation sessions, management training, and educational programs all contribute to transforming the workplace culture and highlighting the responsibilities of employees and judges to promote and ensure an exemplary workplace.

All courts and employing offices must conduct annual training for all Judiciary employees and judges on workplace conduct protections and processes. A recent virtual training series in November and December 2021 was viewed live by over 6,000 employees and judges, and another tailored for chambers staff was attended by nearly 100 staff, including law clerks and judicial assistants.

The Federal Judicial Center (FJC) plays an instrumental role in education and has implemented training recommendations made by the Working Group: (1) ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation programs, with refresher training at regular intervals; (2) develop an advanced training program aimed at developing a culture of workplace civility; and (3) continuously evaluate the effectiveness of workplace conduct educational programs. The FJC has prioritized education on workplace conduct issues and has broadened the availability and scope of its programs. The FJC integrates workplace conduct-related scenarios and

discussions into all of its leadership-oriented programs for both new and experienced leaders, it has especially sought to leverage its reach with podcasts, webcasts, and webinars. In addition, it has created a broad range of publications, on-line resources, and in-person and virtual training programs to promote fair employment practices and workplace civility that supplement court-sponsored training and materials.

RECOMMENDATIONS FOR ADDITIONAL ACTION

While many protections and procedures have been improved, the Judiciary's work is not done. As is the case in all workplaces, the Judiciary must continue to take stock of what it has accomplished and find those areas where more can be done. Accordingly, the Working Group has proposed additional recommendations that would strengthen policies and procedures, expand communication and training, and improve our measurement of progress.

The Working Group recommends a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.

A continuing focus has been to build confidence and trust in the changes that already have occurred and that will occur. Building that trust requires a clear

explanation of how we are addressing workplace misconduct. We have done so with training and awareness at all levels, including nationwide and locally, to include judges and Judiciary employees. The working group recommends strengthening annual EDR training. A related recommendation – to expand outreach and engagement – will help circuits fully understand employee concerns.

Another element of trust is regular reporting. The Working Group recommends including data collection related to Informal Advice contacts and recommends issuing an annual Judiciary workplace conduct report.

Confidence is further enhanced by ensuring fair and impartial procedures. The Working Group is further proposing that, in addition to existing recusal requirements, the Judiciary's policies be enhanced to specify that an employee complaint must be overseen by a judge from outside the court from which the complaint originated.

Another key imperative for creating a safe workplace is effective policies and procedures, using clear and plain language. The working group recommended additional policy enhancements. These include assessing incorporation of additional monetary remedies as part of the EDR complaint process; developing a system for regular review of the Judiciary's workplace conduct policies to ensure comprehensive implementation across courts and circuits; and adopting an express policy regarding romantic relationships that exist or develop between employees

where there is a supervisory or evaluative relationship.

The Working Group's most recent recommendations report are listed below:

- Recommendation 1: Conduct a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.
- Recommendation 2: Augment annual EDR-related data collection to include data related to Informal Advice contacts, while ensuring that confidentiality is protected.
- Recommendation 3: Enhance the Formal Complaint process by revising the Model EDR Plan to specify that an employee complaint must be overseen by a Presiding Judicial Officer from outside the court from which the complaint originated.
- Recommendation 4: Develop an express policy regarding romantic relationships that exist or develop between employees where there is a supervisory or evaluative relationship. The policy should apply to all Judiciary employees and judges.
- Recommendation 5: Assess incorporation of additional monetary remedies as part of the EDR complaint process.
- Recommendation 6: Direct the Office of Judicial Integrity, with the assistance of the Directors of Workplace Relations, to issue an annual Judiciary workplace conduct report.
- Recommendation 7: Expand Outreach and Engagement.
- Recommendation 8: Strengthen annual EDR training by revising the Model EDR Plan to emphasize that courts and employing offices have a responsibility to ensure that EDR training is offered and accessible to all employees and judges on an annual basis, and to take affirmative steps to ensure completion.

- Recommendation 9: Develop a system for regular review of the Judiciary’s workplace conduct policies to ensure comprehensive implementation across courts and circuits.

CONCERNS REGARDING THE JUDICIARY ACCOUNTABILITY ACT

Solutions that work must account for the unique needs and governance of a particular workplace, which for the Judiciary includes a dispersed, regionalized structure. Individual courts at the district and circuit levels possess significant administrative autonomy, including the authority to address employment and workplace conduct matters. We have established a system that empowers employees to seek advice and guidance from experts at the local, regional, or national level, and empowers them to seek resolution through informal advice, assisted resolution or a formal complaint procedure. This is more likely to be used and to be more effective than a single national oversight body.

The Judiciary’s approach of establishing DWRs at each circuit, training and empowering EDR coordinators in each court, and requiring the courts to provide annual training for every judge and employee, matches well with the Judiciary’s decentralized governance and culture. The Judiciary Accountability Act of 2021 (JAA) would reorganize the workplace misconduct program as a national centralized structure that operates outside of the Judicial Conference and the purview of the courts. A centralized structure, as proposed by the JAA, would

provide no mechanism for the Judicial Conference, the courts, or other judicial branch entities to influence or provide input regarding the workplace misconduct prevention program, which could result in policy and programmatic decisions that lack an essential understanding of the unique character of each court and unit. For example, the JAA fails to acknowledge the fundamental differences between FPDOs and other Judiciary units. Yet, such differences led the Judicial Conference to approve a separate EDR plan for FPDOs. The JAA's approach to distancing leaders at the top and its failure to focus on the unique needs of a particular workplace, in this instance the individual courts, is unworkable and unwise.

The JAA proposes to replace existing judicial branch personnel at the local, circuit-wide, and national levels with individuals who are employed by a "judiciary" entity that is centralized at the national level and does not operate under the supervision or direction of a circuit council, the Judicial Conference, or the AO Director. The Judiciary's internal governance system is a necessary corollary to judicial independence. Accordingly, the Judicial Conference has serious concerns that this arrangement would infringe on judicial branch self-governance, undermine the integrity of the branch, threaten the independence of judicial decision making, implicate judicial autonomy, or impair the administration of justice.

By inserting Congress and the Executive Branch within internal Judiciary governance, in the form of a Commission with vast reporting and investigative authorities, including subpoena powers, appointed by and in continual communication with the political branches, the JAA creates a risk that it could be used by the political branches or others to influence, intimidate, harass, or punish judges, or could target its investigative resources at judges based on their decisions, perceived political affiliations, or the party of their appointing president.

Beyond judicial governance concerns, the construct of the JAA removes avenues for reporting misconduct, possibly discouraging reporting. Some employees might be hesitant to report misconduct to a national, centralized entity, rather than within the familiar ambit of their particular court or circuit. The Judicial Conference would not favor legislation to the extent that it would centralize the reporting and processing of workplace misconduct claims (including claims that could potentially lead to judicial conduct and disability proceedings), contrary to best practices, as recommended by the EEOC, which emphasize the importance of multiple advice and reporting options. Centralizing the reporting and processing of workplace misconduct claims would unduly hinder many Judiciary employees from coming forward to report misconduct.

The Judiciary's approach – creating a national, regional, and local networks to receive workplace conduct reports – means multiple resources are fully

accessible to all employees, who can choose the communication path that feels safest to them. Employees should have the option to utilize the avenue they are most comfortable pursuing. Local reporting options provide access to and availability of knowledgeable individuals who can assist with oftentimes complicated and sensitive issues. This is far more effective than one centralized national office.

The JAA's approach to confidentiality is another area of concern. The legislation imposes extensive public reporting requirements that could compromise confidentiality. The Judiciary's recommendation is that data should be collected at a high level (e.g., only the number of contacts), to avoid even the perception that the strong confidentiality protections attached to providing informal advice might be lessened by the collection of court- or allegation-specific data.

Another element of confidentiality relates to ethics advice. The Judicial Conference opposes any legislative proposal that permits any entity other than the Committee on Codes of Conduct (Codes Committee) to provide confidential ethics advice to judges or employees because it infringes on the Committee's authority and may create confusion within the Judiciary. Unlike the Codes Committee, which includes a member judge from every judicial circuit as well as a magistrate judge and bankruptcy judge member, it is doubtful that most members of the Commission proposed by the JAA would have sufficient familiarity with judicial

ethics and the various adjudicative and administrative responsibilities that come with being a judge. To the extent that any office created by the JAA would have the authority to provide advice regarding the Codes, this would interfere with the Codes Committee's authority to provide such advice and could lead to a judge or employee receiving conflicting guidance.

Similarly, the Judicial Conference opposes any provision that authorizes any entity to issue subpoenas without an exception for the Codes Committee's advice because it imposes an intrusive requirement that would interfere with existing policies and procedures regarding the confidentiality of ethics advice and may undermine the role of the Committee by discouraging judges and employees from seeking guidance. If a judge or employee knew that the Committee's confidential advice might be subject to a subpoena as part of a workplace conduct investigation, then the judge or employee might be reluctant to seek the Committee's advice to resolve workplace conduct matters.

A third aspect of confidentiality concerns judicial conduct and disability proceedings. The JAA would amend the JC&D Act to require the Judicial Conference to provide to Congress its determination and the record of the proceedings where it affirms or imposes remedial action on a subject judge (and not only when there is a referral to Congress for consideration of impeachment). Furthermore, the bill would give power to various officials created by the

legislation to obtain all information or subpoena materials related to judicial conduct and disability proceedings. Such provisions threaten the confidentiality of judicial conduct and disability proceedings, which could impact decisional independence and be a deterrent to reporting.

In many regards, the JAA includes provisions that are duplicative of current judiciary processes. For example, under the JAA, the Commission and associated offices would recommend to the Judicial Conference, every four years, revisions to the Codes of Conduct for United States Judges, Judicial Employees, and Federal Public Defender Employees. This creates a structure that unnecessarily duplicates the work of the Codes Committee, and the Judicial Conference does not support this provision.

The Judicial Conference further opposes the bill to the extent it essentially codifies—and to some extent duplicates—existing procedures under the JC&D Act and Rules, which may limit the Judiciary’s flexibility to amend its procedures to account for changing circumstances or future developments.

Beyond duplication of effort and loss of flexibility, the Judicial Conference has additional concerns related to JAA provisions that substantially alter the Judicial Conduct and Disability process so that it would no longer adequately reflect judicial self-regulation and independence. The inclusion of members of a Commission appointed by or in consultation with the executive and legislative

branches on JC&D special committees and judicial councils would undermine judicial self-regulation and independence and would unnecessarily insert the political branches into the realm of judicial discipline.

Furthermore, the JAA threatens to undermine the delicately crafted incentive structure Congress established in the JC&D Act that encourages judicial resignation in appropriate circumstances – by amending the JC&D Act to exclude a judge’s resignation, retirement, or death as grounds for dismissal or conclusion of a JC&D complaint. Because only Congress can remove Article III judges through impeachment proceedings, and because it is a time and resource intensive process that is rarely invoked, a structure that encourages judges to resign when allegations of judicial misconduct are determined to be valid is beneficial to society at large, and to the Judiciary in particular.

The Judicial Conference opposes the JAA to the extent that it establishes a broader scope of workplace protections for the Judiciary than those applicable to other branches of government. The bill would extend workplace and whistleblower protections to categories of individuals with whom the Judiciary does not have an employment relationship, and which are not covered by workplace protections applicable to other branches of government and the private sector.

CONCLUSION

The Judiciary has built an exemplary workplace and is committed to sustaining it. The Working Group will continue to monitor and assess workplace conduct matters throughout the Judiciary, to assist with continued implementation of the workplace initiatives already in place, and to recommend additional changes whenever it sees needs for improvement.

While the Judiciary has made significant strides and improvements, and has done so expeditiously, some changes do not occur overnight. This is a continuing effort, and we expect some cultural changes will need time to take root. However, the Judiciary's process for protecting employees is demonstrating its promise and should be given time to build upon the significant strides made to date. Making premature or sweeping changes could undo several years of steady improvement, with no assurance that alternatives would lead to an improved workplace, more reporting, greater employee trust, or more effective responses to complaints.

The positive effects of the protections and improved process have already begun to take hold. The Judiciary looks forward to even greater improvements that will further enhance the fairness, dignity, and respect with which we treat our employees.

FACT SHEET

Workplace Protections in the Federal Judiciary

Background

Workplace protections have long existed for judicial employees, including explicit prohibitions on discrimination and harassment. Significant improvements have been implemented over the last several years that have increased the scope of employee protections, strengthened the obligations of judges and other employees to report misconduct or take other appropriate action, and improved the processes for reporting and addressing reports of misconduct.

In 2018, at the request of the Chief Justice, the Director of the Administrative Office created the Federal Judiciary Workplace Conduct Working Group to examine the sufficiency of safeguards currently in place within the Judiciary to protect judicial employees from inappropriate conduct in the workplace. In its first six months it conducted extensive investigation and research, and [published a 45-page report](#) that contained numerous findings and recommendations to the Judicial Conference of the United States for enhancing protections, improving working conditions, and refining procedures.

Based on those recommendations, the Judicial Conference approved and implemented sweeping improvements to the Model EDR Plan, Codes of Conduct, and Judicial-Conduct & Judicial-Disability (JC&D) Rules. A national Office of Judicial Integrity was created and the circuits established offices for Circuit Directors of Workplace Relations, in addition to existing Employment Dispute Resolution (EDR) Coordinators at every local court.

Facts

- **Express discrimination and harassment prohibitions and protections have long existed for all judicial employees.**
 - Court EDR Plans prohibit discrimination, harassment, and retaliation, including conduct that would violate Title VII, Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; and the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. The JC&D Rules define misconduct to include discrimination, abusive or harassing behavior, and retaliation.
- **An additional prohibition against Abusive Conduct protects employees even when the misconduct is not discriminatory.**
 - Court EDR Plans prohibit Abusive Conduct, defined as “a pattern of demonstrably egregious and hostile conduct not based on a Protected Category that unreasonably interferes with an employee’s work and creates an abusive working environment. Abusive conduct is threatening, oppressive, or intimidating.” The JC&D Rules define misconduct to include treating judicial employees “in a demonstrably egregious and hostile manner.”
- **The Codes of Conduct and JC&D Rules emphasize that judicial employees and judges have a responsibility to take appropriate action upon learning of potential workplace misconduct, even if they are only a bystander.**
- **Confidentiality policies have been clarified to remove potential barriers and encourage reporting.**
 - Employee confidentiality obligations, such as those for chambers staff, expressly do not preclude one’s ability to report wrongful conduct.

- **Judicial employees have multiple avenues to report workplace conduct concerns, including anonymously and to points of contact within or outside their employing office. A multi-layer network of dedicated personnel—at the national, circuit, and local court levels—is available to provide confidential and impartial advice and guidance to judicial employees, managers, and judges.**
 - The Office of Judicial Integrity at the Administrative Office of the US Courts, Directors of Workplace Relations in each circuit, and Employment Dispute Resolution Coordinators in each court and employing office are all able to assist employees with a broad range of workplace conduct concerns. Employees are free to contact whomever they feel most comfortable and often contact more than one resource.
- **Robust informal processes provide valuable flexibility for employees to address workplace concerns.**
 - In addition to the formal complaint process, employees can also utilize a more flexible Assisted Resolution option, which has fewer fixed rules or deadlines.
- **The Formal EDR Complaint process has been revised in recent years to be more user-friendly and provides well-defined procedures through which workplace conduct issues are heard by an impartial federal judge.**
 - The Formal EDR Complaint process allows for an investigation of allegations and potential hearings for disputed issues. Parties have the right to be represented by counsel and a resulting decision can be appealed to the circuit judicial council.
- **In addition to a Formal EDR Complaint, employees can also file a complaint under the JC&D Act to address allegations of misconduct by a judge.**
- **All courts and employing offices must conduct annual training for all judicial employees and judges on workplace conduct protections and processes.**
- **The Federal Judicial Center (FJC) has created a broad range of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility that supplement court-sponsored training and materials.**
 - The FJC regularly provides training programs for judicial employees in individual districts. Programs include Preventing Workplace Harassment, which is available in two versions, one for managers and one for employees; Respect in the Workplace, which fosters workplace civility; and another regarding the Codes of Conduct. Since 2016, the FJC has presented these programs nearly 200 times in courts around the country.
- **Data is collected across the Judiciary on Formal EDR Complaints and requests for Assisted Resolution, as well as judicial conduct and disability complaints and actions under the JC&D Act.**
- **The Federal Judiciary’s Workplace Conduct Working Group, in collaboration with Judicial Conference committees and Administrative Office advisory groups, continues to engage in evaluation and assessment of existing policies, procedures, and practices to ensure an exemplary workplace for judicial employees.**
- **The Judiciary continues to actively engage internal and external stakeholders. For example, recently a letter was sent to approximately 200 law schools across the country, highlighting the Office of Judicial Integrity and Circuit Directors of Workplace Relations as confidential avenues for law school administrators to seek guidance and/or report concerns of which they become aware.**

**REPORT OF THE
FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP
TO
THE JUDICIAL CONFERENCE OF THE UNITED STATES**
March 15, 2022

INTRODUCTION

The Workplace Conduct Working Group (Working Group) was launched in January 2018, at a time when many individuals came forward as part of the #MeToo movement to relate distressing accounts of sexual abuse and sexual harassment in workplaces throughout the country. The federal Judiciary was not immune. In his 2017 year-end report, Chief Justice John G. Roberts Jr. called for the creation of a Working Group to recommend any changes needed to promote an exemplary workplace and to protect Judiciary employees from harassment and other misconduct.

“These concerns warrant serious attention from all quarters of the judicial branch,” the Chief Justice wrote. “I have great confidence in the men and women who comprise our judiciary. I am sure that the overwhelming number have no tolerance for harassment and share the view that victims must have clear and immediate recourse to effective remedies.”

For the past four years, the Workplace Conduct Working Group, the Judicial Conference, the courts and circuits, the Federal Judicial Center, and the Administrative Office of the U.S. Courts, have been engaged in a substantive and deliberate effort to ensure a safe, respectful, and professional environment. The federal Judiciary is committed, without reservation, to sustaining an exemplary workplace and to the well-being of all its employees.

Workplace protections have long existed for Judiciary employees, including explicit prohibitions on discrimination and harassment. Soon after its formation, the Working Group began a dialogue with Judiciary employees to identify necessary improvements to the Judiciary’s workplace policies and procedures. These conversations led to a series of policy changes and

new initiatives. Significant revisions have expanded and clarified the scope of employee protections, strengthened the obligations of judges and employees to report misconduct, and expanded the avenues for addressing reports of misconduct.

This report summarizes the extensive steps the federal Judiciary has taken since January 2018, when the Working Group was formed. The Judiciary's priorities have included not just meaningful revisions and improvements to its conduct policies, complaint procedures, and ethics codes, but an equally important and enduring commitment to promoting an exemplary workplace through engaged leadership and more expansive education in the areas of civility, respect, and communication. In brief, the Judiciary has improved the environment in which its employees work and serve the public in numerous ways:

- The Judiciary's employment dispute resolution processes have been significantly streamlined and improved, including effective formal and informal avenues to address concerns.
- Workplace protections were significantly expanded to include an express prohibition against abusive conduct, addressing harassing behavior even when it is not discriminatory.
- A national Office of Judicial Integrity was established and Directors of Workplace Relations were hired in every circuit, creating an interlaced network of local, circuit, and national workplace specialists who are outside the supervisory chain of command, positioned to provide confidential guidance and assistance to all Judiciary employees.
- Codes of Conduct have been updated to clarify confidentiality obligations, to remove barriers to reporting, and to emphasize the responsibility of all judges and Judiciary employees to take appropriate action upon learning of potential misconduct.
- The Judicial Conduct and Disability (JC&D) Rules were expanded and, among other changes, now include a mandatory "bystander" reporting obligation.

- A new Model Federal Public Defender Organization Employment Dispute Resolution (EDR) Plan was developed, addressing the issues unique to the federal public defender community.
- An EDR Interpretive Guide and Handbook was created and made available Judiciary-wide, providing detailed explanations and step-by-step directions for each of the EDR options for resolution, which is especially useful to EDR coordinators, Directors of Workplace Relations, unit executives, judges, and others directly involved in or who support the formal and informal EDR processes.
- Training and awareness at all levels is vastly greater than in 2018, including nationwide, circuit, and local workplace conduct training programs aimed at judges and Judiciary employees, as well as additional programs on promoting civility and respect, and other initiatives designed to prevent misconduct from occurring and foster an exemplary workplace.

Notwithstanding all of these significant enhancements, the Judiciary's work is not done. After reflecting on the major changes already made, this report recommends that the Judiciary adopt more tools and policies to build on the progress to date. Recommendations to better measure how well the Judiciary's systems are functioning, to further strengthen policies and procedures, and to expand communication and training are being forwarded to committees of the Judicial Conference for consideration. A full list of recommendations may be found in Section 2.

Specifically, the Working Group recommends that an in-depth nationwide climate survey of Judiciary employees be conducted at regular intervals. It also recommends additional data reporting to measure the utilization of and effectiveness of resources available to employees.

The Working Group is further proposing that, in addition to existing recusal requirements, the Judiciary's policies be amended to require that complaints about wrongful conduct always be reviewed by judges outside the court where a complaint originates, fostering greater employee trust and confidence in the complaint process. And the possibility of

incorporating additional monetary remedies into the Judiciary’s employee complaint process, comparable to those available to other federal employees, should be assessed.

A continuing focus is to build confidence and trust in the changes that already have occurred. A groundbreaking 2016 report by the U.S. Equal Employment Opportunity Commission (EEOC) concluded that employees in most workplaces significantly underreport sexual harassment and other misconduct. The EEOC identified various reasons, common to all workplaces, why employees may be reluctant to come forward, including distrust in their workplace policies and an unwillingness to become embroiled in formal proceedings. As the EEOC noted, underreporting weakens any organization’s ability to respond consistently and effectively, even if its system is otherwise sound.

The Working Group structured its reforms around the EEOC’s recommendations, and the Judiciary’s initial set of reforms was later endorsed by the Chair of the EEOC as “the type of effort that we need to see more of.”

Consistent with the EEOC’s research, the Working Group has prioritized reducing barriers to employee reports of misconduct. Every circuit now has a Director of Workplace Relations—a high level and functionally independent professional—whom employees can approach confidentially for informal advice, support, and information about how to initiate formal proceedings. The Judiciary has revised its confidentiality policies to clarify that employees are always permitted to bring forward reports of misconduct. And, consistent with EEOC recommendations, the Judiciary has created a flexible and accessible process for those employees who wish to attempt resolving their concerns informally in the first instance.

In the Judiciary, building trust begins with a clear explanation of how we are addressing workplace misconduct. It is essential that employees have the opportunity to receive confidential

advice and guidance without fear of retaliation or professional injury. They must also know it is possible to come forward and report their concerns and have them addressed without harm to their careers. To further strengthen accountability, the Judiciary has adopted robust whistleblower protections and has imposed a mandatory obligation on all judges and Judiciary employees to report any misconduct they learn of or witness.

Training programs are communicating these points to judges and employees in every court, court unit, and circuit. Employee focus groups and informal workplace dialogues also are creating a safe environment to discuss workplace conduct concerns and protections. The Working Group is expanding its own emphasis on direct discussions with employees, which provide valuable feedback that informs the Judiciary's continued efforts. Several circuits have also created law clerk advisory committees to ensure that law clerks have direct input into their workplaces' policies.

As this report demonstrates, the recommendations made by the Working Group in 2018 are proving effective, and they are well designed to meet the workplace needs of federal Judiciary employees within the unique governance structure of the Branch. The Judiciary's strong and far-reaching response promotes a positive workplace environment and, when misconduct occurs, enhances the chance of early reporting, meaningful intervention, and long-term prevention of abusive conduct. Judiciary employees now have access to direct assistance, clear and immediate recourse, and effective remedies.

The recommendations for further action contained in this report represent the next steps in the Judiciary's ongoing effort to ensure an exemplary workplace for all its employees. In making these recommendations, the Working Group has sought to build on its progress to date, rather than make premature or sweeping changes that could undo several years of constructive

change. It is the view of the Working Group that concrete and iterative improvements to the Judiciary's policies allow for a more meaningful dialogue with employees and preserve employees' familiarity with the Judiciary's existing procedures.

The Judiciary has developed initiatives and revised its procedures to promote an exemplary workplace. As in any workplace, continual review and thoughtful revision are needed, but the Working Group believes that the Judiciary's process for protecting employees is demonstrating its promise and should be given time to build upon the significant strides made to date.

SECTION 1: The Judiciary's Response

Drawing on the expertise of the EEOC, the Working Group's initial proposals addressed five key areas that work in harmony to define a healthy workplace:

- Committed and Engaged Leadership
- Cultural Assessment
- Consistent and Demonstrated Accountability
- Effective Policies and Procedures
- Training that Works

Of equal importance, the Working Group's findings, and its recommendations for change, emerged from extensive dialogue with Judiciary employees. The Working Group conferred with many groups of Judiciary employees and reviewed anonymous email comments. The Working Group met multiple times with law clerks and law clerk groups. The Working Group also met with groups representing a cross-section of all Judiciary employees, including staff from federal defender offices, probation and pretrial services offices, clerks of court staff, chambers staff, and other employees.

The Judiciary’s strategy and tools for supporting a respectful workplace align closely with the needs and concerns expressed by employees in these conversations. Based on the communications, the Working Group concluded that abusive behavior, rather than sexual harassment, was the most common form of wrongful conduct in the Judiciary. The Working Group also concluded that workplace misconduct was likely being underreported in the Judiciary.

“The Working Group believes that inappropriate conduct, although not pervasive in the Judiciary, is not limited to a few isolated instances. This information suggests that, of the inappropriate behavior that does occur, incivility, disrespect, or crude behavior is more common than sexual harassment,” the Working Group stated in June 2018. The report noted that formal complaint procedures under the Judicial Conduct and Disability Act and EDR plans “generally work well in addressing workplace misconduct in the instances when they are invoked.” But the Working Group added that formal complaints by Judiciary employees against judges and senior staff were rare.

Although the sexual harassment of law clerks by judges was an initial emphasis and focus, the Working Group defined a broader scope, proactively seeking a positive work environment for all of the Judiciary’s 30,000-plus employees. “The Judiciary should set as its goal the creation of an exemplary environment in which every employee is not only free from harassment or inappropriate behavior, but works in an atmosphere of civility and respect,” the Working Group’s first report said in June 2018.

That report contained more than 30 recommended changes, all of which were quickly adopted by the Judiciary. Since then, courts and circuits have worked aggressively to implement those changes, and have taken additional steps to carry out the Judiciary’s shared vision of an

exemplary workplace.

A timeline of Working Group and Judiciary activity is available in Appendix A, including links to the Working Group's [2018](#) and [2019](#) reports. Appendix B provides a detailed summary of specific measures and initiatives undertaken since the Working Group's last report. But a true understanding of what the Judiciary has achieved, and what the Working Group believes is needed going forward, is helped by explaining the Group's history in narrative form. This report seeks not merely to catalog the Working Group's original recommendations, but also to illustrate how those recommendations are working in practice—especially focusing on how employees' experience has improved.

Recognizing Barriers to Reporting

One of the key issues facing the Judiciary, as with all employers, is reluctance to report wrongful conduct.

The 2016 EEOC report on sexual harassment in the workplace served as a foundation for the Working Group's efforts. The EEOC said workplace harassment exists in virtually all workplaces, and that in most instances a victim does not report perceived mistreatment to superiors.

Every organization seeking to eliminate harassment and other workplace misconduct must address employees' reluctance to report when they believe they have been mistreated. A key goal of the Judiciary's program, as first laid out by the Working Group, is to make it safer for all employees to come forward when inappropriate behavior is identified. Key areas of the Judiciary's workplace strategy—changes to policy, expansion in training, multiple channels to receive confidential guidance and support from workplace specialists at the circuit and national

levels, and the opening of informal avenues to resolve workplace concerns—all work together to make reporting of misconduct more likely to occur.

In detailed conversations with Judiciary employees, including current and former law clerks, the Working Group probed the complex and conflicting choices employees face when choosing whether or not to report workplace concerns.

The Judiciary recognized the need to expand employees' reporting options. In early 2018, an employee could file a formal complaint under the Judicial Conduct & Disability Act or under a court's EDR plan. Or they could take their complaint to a chief judge. Some employees told the Working Group that they perceived all of these choices as highly risky.

Expanding Avenues to Reporting and Assistance

Employees frequently requested a clearly identifiable and independent person to whom employees could report misconduct and discuss other workplace concerns. Employees stressed that the person should be outside of the supervisory chain of command.

To address these concerns, the Judiciary established separate and independent reporting channels outside the court or unit where an employee works. These include the national Office of Judicial Integrity, headed by the Judicial Integrity Officer, and a Director of Workplace Relations in each circuit. The Directors of Workplace Relations and the Judicial Integrity Officer are workplace conduct specialists who bring wide-ranging experience to their roles. The Directors of Workplace Relations include former federal circuit court law clerks, Title IX officers, mediators, employment law attorneys, and EEOC administrative law judges.

The impact of these workplace officers for employees is immediate and positive. Today, when Judiciary employees need help with a workplace concern, they are not isolated or limited.

Their choices in whom they can confidentially contact and how they can address concerns are far more varied and effective than in 2018.

First, employees continue to be served by a court-level EDR coordinator. While there were EDR coordinators before 2018, changes in the Model EDR Plan greatly expanded the ways they can assist employees. They can counsel employees on informal resolution options and even assist in face-to-face conversations between employees and their coworkers or superiors. EDR coordinators now receive enhanced training to support their expanded role.

In addition to local EDR coordinators, employees now have two additional channels for confidential guidance that exist entirely outside their court's chain of command. The Office of Judicial Integrity provides confidential help, information, referral, and guidance to any Judiciary employee on options to address workplace harassment, abusive conduct, or other forms of wrongful conduct. Similarly, circuit Directors of Workplace Relations confidentially discuss issues with judges and employees (including law clerks, supervisors, managers, and court unit executives), provide information about policies and procedures, and help facilitate informal resolutions and support formal complaint procedures. Additionally, Directors of Workplace Relations coordinate and provide numerous training programs throughout their circuits, propose and assist in the implementation of various policy initiatives, and collaborate on best practices to foster consistency across the circuits and courts.

Directors of Workplace Relations serve all court units within a circuit—the court of appeals, district and bankruptcy courts, probation and pretrial offices, and federal public defender offices. Because the Directors of Workplace Relations are available to employees in all court units, they function as centralized and uniform resources for employees to learn about their

rights and options without fear that their supervisors or local leadership will be informed of their confidential conversations.

This approach is consistent with the EEOC Study recommendation that “Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.”

This increased level of assistance has improved the experience of Judiciary employees, including those who work in chambers and other isolated settings. If an employee needs help or guidance, the assistance of trained professionals who understand workplace issues is available every step of the way. The request for help remains confidential and, if the employee chooses, completely independent of the court’s chain of command. By creating a national, regional, and local network to receive workplace conduct reports, assistance is fully accessible to all employees, who can choose the communication path that feels safest to them. These officers also provide the Judiciary with an internal network of experts who can spot systemwide workplace trends and are well-positioned to recommend additional improvements to the Judiciary’s policies, processes, and structures for addressing workplace issues. This approach is far more effective and comprehensive in providing help than one centralized national office.

Providing Informal Advice and Assisted Resolution

Early conversations with Judiciary employees identified another factor that discouraged reporting of workplace misconduct.

The Judiciary has long had processes for addressing misconduct, and they carry potentially significant consequences, including referral to Congress for possible impeachment in the case of judges. But employees reported that these two processes—formal complaints under

the Judicial Conduct and Disability Act or through their court’s EDR Plan—often seemed excessive in relation to the more common, but less egregious issues of concern they faced.

As the 2018 Working Group report said: “The JC&D Act and the EDR Plans provide useful formal mechanisms for responding to serious cases of harassment and workplace misconduct, but the Working Group found that they are not well suited to address the myriad of situations that call for less formal measures. For example, an employee may be uncomfortable with a well-meaning supervisor’s familiarity or avuncular physical contact and seek advice on how to express discomfort. Or an employee may encounter crude or boorish behavior from a coworker and not want to file a formal complaint, but may want a supervisor to step in and curtail the conduct. . . . Neither the JC&D Act procedures nor the EDR Plans are designed to address those situations.”

The EEOC’s 2016 report said that “Increasing informal, confidential options within the complaint–response system is important . . . to create more supportive environments for those who have experienced sexual harassment.” Judiciary employees concurred that they feel more confident pursuing grievances when informal advice and multiple communication channels are available to them.

In accordance with these recommendations and the supporting research, the Judiciary undertook significant reforms to its complaint processes in 2019. Those reforms included changes to the Model EDR policy that emphasized informal resolutions as an important tool for addressing workplace conduct issues.

“Informal Advice” is an option that allows an employee to air their concerns and receive confidential advice and guidance from a local EDR Coordinator, a circuit Director of Workplace Relations, or the national Judicial Integrity Officer. This confidential guidance may include

providing information on the employee's rights, discussing ways to respond to the conduct, and providing an outline of potential options for how to proceed with their concerns. Having an informal advice channel also can overcome any perceived barriers to reporting in a more formal process.

The "Assisted Resolution" option available under court EDR plans is an interactive and flexible process that may include discussions with the source of the conduct, voluntary mediation, preliminary investigations including interviewing witnesses, and/or seeking a mutually agreeable resolution. Consistent with the EEOC Report, this option gives employees an informal method to resolve a workplace matter, typically at an early stage. At all stages, an employee retains the option of filing a formal complaint.

Early evidence indicates that the creation of multiple and confidential informal avenues for reporting has been successful in removing barriers to reporting. The Directors of Workplace Relations report that they spend more of their time on confidential informal advice than anything else, and that these interactions involve a range of workplace issues, not just harassment. Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were uncomfortable either coming forward or engaging in a more formal process.

The interventions have included informal actions to stop inappropriate behavior, mediations and facilitated conversations, and investigations that resulted in settlements. These informal, confidential, and flexible options can counter-balance some of the power disparities inherent in the Judiciary. And again, pursuing these options does not preclude the filing of a formal complaint.

Clarifying and Strengthening Employee Workplace Protections

The Working Group’s conversations with Judiciary employees revealed that some employees were unsure about the scope and meaning of certain provisions of the Judiciary’s policies and Codes of Conduct as they related to workplace conduct. The Judiciary collectively spent much time and energy clarifying and strengthening its policies and codes of conduct, as well as enacting significant enhancements to the Model EDR Plan.

For example, the Working Group learned that there was confusion and ambiguity about whether confidentiality obligations impeded the reporting of harassment. The Working Group stressed that the “confidentiality obligations [of Judiciary employees] must be clear so both judges and judicial employees understand these obligations never prevent any employee—including a law clerk—from revealing abuse or misconduct by any person.”

Judiciary employees and judges also said it was unclear whether they were supposed to report potential misconduct by workplace colleagues. The Codes of Conduct for employees and judges were thus amended to emphasize the responsibility to take appropriate action upon learning of potential wrongful conduct, and the Judicial Conduct and Disability Rules were expanded to include a mandatory “bystander” reporting obligation for judges.

Under the revised JC&D Rules, judges engage in misconduct if they fail “to bring ‘reliable information reasonably likely to constitute judicial misconduct’ to the attention of the relevant chief district judge or chief circuit judge.” This change is significant, as the information ultimately must be shared with chief circuit judges who, in addition to an individual complainant, have the authority to initiate a complaint against a judge.

The revised Model EDR Plan also provides that those managing or presiding over an EDR process must recuse if they witnessed, or were otherwise involved in, the alleged conduct.

It also requires recusal if the matter creates an actual or perceived conflict of interest. Where appropriate, it allows for a judge from a different court to be brought in to preside over a complaint. In January 2020, the Judiciary issued an internal EDR interpretive guide and handbook for all employees, managers, and judges, so that EDR claims can be processed in a uniform, conflict-free manner nationwide.

One of the more impactful policy enhancements to the Model EDR Plan is the addition of express protections against “abusive conduct,” defined in the Model EDR Plan as “a pattern of demonstrably egregious and hostile conduct not based on a Protected Category that unreasonably interferes with an employee’s work and creates an abusive working environment.” This protection affords Judiciary employees a specific standard and meaningful avenues for addressing workplace concerns that previously lacked recognition. It also extends beyond similar protections under federal employment laws, as it defines and prohibits workplace harassment even when it is not based on the recipient’s membership in a protected class.

As courts and employing offices have updated their EDR Plans to include a defined prohibition against abusive conduct, the bulk of inquiries and concerns among Judiciary employees have related to this type of non-discriminatory abusive conduct or other forms of uncivil behavior, according to the experience collected. Positively, employees are using the new informal avenues of Informal Advice and Assisted Resolution to raise, address, and resolve these concerns. This experience demonstrates that the improvements to the EDR process were both necessary and have made a difference.

Leadership, Training, and Trust

Key elements tying the Judiciary’s workplace conduct program together are leadership and education. Chief judges, judges, and unit executives are actively engaged in training and

other initiatives, and they are leading by example through their personal commitment to maintaining an exemplary workplace. Since 2018, there has been a dramatic increase in training related to workplace conduct.

This has led to two beneficial developments. Knowledge about issues and resources related to workplace conduct has steadily grown as trainings have been conducted by the Federal Judicial Center, the Office of Judicial Integrity, and the circuit Directors of Workplace Relations. In addition, the Directors of Workplace Relations have become much better known inside courts and offices as they lead workplace conduct trainings. Direct interaction has made these workplace specialists reliable and trustworthy to court employees, and has opened up informal communication channels when help is needed.

Throughout the Working Group's early deliberations, an urgent need for training was expressed in all quarters. Survey responses and other feedback revealed that, prior to 2018, many employees were unaware of policies prohibiting misconduct, their rights under those policies, and to whom they could turn with workplace conduct concerns. In addition, some judges, managers, and supervisors were unsure of their obligations and responsibilities if they observed or otherwise became aware of misconduct.

Examples of specific national training requirements and initiatives include:

- The revised Model EDR Plan now requires annual EDR training to be provided for all employees, including law clerks, and judges.
- All EDR coordinators in the Judiciary must now be trained and certified on the information and skills necessary to fulfill their function, and the Office of Judicial Integrity has developed a uniform national training and certification curriculum for EDR Coordinators. This training is in addition to the annual training provided for all employees.

- Information on workplace conduct protections, resolution options, and resources is provided as part of orientations for new law clerks, recently appointed judges, and new chief judges.
- The Federal Judicial Center regularly organizes educational programs for judges, court unit executives, managers and supervisors, and Judiciary staff.
- The Federal Judicial Center also has conducted trainings and programs on respect in the workplace, civility, implicit bias, and other workplace topics.

Extensive training also is being offered at the circuit level. As an example, one circuit has developed special initiatives focusing on law clerks—expanded law clerk orientation agendas that include sessions on discrimination and harassment policies and employment dispute procedures, and sample chambers checklists on workplace expectations. These resources also explain how law clerks can seek help.

Increased education about the workplace makes employees aware of their rights, makes judges more aware of their obligations and responsibilities, reinforces behavioral expectations, and sends a clear message that these issues matter and are taken seriously. When employees, including law clerks, are informed—early, clearly, and repeatedly—of their rights and options and of the expectations and obligations placed on judges and Judiciary employees, the Judiciary’s commitment to a fair and transparent workplace is reinforced.

While imparting knowledge about workplace conduct is essential, the trainings also are building trust in, and use of, the system that has been created. The Directors of Workplace Relations work across their circuits, providing training for all levels of Judiciary employees in different court units. The Directors of Workplace Relations and Judiciary employees are forming direct channels of communication with one another. Such connections are vital in letting employees know there is a reliable person to turn to if needed.

The Judicial Integrity Officer, chief judges, and Directors of Workplace Relations are seeing the impact of increased communications and training through additional inquiries about possible misconduct. Many employees have stated that these trainings alerted them to the inappropriate nature of certain behaviors and to the resources available to address them.

By creating a training network with local as well as national and circuit level resources, the enhanced commitment to an exemplary workplace is permeating courts and other Judiciary offices. The Working Group believes that broad changes at the local level, supported by local and circuit training, are the best path to a sustainable and positive environment for federal Judiciary employees.

Finding Solutions That Work

Testifying before Congress in 2020, a co-author of the EEOC's 2016 study on sexual harassment noted that "two essential components of a successful effort to shape workplace culture are leadership from the top and a focus on the unique needs of a particular workplace."

Finding solutions that work requires consideration of the unique culture and governance of a particular workplace. Any effort to promote an exemplary workplace must take into account the Judiciary's dispersed, regionalized governance structure. Individual courts possess significant administrative autonomy, including the authority to address workplace conduct matters.

Chief Justice Roberts has demonstrated decisive leadership from the top, and the Judiciary and Workplace Conduct Working Group have been well served by his commitment to an exemplary workplace. In the federal Judiciary, "leadership from the top" requires leadership from many "top" individuals, not just one national leader or agency. At a minimum, this includes the chief judge of each court and also the head of each court unit. The personal commitment of

judges and court leaders sends a powerful signal that everyone must support a safe and civil workplace.

The policies and procedural changes adopted since 2018 took careful account of the Judiciary's decentralized governance and culture. By establishing Directors of Workplace Relations at each circuit, by training and empowering EDR coordinators in each court, and by requiring the courts to provide annual training for every judge and employee, among other things, the Judiciary's approach is making itself known, available, and trusted in every court and Judiciary office. This comprehensive approach, operating locally, regionally by circuit, and nationally, is supporting necessary culture changes that can sustain themselves over time. Judges and other court leaders are actively engaged, and employees are learning that they can discuss inappropriate workplace behavior, and receive confidential guidance, without incurring professional risk.

Change is happening, and it is happening at the courthouse — the place where employees work and where the authority to address workplace issues actually resides.

In its early discussions, the Working Group concluded that an approach that empowers employees to bring complaints in their local courthouses or circuits is more likely to be used and to be effective than a single national oversight body. For many years, the Judiciary has long had a formal complaint process. But the historic lesson is that without on-the-ground training and counseling, the Judiciary's formal complaint process did not inspire trust among employees to use it.

As employees described their views and recommendations to the Working Group and in surveys, it became apparent that proposals for a national commission to investigate workplace complaints could suffer from the same trust and safety issues that historically limited employee

use of the Judiciary's formal workplace complaint procedures. Further, the employees were not in favor of an outside body to oversee workplace issues.

Without employee trust and participation, any workplace conduct program is at high risk of failure. And in the Judiciary, that means any proposed program to report and prevent abuse must earn trust in the local workplace. That is where the investment has been made, and that is where the important work is being done. As the Working Group's 2018 recommendations have been adopted, the necessary trust is taking root.

The Working Group believes that the Judiciary's response to workplace conduct concerns is succeeding, locally, by circuit, and nationally. While the Judiciary has made significant strides and improvements, and has done so expeditiously, some changes don't occur overnight. There is a continuing effort to monitor what we have done, and we expect some of the cultural changes will need time to take root. That said, we do not condone misconduct at any level. The Working Group recommends that the Judiciary's strategy for an exemplary workplace continue on its current course.

SECTION 2: Recommendations for Additional Improvements

Workplace conduct programs in any workplace must always evolve to address a constantly changing workforce. The Judiciary, like any workplace, must continue to take stock of what it has accomplished and find those areas where more can be done. Section 2 contains nine recommendations to address further areas of improvement. Where needed, the Working Group asks that these recommendations be considered by appropriate committees of the Judicial Conference.

A. Measure the Use and Effectiveness of Existing Procedures

Now that the Judiciary has implemented the various changes in policies, procedures, and education described in this report, the time is appropriate to assess the workplace climate in the Judiciary and the effectiveness of the changes in addressing workplace conduct issues. The Working Group has two recommendations in this regard.

Recommendation 1: Conduct a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.

Background: Several circuits and individual courts have conducted their own climate surveys or workplace environment assessments, and the resulting information has proven useful for their respective populations. A uniform climate survey across the Judiciary as a whole can provide additional valuable insight into not only the prevalence of certain types of workplace conduct issues in the Judiciary, but also the impact and effectiveness of the numerous improvements the Judiciary has made to its policies and processes since 2018.

The Working Group has partnered with the Federal Judicial Center to develop a draft Judiciary climate survey. The Working Group recommends that the Federal Judicial Center administer and disseminate the survey to all Judiciary employees, managers, unit executives, and judges for their voluntary participation.

The draft climate survey would:

- provide a general picture of the federal Judiciary workplace environment, including employee assessments of how the Judiciary's overarching commitment to civility, respectfulness, equity, diversity, and inclusion have been realized;

- help the Judiciary understand the nature and extent of any wrongful conduct employees may have experienced;
- explore whether wrongful conduct has been disclosed or reported and identify any potential barriers to reporting;
- assess the knowledge of and satisfaction with how reports of wrongful conduct are handled;
- assess the effectiveness of confidential advice provided by the Office of Judicial Integrity and Directors of Workplace Relations; and
- gather information and feedback that will help improve the Judiciary’s policies, procedures, and education and training initiatives.

Recommendation 2: Augment annual EDR-related data collection to include data related to Informal Advice contacts, while ensuring that confidentiality is protected.

Background: Judicial Conference policy currently requires the annual collection of certain data regarding use of the EDR process throughout the Judiciary. Judiciary EDR Plans provide three distinct options for addressing instances of wrongful conduct: (1) Informal Advice, (2) Assisted Resolution, and (3) Formal Complaint. Only the latter two are currently the subject of nationwide data collection.

The Working Group recommends that, in addition to current EDR-related data collection, the Judiciary also collect anonymized data regarding the number of Informal Advice contacts received by the Office of Judicial Integrity and circuit Directors of Workplace Relations. Data should be collected at a high level (i.e., only the *number* of contacts), to avoid even the perception that the strong confidentiality protections attached to Informal Advice might be lessened by the collection of court- or allegation-specific data. This will provide a “usage rate” for how often the Judiciary’s new positions at the circuit and national level are being used by employees for confidential advice and guidance.

B. Strengthen Policy and Procedure

Recommendation 3: Enhance the Formal Complaint process by revising the Model EDR Plan to specify that an employee complaint must be overseen by a Presiding Judicial Officer from outside the court from which the complaint originated.

Background: The Model EDR Plan includes a number of procedural safeguards to ensure that the informal and formal EDR options for addressing workplace conduct concerns are consistent, unbiased, and effective. Among these safeguards are robust recusal requirements.

Moving the investigative and adjudicative functions within the Formal Complaint process to a different court could further enhance the perceived impartiality of the process. The Working Group believes that employee confidence in the Formal Complaint process could be strengthened if the Model EDR Plan were revised to require the role of Presiding Judicial Officer to be outside of the court from which the complaint originated.

Recommendation 4: Develop an express policy regarding romantic relationships that exist or develop between employees where there is a supervisory or evaluative relationship. The policy should apply to all Judiciary employees and judges.

Background: Current Judicial Conference policy specifically prohibits instances of nepotism and favoritism, and relevant advisory opinions by the Committee on Codes of Conduct provide further guidance for the application of existing policies to various, more nuanced situations. Some non-Judiciary workplaces have adopted an express policy for both pre- and post-appointment situations in which romantic relationships exist or develop, particularly between individuals where there is a supervisory or evaluative relationship.

The Working Group believes an express Judiciary-wide policy in this area is necessary and suggests that it should apply to all Judiciary employees, managers, unit executives, and

judges. The Working Group recommends that the Office of Judicial Integrity work with others in the Administrative Office and relevant advisory councils to further examine the issue and develop a proposed policy for consideration by the relevant Judicial Conference committees.

Recommendation 5: Assess incorporation of additional monetary remedies as part of the EDR complaint process.

Background: The Model EDR Plan applies to Judiciary employees the protections accorded to many federal employees under the federal employment statutes. Certain monetary remedies and attorney fees are already available within the EDR complaint process through its incorporation of the Back Pay Act. However, the Judiciary is one of the few workplaces that does not include the additional monetary remedies available to employees in other agencies or organizations, including other federal employees. With enhanced protections and improved policies now in place through a significantly revised Model EDR Plan, the Working Group recommends that the Judiciary assess incorporation of additional monetary remedies into the EDR framework.

C. Expand Communication

Recommendation 6: Direct the Office of Judicial Integrity, with the assistance of the Directors of Workplace Relations, to issue an annual Judiciary workplace conduct report.

Background: As the Judiciary’s Strategic Plan states, “Public trust and confidence and workforce morale and productivity are enhanced when the Judiciary provides an exemplary workplace for everyone.” One necessity for public trust and confidence is regular reporting on the progress and evolving challenges of fostering an exemplary workplace. The Working Group believes that the Office of Judicial Integrity can help pursue this goal through the publication of an annual report.

Recommendation 7: Expand Outreach and Engagement.

Background: As this report and the Working Group’s June 2018 report make clear, the Working Group’s efforts have benefited immensely from interactive dialogue with numerous Judiciary employees, including law clerks, court executives, and employees in defender offices, probation and pretrial services, and a wide range of administrative positions. In August 2021, that outreach was expanded by way of a letter sent to approximately 200 law schools across the country, highlighting the Office of Judicial Integrity and circuit Directors of Workplace Relations as confidential avenues for law school administrators to seek guidance and/or report concerns of which they become aware.

The Working Group encourages circuits to continue, institute, or expand interactive-listening efforts with focus groups and possibly advisory bodies to ensure that they fully understand employee concerns. The Working Group, in turn, will increase its own emphasis on interactive listening, by inviting employee groups to meet directly with the Working Group, and also to partner with circuits to attend circuit-level discussions.

D. Additional Recommendations

Recommendation 8: Strengthen annual EDR training by revising the Model EDR Plan to emphasize that courts and employing offices have a responsibility to ensure that EDR training is offered and accessible to all employees and judges on an annual basis, and to take affirmative steps to ensure completion.

Background: Under existing policy, the Model EDR Plan currently requires courts and employing offices, including federal public defender offices, to conduct training annually for all judges and employees, including chambers staff, to ensure that they are aware of the rights and obligations under the EDR Plan and the options available for reporting wrongful conduct and

seeking relief. However, there is no requirement that courts and employing offices ensure that all employees attend training that is offered or that they keep track of who has completed training each year.

The Working Group believes the Model EDR Plan's current training efforts could be further strengthened if courts and employing offices ensured that all their employees not only have access to but also complete EDR training on an annual basis. Tracking and ensuring consistent completion of annual training is especially important for employees in term positions, such as law clerks, who may serve in the Judiciary for only a year or two.

Recommendation 9: Develop a system for regular review of the Judiciary's workplace conduct policies to ensure comprehensive implementation across courts and circuits.

Background: The Working Group emphasized in its 2018 report the value of systemic institutional review and recommended further steps be taken to ensure the consistent application of workplace conduct policies across the Judiciary. A system for regularly assessing the comprehensive implementation of the Judiciary's workplace conduct policies achieves this goal.

The resources necessary for conducting such regular assessments were provided with the creation of the Office of Judicial Integrity and the Directors of Workplace Relations. These professionals already provide training, guidance, and programmatic support for courts and employing offices throughout the year, and are well-positioned to reinforce ongoing efforts by the Judiciary to ensure an exemplary workplace for employees.

APPENDIX A

Federal Judiciary Workplace Conduct Working Group Timeline

December 31, 2017: In his [Year-End Report on the Federal Judiciary](#), Chief Justice John G. Roberts, Jr., calls for creation of a working group to undertake “a careful evaluation of whether [the Judiciary’s] standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure exemplary workplace conduct for every judge and every court employee.”

Early January 2018: The [Federal Judiciary Workplace Conduct Working Group](#) is established. It is chaired by James C. Duff, then director of the Administrative Office of the U.S. Courts (AO), and among its members are chief judges, district and appeals court judges, a circuit executive, the current Director of the Federal Judicial Center, and the counselor to the Chief Justice.

January to May 2018: The Working Group holds a series of meetings with current and former law clerks, a cross-section of Judiciary employees, Judiciary advisory councils, industry experts, and the authors of a 2016 report from the Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace. They review employee surveys and set up a comment mailbox on the Judiciary’s public website for employees to offer suggestions, anonymously if desired.

The Judiciary takes several [early actions](#) to improve workplace protections. Confidentiality provisions in the law clerk handbook are revised to clarify that they do not prohibit reports of misconduct by judges, supervisors, or any Judiciary employee. A session on sexual harassment and other workplace conduct issues is added to the training program for newly appointed judges.

June 1, 2018: The Workplace Conduct Working Group issues [a report](#) with more than 30 detailed recommendations for improvements in policies and procedures.

August 2018: The U.S. circuit courts begin the process of recruiting and hiring circuit Directors of Workplace Relations to provide confidential guidance and assistance to employees within the circuit, assist in resolving workplace issues (including those involving both mediation and workplace investigations), and offer training on identifying and reporting workplace misconduct. The Tenth Circuit hires the first Director of Workplace Relations.

September 13, 2018: Based on the Working Group’s recommendations, the Judicial Conference approves several of the changes to the Model Employment Dispute Resolution plan (EDR) – to cover interns and externs and extend the time for initiating EDR complaints from 30 to 180 days. A list of [proposed amendments](#) is published for public comment.

October 2018: An EDR Working Group is appointed and begins work on additional revisions to the Model EDR Plan. The working group consists of judges, court executives, and Judiciary employees.

October 30, 2018: Judicial Conference committees hold a [public hearing](#) on the proposed changes to the judges' Code of Conduct, the employees' Code of Conduct, and the Judicial Conduct and Disability Rules in Washington, DC.

December 2018: Based on recommendations from the Working Group, the Judiciary hires its first national [Judicial Integrity Officer](#) to provide confidential advice and guidance on conflict resolution, mediation, and formal complaint options. Local court EDR coordinators serve as a resource for employees within their respective courts, while circuit Directors of Workplace Relations and the national Office of Judicial Integrity serve as additional points of contact from whom employees can seek guidance and assistance outside their court's chain of command.

January 2019: The Judicial Integrity Officer begins holding twice monthly meetings with circuit Directors of Workplace Relations to discuss best practices, trends, and training needs. Within the first months of 2019, the Office of Judicial Integrity develops a workplace conduct section for the Judiciary's intranet to make information easy to find and to provide a portal for employees to submit anonymous reports. Throughout 2019 and early 2020, the Judicial Integrity Officer travels extensively around the country to educate judges, managers, and employees about the Judiciary's standards for workplace conduct and the EDR options for resolution.

March 12, 2019: The Judicial Conference [approves](#) the Working Group's recommendations for changes to the Codes of Conduct for judges and Judiciary employees, and to the Judicial Conduct and Disability Rules. These include: 1) expressly stating that judges and judicial employees should neither engage in nor tolerate workplace misconduct and that workplace harassment is within the definition of judicial misconduct; 2) emphasizing that judges and judicial employees have a responsibility to take appropriate action upon learning of potential workplace misconduct and including within the definition of judicial misconduct a judge's failure to report or disclose misconduct; 3) further clarifying that confidentiality obligations do not preclude reporting or disclosing judicial misconduct; 4) clarifying that judicial misconduct includes retaliation against employees for reporting or disclosing misconduct; and 5) recognizing that the Judicial Conference and judicial councils have the authority to assess potential institutional issues related to a judicial misconduct complaint, such as an analysis of conditions may have enabled misconduct or prevented its discovery, even in cases where a subject judge resigns.

September 17, 2019: The Judicial Conference approves a new [Model EDR plan](#) that expands the options for addressing wrongful workplace conduct. The new plan includes definitions and examples of wrongful conduct; three flexible options for addressing workplace conduct issues; flowcharts that explain EDR rights and options; and training and certification requirements for court EDR coordinators. The [changes](#) were all recommended by the Working Group to improve the Judiciary's procedures for identifying and correcting wrongful conduct and providing more informal and flexible ways to report and address workplace conduct issues.

September 2019: The Working Group issues a [status report](#) on the actions taken on its recommendations and notes that "nearly all" of them have been implemented through a concerted effort by the Judicial Conference, the courts, the AO, and the Federal Judicial Center.

January 2020: The Office of Judicial Integrity and the EDR Working Group issue a 150-page Employment Dispute Resolution Interpretive Guide and Handbook for employees, managers, and judges to foster uniform and effective processes to resolve workplace conduct issues through the EDR options for resolution.

July 2020: An online workplace conduct training course for EDR coordinators is distributed to the courts. All EDR coordinators must pass tests in five modules to become certified. Amidst the global pandemic, the Office of Judicial Integrity and Directors of Workplace Relations continue to provide workplace conduct training to courts and judicial employees remotely via Zoom and Teams.

August 2020 to July 2021: Additional training programs are developed; circuits continue outreach efforts to both internal and external stakeholders; specialized training and tailored resources are developed for law clerks; and websites are updated to provide clear information on workplace resources.

August 2021: All of the circuits have a [Director of Workplace Relations](#) in place to provide confidential guidance and assistance to employees within the circuit and to provide training.

A letter is sent to every American Bar Association-accredited law school in the country, explaining how the Office of Judicial Integrity and Directors of Workplace Relations can assist law clerks and law school administrators, and emphasizing that these officials offer a confidential forum for law schools to seek guidance and report workplace conduct concerns when they become aware of them.

Nearly all courts adopt the revised EDR plan. The Working Group and the Director of Workplace Relations Advisory Group continue to meet regularly to monitor and assess workplace conduct matters throughout the Judiciary.

APPENDIX B

Major Actions in 2020 and 2021

The improvements implemented throughout 2020 and 2021 include the following:

- The Judiciary has in place a strong network of professionals who are expert in matters of workplace conduct and are outside of the traditional court chain of command to support and provide services to both employees and employing offices. Key to this network are the Directors of Workplace Relations, and every circuit now has a Director of Workplace Relations (or analogous position). These positions focus on workplace conduct issues and serve all courts and employing offices within a circuit.

In addition, the national Office of Judicial Integrity, headed by the Judicial Integrity Officer, was established by the Administrative Office to also serve as an independent avenue for employees and employing offices. The Office of Judicial Integrity collects information about the use of EDR processes nationally, monitors workplace issues to identify trends, and provides leadership on policy initiatives. The Office of Judicial Integrity is in the process of expanding to include additional staff to assist with national efforts. Together, this network of individuals provides confidential advice and guidance to employees, managers, and judges; supports and facilitates EDR processes; coordinates training programs; proposes and assists in the implementation of policy initiatives; and collaborates on best practices to foster consistency across the circuits and courts.

- Judiciary employees benefit from a wide range of outreach and engagement opportunities provided by Directors of Workplace Relations. The Office of Judicial Integrity and Directors of Workplace Relations provide training to clearly communicate employee rights and the workplace conduct process, and disseminate resources through websites, newsletters, posters, and other outreach initiatives. A recent virtual training series in November and December 2021 was viewed live by over 6,000 employees and judges, and another tailored for chambers staff was attended by nearly 100 staff, including law clerks and judicial assistants. Several circuits have formed workplace conduct committees, diversity and inclusion task forces, focus groups, and employee advisory groups, such as those specific to law clerks and probation/pretrial employees, to garner valuable feedback and inform future initiatives.
- The Judiciary has taken active steps to establish clear and trusted lines of communication with law schools to ensure they are aware of the Judiciary's workplace protections and available processes for addressing concerns and highlighting the Office of Judicial Integrity and Directors of Workplace Relations as confidential avenues for law school administrators to seek guidance and/or report concerns of which they become aware. This has resulted in outreach from law schools seeking guidance or inviting the Office of Judicial Integrity or Directors of Workplace Relations to provide presentations or training

to their staff or students regarding the Judiciary's workplace conduct policies and processes.

- The Federal Judicial Center, in concert with the Office of Judicial Integrity and Directors of Workplace Relations, has increased the availability and dissemination of workplace conduct training to the entire Judiciary – judges, law clerks, chamber staff, and other staff – tailored to their roles and responsibilities. The Federal Judicial Center provides sessions that address various aspects of workplace conduct at orientations for new judges and through continuing education programs. Virtual and in-person programs, webinars, and podcasts for new and current Judiciary employees address topics such as preventing workplace harassment, civility in the workplace, dealing with difficult situations, and the codes of conduct.
- The strengthened and streamlined Model EDR Plan has been adopted by every circuit and virtually all courts and employing offices. The Model EDR Plan includes enhanced policy protections, including an express prohibition for abusive conduct, covers all paid and unpaid employees, provides specific informal avenues (Informal Advice and Assisted Resolution) for reporting and addressing wrongful conduct, and provides a more streamlined formal complaint process and allows for more time to file a formal claim. Employees are aware of their enhanced protections regarding abusive conduct and are using the EDR options to effectively address those concerns. The addition of informal advice and assisted resolution has broken down barriers to reporting as indicated by the increased use of these processes and has allowed issues to be resolved more quickly. This demonstrates that the improvements to the EDR process, addressing this newly defined category of wrongful conduct and providing flexible options for resolution, were both necessary and have proven impactful.
- A new Model Federal Public Defender Organization EDR Plan was developed and approved by the Judicial Conference, designed to address the issues unique to the federal public defender organization community, including: the distinct employment relationship between the federal public defenders and their employees, their role as legal representatives with ethical obligations to clients on whose behalf they appear in court, and the need to mitigate concerns regarding access to sensitive information. The foundational policy protections and general processes, timelines, and standards for reporting wrongful conduct, filing complaints, conducting investigations, and achieving resolution under this plan remain consistent with those set forth in the Judiciary's Model EDR Plan previously adopted.
- New requirements in the Model EDR Plan have helped to ensure that every court and employing office has at least two trained and certified EDR coordinators. An online training course must be taken and passed by EDR coordinators in order to become certified, and over 400 EDR individuals have been certified to date.

- The EDR Interpretive Guide and Handbook (EDR Handbook) was prepared by the Office of Judicial Integrity, in collaboration with the Directors of Workplace Relations, and made available Judiciary-wide, but especially useful to EDR coordinators, Directors of Workplace Relations, unit executives, judges, and others directly involved in or who support the formal and informal EDR processes. The EDR Handbook provides detailed explanations for each of the EDR options for resolution, step-by-step directions for each process, information about the remedies available under the EDR Plan, proactive and responsive steps for safeguarding the rights and protections afforded under the EDR Plan, and more.
- Policies for the provision of interim and permanent relief related to allegations of wrongful conduct were clarified and streamlined. Courts and employing offices can provide immediate interim remedies such as temporary reassignment or relocation as allegations of wrongful conduct are being investigated. To streamline the process, the Judicial Conference delegated to the Committee on Judicial Resources the authority to more expediently grant permanent relief without diminution of an employee's salary, grade, and employment status.
- The Codes of Conduct – for judges, employees, and federal public defender office employees – were modified to ensure that judges and employees understand that confidentiality obligations should never prevent any employee, including a law clerk, from revealing abuse or reporting misconduct by any person. In addition, the Codes of Conduct and Judicial Conduct and Disability Rules were modified to provide clear obligations for judges and employees to take appropriate action upon learning of potential misconduct. Extensive training, highlighting these changes, has been conducted for judges and employees throughout the Judiciary.

**STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT
WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES
SEPTEMBER 17, 2019**

INTRODUCTION

This status report summarizes progress made on recommendations in the [Federal Judiciary Workplace Conduct Working Group Report](#) (Report), submitted to the Judicial Conference of the United States on June 1, 2018. At the direction of Chief Justice John G. Roberts, Jr., the Federal Judiciary Workplace Conduct Working Group (Working Group) was established in January 2018 to evaluate the Judiciary's standards of conduct and procedures for investigating and correcting inappropriate workplace conduct. The Working Group made more than thirty detailed recommendations to improve the Judiciary's policies and procedures and achieve the Chief Justice's goal of creating an exemplary workplace for every federal judicial employee and judge.

The Working Group's recommendations cover three general categories:

- Revisions to the Codes of Conduct for United States Judges (Codes of Conduct or Code) to state clear and consistent standards describing inappropriate workplace behavior.
- Improvements to the Judiciary's procedures for identifying and correcting misconduct and providing more informal and flexible ways to report and resolve workplace conduct issues, including revising the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules) and the Model Employment Dispute Resolution (EDR) Plan, and creating a national Office of Judicial Integrity (OJI) and circuit directors of workplace relations as independent

resources for employees to report and receive advice about workplace misconduct; and

- Enhancements to the Judiciary’s educational and training programs to raise awareness of workplace conduct issues, prevent discrimination and harassment, and promote civility throughout the Judicial Branch.

Prior to the submission of the Report, the Judiciary took several actions that did not require Judicial Conference action. Those included:

- Revising the confidentiality provisions in the law clerk handbook to clarify that nothing in those provisions prevents revealing workplace misconduct, including harassment, and removing the Model Confidentiality Statement from JNet, the courts’ intranet website;
- Establishing a comment mailbox on the uscourts.gov public website for current and former law clerks and other employees to send comments and suggestions to the Working Group;
- Meeting with the authors of the 2016 report from the Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace;
- Meeting with a group of law clerks, and a cross-section of Judiciary employees to hear their workplace experiences;
- Adding instructive in-person programs on Judiciary workforce policies and procedures and workplace sexual harassment to the curricula at Federal Judicial Center programs for chief district and chief bankruptcy judges; and

- Providing a session on sexual harassment during ethics training for newly appointed judges.

Since the receipt of the Working Group's Report in June 2018, the Judicial Conference of the United States, the Administrative Office of the U.S. Courts (AO), the Courts, and the Federal Judicial Center have acted on nearly all of the Working Group's recommendations. These actions include the following:

- The Judicial Conference approved revisions to the Codes of Conduct for United States Judges and Codes of Conduct for Judicial Employees, as well as the JC&D Rules in March 2019 to state expressly that sexual and other discriminatory harassment, abusive conduct, and retaliation are cognizable misconduct, as is the failure to report misconduct to the chief district or chief circuit judge.
- AO Director James C. Duff appointed Jill Langley to head the newly-created OJI and that office began actively providing confidential advice and guidance since her January 2019 appointment.
- Many federal circuits and courts established workplace conduct committees and created directors of workplace relations (or similar positions) to provide circuit-wide guidance and oversight of workplace conduct matters.
- The Federal Judicial Center (FJC) has provided nation-wide training on preventing harassment, workplace civility, and diversity and inclusion.
- Most recently, on September 17, 2019, the Judicial Conference approved a significantly revised and simplified Model EDR Plan that clearly states that harassment, discrimination, abusive conduct, and retaliation are prohibited; provides several options for employees to report and seek redress for wrongful

conduct; and ensures that Judiciary employees know the many resources available to them.

This report addresses these improvements in more detail below. The Working Group has been encouraged by the initiatives at the national and local levels to assure professionalism, civility, and accountability in the workplace. The Working Group remains in place to monitor the progress and success of these initiatives and the ongoing work on the remaining recommendations.

I. AMENDMENTS TO THE CODES OF CONDUCT

The Judicial Conference took action in response to several recommendations in the Working Group’s Report. This action includes the overall recommendation that the Judiciary “revise its codes and other published guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behavior.” Report at 21. The Judicial Conference Committee on the Codes of Conduct’s (Codes Committee) proposed revisions to the Codes of Conduct were published for written comment in September 2018. In October 2018, the Codes Committee held a public hearing to consider comments on the proposed amendments. After further consideration of all comments, the Codes Committee developed final recommendations, which the Judicial Conference approved in March 2019. The [revisions to the Codes](#) addressed the following Working Group recommendations.

A. Promoting Appropriate Workplace Behavior and Prohibiting Workplace Harassment

In its Report, the Working Group suggested clarifying in the Codes of Conduct that a judge has an affirmative duty to promote civility not only in the courtroom but throughout the courthouse. This includes the duty to promote appropriate behavior in the workplace, especially in chambers. The Working Group further recommended that the Code explicitly affirm that a

judge must not engage in or tolerate any workplace misconduct, including harassment, abusive behavior, or retaliation for reporting such conduct.

In response to these recommendations, the Judicial Conference amended the Codes of Conduct at Canon 2A (Commentary), the introduction to Canon 3, Canon 3B(4), and Canon 3B(4) (Commentary). These amendments make clear that a judge should promote and practice civility—by being patient, dignified, respectful, and courteous—in dealings with court personnel, including chambers staff. The amendments also prohibit judges from taking part in, or allowing, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct.

B. Prohibiting Impermissible Harassment, Bias, or Prejudice

The Working Group recommended Code amendments to clarify that harassment, bias, or prejudice based on race, color, religion, national origin, sex, age, disability, or other bases (including sexual orientation or gender identity) is impermissible. In response, the Judicial Conference added Commentary to Canon 3B(4) that “harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others.”

C. Requiring Appropriate Action Concerning Misconduct

The Report recommended clarifying a judge’s existing obligation under the Code to “take appropriate action” against misconduct extends to the inappropriate treatment of court employees, including those in chambers. The Report advised that “appropriate action” should reasonably address the misconduct, prevent harm to those affected by it, and promote public confidence in the integrity and impartiality of the Judiciary.

The Code amendments that are responsive to these recommendations are in Canon 3B(6) and Canon 3B(6) Commentary. As noted in the Commentary, “Public confidence in the integrity and impartiality of the Judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence.”

D. Clarifying Confidentiality and Reporting

The Report stressed that confidentiality obligations must be clear so both judges and judicial employees understand these obligations never prevent any employee—including a law clerk—from revealing abuse or misconduct by any person. In response, the Codes Committee recommended, and the Judicial Conference approved, an amendment to the Code of Conduct for Judicial Employees at Canon 3D(3) to clarify that the “general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.”

E. Coordinating Amendments with Other Codes of Conduct

The Working Group recommended making similar changes to the codes of conduct that apply to all judicial employees (including the Code of Conduct for Judicial Employees and the Code of Conduct for Federal Public Defender Employees). In response, the Judicial Conference adopted amendments to the Code of Conduct for Judicial Employees at Canon 3C and 3D. These amendments include a duty to promote appropriate workplace conduct, prohibit workplace harassment, take appropriate action to report and disclose misconduct, and prohibit retaliation for

reporting or disclosing misconduct. The Codes Committee expects to recommend similar revisions to the Code of Conduct for Federal Public Defender Employees later this year.

The Working Group also asked the Codes Committee to consider whether there was a continuing need to use the existing model confidentiality statement to inform employees about their confidentiality obligations. The Working Group viewed the statement—and the Codes Committee agreed—as an impediment to reporting workplace misconduct. The confidentiality statement was rescinded in February 2018. The Codes Committee further decided that developing a new confidentiality statement may not be necessary, as working groups at the circuit level have issued a variety of proposals to improve understanding of employee confidentiality issues. The Codes Committee intends to develop ethics education programs on this topic, including assisting judges and court executives to educate judicial employees about their confidentiality obligations.

F. Improving Educational and Guidance Materials

The Report included a recommendation to review and revise all written ethics guidance concerning workplace conduct. The recommendation aims to ensure that the Judiciary provides a consistent and accessible message that it will not tolerate harassment or other inappropriate conduct. The Report further recommended developing ethics education programs, in cooperation with the FJC, on these topics. The Codes Committee has begun to review and revise existing written educational materials that inform judges and judicial employees of their ethical obligations related to workplace conduct and is working with the FJC to develop new ethics education programs for judges and court employees on these topics.

II. AMENDMENTS TO THE PROCEDURES AND NEW INITIATIVES FOR IDENTIFYING AND CORRECTING WORKPLACE MISCONDUCT

A. *Rules for Judicial-Conduct & Judicial-Disability Proceedings (JC&D Rules)*

In response to the Working Group’s recommendations, the Committee on Judicial Conduct and Disability (JC&D Committee) proposed amendments to the JC&D Rules. The JC&D Committee released final draft proposed amendments to the JC&D Rules on September 13, 2018, for a sixty-day public comment period that ended on November 13, 2018. The JC&D Committee, in coordination with the Codes Committee, held a public hearing on October 30, 2018, to hear testimony and comments concerning the proposed amendments to the JC&D Rules, as well as the Codes of Conduct. The JC&D Committee prepared a final set of proposed amendments, which the Judicial Conference approved at its March 2019 session. The [amendments](#) address the following Working Group recommendations.

1. *Requiring Judges to Report or Disclose Misconduct*

Most significantly, the Working Group recommended that the JC&D Committee “provide additional guidance . . . on a judge’s obligations to report or disclose misconduct and to safeguard complainants from retaliation” and that the Committee “reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct.” Report at 31. In response, the JC&D Committee recommended, and the Judicial Conference adopted, an expansion of the JC&D Rules’ misconduct definition to include retaliation for reporting or disclosing judicial misconduct or disability. *See* Rule 4(a)(4) (“Retaliation”). The Judicial Conference also added a new provision that includes a judge’s failure to bring “reliable information reasonably likely to constitute judicial misconduct” to the attention of the relevant chief district judge or chief circuit judge within the definition of cognizable misconduct. *See*

Rule 4(a)(6) (“Failure to Report or Disclose”) & Commentary; *see also* Rule 23 (“Confidentiality”) Commentary.

2. *Expressly Prohibiting Workplace Harassment*

In its Report, the Working Group suggested that the JC&D “Rules or commentary include express reference to workplace harassment within the definition of misconduct,” and include changes “clear[ly proscribing] harassment based on sexual orientation or gender identity.” Report at 30. The Judicial Conference responded by revising the JC&D Rules and related Commentary to include abusive or harassing behavior (including unwanted, offensive, or abusive sexual conduct; hostile work environment; and discrimination based on race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, and disability) within the definition of misconduct. *See* Rule 4(a)(2) (“Abusive or Harassing Behavior”); Rule 4(a)(3) (“Discrimination.”)

3. *Exempting Reports of Misconduct from Confidentiality Rules*

The Working Group proposed that “the Committee on Judicial Conduct and Disability make clear . . . that confidentiality obligations should never be an obstacle to reporting judicial misconduct or disability” in order to ensure that complainants “understand that the obligations of confidentiality that judicial employees must observe in the course of judicial business do not shield a judge from a complaint under the JC&D Act.” Report at 30-31. In response, the Judicial Conference adopted a new JC&D Rule and related Commentary emphasizing that nothing in the JC&D Rules regarding confidentiality of the complaint process prevents a judicial employee from reporting or disclosing misconduct or disability. *See* Rule 23(c) (“Disclosure of Misconduct and Disability”). *See also* Rule 4 (“Misconduct and Disability Definitions”) Commentary; Rule 6 (“Filing of Complaint”) Commentary.

4. Clarifying Eligibility to File a JC&D Complaint

The Working Group recommended that the “Rules or associated commentary state with greater clarity that traditional judicial rules respecting ‘standing’— viz., the requirement that the complainant himself or herself must claim redressable injury from the alleged misconduct—do not apply to the JC&D Act complaint process.” Report at 29–30. In response, the Judicial Conference revised the JC&D Rules and related Commentary to note that traditional standing requirements do not apply, and that individuals and organizations may file a complaint even if they have not been directly injured or aggrieved. *See* Rule 3(c)(1) (“Complaint”) & Commentary.

5. Improving Transparency

The Working Group recommended that “the Judiciary as a whole consider possible mechanisms for improving the transparency of the JC&D Act process.” Report at 31. The Judicial Conference approved various changes to the JC&D Rules, including: expanding the provision regarding confidentiality to allow judicial councils and the JC&D Committee (and not just circuit chief judges) to disclose the existence of proceedings in specific circumstances, *see* Rule 23(b)(1)) (“General Rule” on “Confidentiality in the Complaint Process”); expanding the provision regarding disclosure of information about the consideration of a complaint where a complainant or other person has publicly released information regarding the existence of a complaint proceeding, *see* Rule 23(b)(8) (“Disclosure in Special Circumstances”) & Commentary; permitting the disclosure of a subject judge’s name in additional circumstances where a complaint is concluded based on voluntary corrective action, *see* Rule 24 (“Public Availability of Decisions”) Commentary; and including language that the Judiciary will seek ways to make decisions available to the public through searchable electronic indices, *id.*

6. Authorizing Systemic Evaluations

As the Working Group notes, the Judiciary has an “institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition.” Report at 39. The Judicial Conference added language to the JC&D Rules that the Judicial Conference and judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote “the expeditious conduct of court business.” 28 U.S.C. § 331. This includes making “all necessary and appropriate orders for the effective administration of justice within [each] circuit,” *id.* at § 332(d)(1), including consideration of what precautionary or curative steps could be undertaken to prevent the recurrence of misconduct. *See* Rule 11 (“Chief Judge’s Review”) Commentary.

B. Amendments to the Model Employment Dispute Resolution (“EDR”) Plan

The Working Group recommended revisions to the Model EDR Plan to provide clear, uniform definitions of “wrongful conduct,” such as harassment and discrimination; offer informal avenues for employees to report wrongful conduct; allow employees more time to file a formal claim; cover all paid and unpaid Judiciary employees; increase awareness of EDR rights and options to address workplace misconduct; and ensure the appropriate chief judge is notified of potential misconduct by a judge.

The Judicial Conference approved two of the Working Group’s recommendations in September 2018: increasing the time to file a formal EDR Complaint from 30 to 180 days and extending EDR coverage to all paid and unpaid interns and externs. As it always has, the Model EDR Plan applies to all Article III and other judicial officers of the federal courts; all current and

former Judiciary employees, including all chambers staff; federal public defenders and their staffs; and all applicants for employment who have been interviewed.

The Director of the AO established a Model EDR Plan Working Group (EDR Group), made up of federal judges and Judiciary officials with expertise in employment dispute resolution. The EDR Group drafted a revised Model EDR Plan to incorporate the Working Group's recommendations and ensure consistency with the amendments to the Codes of Conduct and the JC&D Rules. The proposed revision was circulated for Judiciary-wide comment. The Judicial Resources Committee of the Judicial Conference and its Diversity Subcommittee then considered the revised Model EDR Plan and recommended its adoption, which the Judicial Conference adopted at its September 2019 session. Some of the significant changes to the Model EDR Plan are highlighted below.

1. Providing Clear and Consistent Definitions of Wrongful Conduct

The Working Group recommended revising all of the Judiciary's guidance documents, including the Model EDR Plan, in parallel fashion with the Codes of Conduct to provide consistent standards of workplace conduct. In response, the revised Model EDR Plan now states the Judiciary's core values, including a commitment to a workplace of respect, civility, fairness, tolerance, and dignity, free of discrimination and harassment. Consistent with changes to the Codes of Conduct and the JC&D Rules, the Model EDR Plan encourages reports of wrongful conduct and makes clear that confidentiality requirements do not prohibit anyone, including law clerks, from reporting any type of workplace misconduct. Furthermore, consistent with the revised Codes of Conduct and JC&D Rules, the revised Model EDR Plan includes a clear policy statement of prohibited "wrongful conduct" in the workplace, using explanatory examples,

namely: discrimination; sexual, racial or other discriminatory harassment; abusive conduct; retaliation; and violations of specific employment laws.

The Model EDR Plan has always protected against discrimination and harassment based on race, color, national origin, sex, gender, pregnancy, religion, and age (40 years and over), but the Working Group recommended expanding the Model EDR Plan's definition of sex discrimination to match established legal definitions and the language used within the Codes of Conduct and other Judiciary policy statements. The revised Model EDR Plan includes gender identity and sexual orientation as a "protected category" consistent with similar action taken by the Judicial Conference in March 2019 in amending the Codes of Conduct and the JC&D Rules.

2. Prohibiting Abusive Conduct

The Working Group suggested that the revised Model EDR Plan state that harassment, without regard to motivation, is wrongful conduct. The revised Model EDR Plan adds "abusive conduct" as a form of wrongful conduct, defined as "a pattern of demonstrably egregious and hostile conduct *not* based on a protected category that unreasonably interferes with an employee's work and creates an abusive working environment." This definition is consistent with language defining abusive behavior in the JC&D Rules. The definition excludes communications and actions reasonably related to performance management.

3. Providing Flexible and Informal Options for Resolution

The Working Group recommended that the Model EDR Plan provide an avenue for employees to report wrongful conduct without filing a formal EDR complaint. The revised Model EDR Plan provides new flexible and more informal ways for reporting and resolving allegations of wrongful conduct, called "Options for Resolution:" (1) informal advice; (2) assisted resolution; or (3) formal complaint. Based on the Working Group's recommendation,

the revised Model EDR Plan allows an employee, including a law clerk or other chambers employee, to request interim relief during the pendency of any Option for Resolution, including transfer or an alternative work arrangement.

Informal advice is just that: an employee can contact an EDR Coordinator, circuit director of workplace relations, or the national OJI for informal, confidential advice and guidance about workplace misconduct. Assisted resolution simply means an employee can ask for help with a workplace conduct issue. Assistance under this option includes facilitated discussions, voluntary mediation, a preliminary investigation, or any other steps that may yield an effective resolution of the issues.

The formal EDR complaint option is substantially the same: it allows an employee to use a structured claims process overseen by a presiding judicial officer assigned by the chief judge. It provides for a fair and impartial investigation, a hearing before the presiding judicial officer to resolve material factual disputes, a written decision, and a right to have that decision reviewed by the circuit judicial council. The new Model EDR Plan sets out mandatory recusal standards for those involved in the EDR process to avoid conflicts of interest.

4. Increasing Awareness of EDR Rights and Options for Resolution

The Working Group found that employees lacked awareness of the rights and options available to them under the Model EDR Plan. In response, the new Model EDR Plan is written in “plain English”; includes easy-to-follow infographics describing EDR rights and options; and requires courts to post the EDR Plans and infographics prominently on their websites, along with contact information for the court’s EDR Coordinators and the national OJI. The Model EDR Plan now also requires courts to conduct EDR and workplace conduct training annually for all judges and employees, including chambers staff.

Based on a Working Group recommendation, the revised Model EDR Plan requires that all EDR coordinators be trained and certified on the Model EDR Plan's rights, processes, and Options for Resolution. The EDR Group is currently developing materials to assist in training and to answer frequently asked questions about EDR.

5. Providing Notice of Wrongful Conduct Allegations Against Judges

The Model EDR Plan has always permitted employees, including chambers employees, to report judicial misconduct in the workplace. Implementing the Working Group recommendation, the revised Model EDR Plan now requires notice to the appropriate chief district or circuit judge when an EDR-level allegation is made against a judge in their district or circuit. In such a case, the appropriate chief district or chief circuit judge is responsible for coordinating an Assisted Resolution request or overseeing a formal EDR Complaint. As it has in the past, the Model EDR Plan states that if a judge is the subject of both a formal complaint under the Model EDR Plan and a complaint under the Judicial Conduct and Disability Act, the chief circuit judge will determine the appropriate procedure for addressing both.

C. Creation of Office of Judicial Integrity

The Working Group recommended that the Judiciary offer employees a broad range of options and methods to report harassment and seek guidance about workplace conduct concerns, with multiple points-of-contact at both the local and national level. As part of that goal, it recommended the AO establish a national OJI to provide confidential assistance regarding workplace conduct to all Judiciary employees.

1. Providing Independent, Confidential Advice on Workplace Conduct

The Director of the AO created the OJI, which began operations in January 2019. The OJI serves as an independent resource where current and former Judiciary employees can seek—by phone or confidential email—counseling, guidance, and intervention regarding sexual and other harassment, abusive conduct, discrimination, and other workplace misconduct. The OJI ensures employees are aware of all the informal and formal options available to them to report and address workplace harassment or other wrongful conduct. The OJI provides a safe and confidential avenue for employees who, for whatever reason, choose not to report misconduct to, or discuss their workplace concerns with, their local court office.

Employees can make confidential, even anonymous, reports of harassment or other wrongful conduct on an email form located on the OJI's JNet website, linked prominently on a Workplace Conduct Quick Link on the front page of the JNet. Former employees and members of the public can submit similar confidential reports on the OJI's public site on www.uscourts.gov. The OJI's JNet website provides links to other workplace resources, such as court EDR Plans and EDR Coordinators, the Codes of Conduct and JC&D Rules, the Working Group's June 2018 Report, and the FJC's workplace conduct training programs and offerings.

The OJI also provides guidance and advice to judges, unit executives, managers, and EDR Coordinators about workplace conduct matters. It provides advice on best practices for conducting a fair, thorough, and impartial workplace investigation, and, at the request of a court Chief Judge, can assist with a workplace investigation. It ensures managers are aware of other workplace conduct resources at the AO, including the AO's Court Human Resources Division,

the Office of the General Counsel, and the FJC's workplace conduct in-person and web-based training programs.

The OJI is headed by the first appointed Judicial Integrity Officer, Jill Langley, formerly the Tenth Circuit's Director of Workplace Relations. Prior to her appointment, Ms. Langley was an attorney with the Tenth Circuit for twenty-three years and spent thirteen years focusing on EDR, during which time she developed an EDR training program that she presented nation-wide. Before joining the court, Ms. Langley was in private practice with a law firm in Phoenix, Arizona. She graduated cum laude from the Sandra Day O'Connor College of Law at Arizona State University, where she was an editor of the law review, and received her undergraduate degree from the University of Arizona.

2. Outreach to Future, Current, and Former Judicial Employees and Law Clerks

The OJI provides an avenue for law schools to report any information they learn from students about judicial workplace misconduct. Law schools and law students who worked in chambers can report a judicial workplace misconduct issue directly to the OJI. If the law school or student would prefer to remain anonymous, they can submit a confidential report via the OJI's public website. After receiving any such report, the OJI will notify the appropriate Chief Judge of the reported information.

The Judicial Integrity Officer travels extensively to circuit and court conferences to increase awareness of the OJI and its workplace conduct resources and of workplace conduct issues generally. In 2019, the Judicial Integrity Officer has been invited by courts in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh and District of Columbia circuits to participate in, or provide, training on the role of the OJI, workplace conduct, and the Model EDR Plan. The conferences have included judge conferences, court manager conferences, new law

clerk orientations, workplace conduct workshops, and training programs for Human Resource Professionals and EDR Coordinators. As courts adopt their EDR Plans based on the new Model EDR Plan, the OJI will be available to provide training next year to educate employees about their rights and options under the Model EDR Plan and make them aware of the many ways—informal and formal—they can get help with a workplace conduct concern.

3. Analyzing Issues and Trends

The OJI maintains a confidential database of all contacts with the OJI, including the nature of the allegations, to inform the Judiciary and this Working Group about the frequency and the nature of the reported workplace conduct issues and any notable trends. In addition, the OJI works with the Court Human Resources Division, which currently administers a national exit survey of all former Judiciary employees, to identify workplace conduct issues or trends revealed in the exit surveys.

The AO is in the process of clarifying the data that courts will be required to report under the new Model EDR Plan and creating easier and more accurate ways for courts to provide that information. This data collection will include a requirement that courts annually report sexual harassment claims.

D. Circuit and Court Initiatives

Following the recommendation of the Working Group, many circuits have now hired trusted individuals, often called Directors of Workplace Relations, to provide confidential guidance and resolution of workplace conduct issues to Judiciary employees within the circuit. The Directors of Workplace Relations offer workplace conduct training; give guidance to employees and managers about conduct issues; provide informal workplace conduct advice, train and assist court EDR Coordinators; and assist with workplace conduct investigations, mediation,

and dispute resolution. It is anticipated that the OJI and Circuit Directors of Workplace Relations will meet at least annually to develop best practices, identify effective training programs, improve methods and processes for employees to report misconduct, and identify workplace conduct trends. Many circuits have also created workplace conduct committees, either in addition or as an alternative to, a circuit director of workplace relations.

Many circuits and individual courts have conducted confidential climate surveys, developed their own workplace conduct training programs, and offered workplace conduct workshops and seminars. Courts in every circuit have provided training and education to staff and employees about workplace conduct, particularly the ways that employees can report issues and how managers can address and correct issues. The Seventh Circuit and the Ninth Circuit, which amended their EDR Plans in advance of the new Model EDR Plan, provided circuit-wide training to EDR Coordinators, including training on mediation skills and conducting a workplace investigation.

III. TRAINING AND EDUCATION

The Working Group made three recommendations to the FJC regarding training. First, the FJC should ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation programs, with refresher training at regular intervals. Second, the FJC should develop an advanced training program aimed at developing a culture of workplace civility. Finally, the FJC, in coordination with the AO and individual courts, should continuously evaluate the effectiveness of workplace conduct educational programs.

The FJC has delivered “workplace standards” training at the initial orientations of new federal judges (phases I and II of the orientations for new district, bankruptcy, and magistrate judges). The FJC also regularly offers periodic refresher training consisting of sessions at

national and circuit judicial workshops. An orientation video covering workplace conduct issues for new law clerks was produced in time for summer 2018 term law clerks entering into their duties. That video is currently being updated to reflect changes recommended and implemented following the Working Group report, and to include the formation of the OJI and the amendments to the Codes of Conduct and JC&D Rules. The FJC anticipates creating EDR training programs after the Judicial Conference approves the revised Model EDR Plan.

With respect to an initial orientation for all new Judiciary employees, an FJC webcast last fall in the series “Court Web” reached roughly 2,400 participants and consisted largely of scenario-based discussions of acceptable workplace conduct. It is likely that an online approach, whether via podcast, webcast, or a similar mechanism, which allows the recipients to absorb the content at a time their choosing, offers the best chance of reaching the entirety of the target audience.

The FJC believes the most effective educational approach is to use scenarios, some of which are adapted from actual reports received, that enable candid discussions among groups of judges, court unit executives, and managers and supervisors. The formal ethics presentations at new judge orientations (typically consisting of a judge representative from the Codes Committee and a representative from the AO’s Office of the General Counsel) have been expanded to include greater focus on the ethical obligations of judges in responding to workplace misconduct allegations. The perceptions formed at orientations for new judges as to what is and is not acceptable within the Judiciary’s culture, guided by mentor judge observations, are critical. Discussions at national workshops of district, bankruptcy, and magistrate judges, circuit judicial workshops, chief district and bankruptcy judge workshops, and the new chief judge (circuit,

district, and bankruptcy) leadership seminar program have all proven useful in capturing important workplace conduct insights.

The FJC's lineup of in-person programs for unit and deputy unit executives, experienced supervisors, and new supervisors all address various issues affecting workplace conduct. The Conference for Court Unit Executives, a national-level gathering, addressed various aspects of workplace conduct both in plenary and elective sessions. At the court staff level, the primary educational method of learning more about these issues is a variety of in-district training seminars (e.g., Preventing Workplace Harassment, Dealing with Difficult Situations; Meet: Breaking New Ground – Respect and Inclusion in the Workplace) delivered by court trainers. In the year ahead, the FJC intends to add another program, Civility in the Workplace, to those seminars.

CONCLUSION

The Judicial Branch has demonstrated commitment from courts nationwide to creating and ensuring exemplary workplaces. Managers are offering workplace training and workshops, judges are actively involved in workplace concerns, and employees are coming forward, both locally and to the OJI, to discuss and resolve any concerns they may have. Our Working Group will continue to monitor and assess workplace conduct matters throughout the Judiciary, to assist with continued implementation of the workplace initiatives already in place, and to recommend additional changes whenever we see needs for improvement.

**REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT
WORKING GROUP
TO
THE JUDICIAL CONFERENCE OF THE UNITED STATES
JUNE 1, 2018**

INTRODUCTION

On December 20, 2017, Chief Justice John G. Roberts, Jr., asked the Director of the Administrative Office of the United States Courts to establish a working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect all court employees from inappropriate conduct in the workplace.¹ The Chief Justice highlighted this issue in his 2017 *Year-End Report on the Federal Judiciary*, noting that the Judicial Branch cannot assume that it is immune from the problems of sexual harassment that have arisen elsewhere in the public and private sectors. He directed the working group to consider whether changes are needed to: the Judiciary's codes of conduct; its guidance to employees on issues of confidentiality and reporting of instances of misconduct; its educational programs; and its rules for investigating and processing misconduct complaints.² The ultimate goal of this undertaking is "to ensure an exemplary workplace for every judge and every court employee."³

On January 12, 2018, the Director announced the formation of the Federal Judiciary Workplace Conduct Working Group (Working Group).⁴ The Working Group, chaired by the Director, consists of eight experienced judges and court administrators from diverse units within

¹ See Appendix 1: Memorandum from James C. Duff, Director of the Administrative Office, to all Judiciary Employees (Dec. 20, 2017).

² See Appendix 2: Chief Justice John G. Roberts, Jr., United States Supreme Court, *Year-End Report on the Federal Judiciary* at 11 (2017).

³ *Id.*

⁴ See Appendix 3: Press Release, Federal Judiciary Workplace Conduct Working Group Formed (Jan. 12, 2018).

the Judiciary. The members include representatives from the Administrative Office, the Federal Judicial Center (FJC), and six different courts from five different circuits.⁵ The Director has enlisted the Administrative Office's General Counsel and her staff to provide additional subject-matter expertise, counsel, and support. The Working Group has collaborated continuously since its inception by telephone and electronic means, and it has convened monthly in-person meetings at the Administrative Office in Washington, D.C., on February 7, 2018; March 1, 2018; April 6, 2018; and May 21, 2018.

The Working Group took its charter from the Chief Justice's goal of ensuring an exemplary workplace for every judge and every court employee. As the branch of government whose core purpose is equal justice under law, the Judiciary must hold itself to the highest standards of conduct and civility to maintain the public trust. The Working Group developed its findings and recommendations not only to address harassment, but to pursue the overarching goal of an inclusive and respectful workplace.

The Working Group proceeded from the premise that in many respects the Judiciary shares common features with other public and private workplaces. The Working Group therefore analyzed existing literature on workplace misconduct in those sectors. The Working Group found particularly helpful a June 2016 study by a Select Task Force of the United States Equal Employment Opportunity Commission (EEOC).⁶ The EEOC Study analyzes the prevalence of harassment, employee responses, risk factors, and steps that can be taken to prevent and remedy inappropriate conduct.⁷ Its summary of recommendations provides

⁵ *Id.*

⁶ U.S. Equal Emp. Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, (2016), (*EEOC Study*).

⁷ *Id.*

invaluable general guidance on developing harassment prevention policies, providing education and compliance training, and promoting workplace civility.⁸

The Working Group included in its review the entire federal Judiciary, including judges, court unit executives, managers, supervisors and others serving in supervisory roles, as well as employees, law clerks, interns, externs, and other volunteers. It recognized that, despite the Judicial Branch’s many shared characteristics with other workplaces, the judicial workplace is unique in certain respects. On the one hand, the Judiciary has distinct features that are likely to lessen the risk of employee harassment. For example, the Judiciary, by virtue of its institutional role, is committed to fairness and the rule of law; it has a tradition of formality and decorum; its Article III judges are subject to rigorous screening through the judicial confirmation process; its bankruptcy and magistrate judges are carefully vetted before appointment; its executives and most employees are subject to pre-employment background investigations; it has long maintained codes of professional conduct; it has developed and maintained a host of fair employment training and educational programs; and it is subject to both statutory and regulatory programs to investigate and remedy misconduct.⁹ But on the other hand, some elements of the judicial workplace can increase the risk of misconduct or impose obstacles to addressing inappropriate behavior effectively. For example, there are significant “power disparities” between judges and the law clerks and other employees who work with them, which may deter a law clerk or employee from challenging or reporting objectionable conduct. Judges enjoy life tenure, and they are subject to discipline only through formal processes. Further, the judicial decision-making process requires a high degree of confidentiality, and law clerks and other

⁸ *Id.* at 66-71.

⁹ *See* Appendix 4: Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Feb. 16, 2018).

chambers employees may mistakenly believe that the obligation of confidentiality extends to the reporting of misconduct.

The Working Group accordingly embraced the recommendations set forth in the EEOC Study, but it focused additional effort on identifying those factors that distinguished the Judiciary and called for further refinement of the standards that would apply in other workplaces. The Working Group sought out the views of interested constituencies, including current and former law clerks, court employees, and Judicial Branch advisory councils. It conducted in-person meetings with representative law clerks, employees, and industry experts, including the co-chairs of the EEOC Study.¹⁰ The Working Group broadly solicited input through an “electronic mailbox” that enabled any current or former Judiciary employee to provide anonymous or attributable suggestions and comments. The Working Group sought and received input from several circuits’ own workplace conduct working groups. Based on its input from these sources and its members’ own experiences in the Judiciary, the Working Group then engaged in a review of: (1) the Judiciary’s codes of conduct and published guidance for judges, law clerks, and other judiciary employees; (2) the existing statutory framework for misconduct complaints under the Judicial Conduct and Disability Act (JC&D Act) and the Judiciary’s internal framework of Employment Dispute Resolution Plans (EDR Plans); and (3) the Judiciary’s educational programs and publications for promoting fair employment practices and workplace civility.¹¹

¹⁰ The Working Group appreciates the written submissions and detailed in-person discussions during meetings between the Working Group members and the co-chairs of the EEOC Study (*supra* note 6), Acting Commission Chair Victoria A. Lipnic and Commissioner Chai R. Feldblum, and with current and former law clerks Jaime Santos, Kendall Turner, Deeva Shah, Claire Madill, and Sara McDermott, as well as many other current employees within the Judiciary.

¹¹ In the course of this undertaking, the Working Group briefed the Judicial Conference and all Judiciary employees on its progress, answered media inquiries, and responded to communications from interested members of Congress. *See, e.g.*, Appendix 4, *supra* note 9. *See also* Appendix 5: Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Mar. 8, 2018); Memorandum from James C. Duff, Director of the Administrative Office, seeking comments from all Judiciary employees (Feb. 20, 2018); Press Release, Judiciary Workplace Conduct Group Seeks Law

The product of these efforts is this report to the Judicial Conference of the United States. The Judicial Conference, presided over by the Chief Justice, is the national policy-making body for the federal courts. It establishes policies based on the advice of its various committees. The Working Group's Report offers a number of recommendations to the Judicial Conference and its committees for their consideration and further action. The Report also includes recommendations that the Administrative Office, as the administrative arm of the Judiciary, and the FJC, as the Judiciary's education and research agency, can implement directly.

The Report first provides a summary of what was learned through the meetings with affected constituencies, subject-matter experts, and other interested groups, and from comments submitted by employees. The Report then sets forth recommendations and identifies steps already taken to: (1) revise and clarify the Judiciary's codes and other published guidance for promoting appropriate workplace behavior; (2) improve the procedures for identifying and correcting misconduct, including the creation of new avenues for employees to seek advice and register complaints; and (3) enhance educational and training programs to raise awareness of conduct issues, prevent harassment, and promote an exemplary workplace environment.

The Working Group's submission of this Report does not conclude its work. Under the Chief Justice's direction, the Working Group intends to monitor ongoing initiatives and measure progress to ensure its goals are fulfilled.

I. FINDINGS

Clerk, Employee Input (Feb. 21, 2018); Memorandum from James C. Duff, Director of the Administrative Office, to all United States Judges (Feb. 28, 2018). See Appendix 6: Press Release, Judicial Conference Receives Status Report on Workplace Conduct Review (Mar. 13, 2018).

The EEOC Study of harassment in the workplace provided the Working Group with a current and reliable empirical baseline to understand the problem and focus its inquiries. The EEOC Task Force conducted its study over 18 months from January 14, 2015, through June 2016. The 88-page report convincingly explains that workplace harassment is a persistent and pervasive problem in all economic sectors, in all socioeconomic classes, and at all organizational levels. The EEOC Study noted that almost one third of the 90,000 charges it received in 2015 included an allegation of workplace harassment. Those charges included harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion.¹² The EEOC Study found that between 25 percent and 85 percent of women in the private sector and federal sector workplace experienced sexual harassment, depending on how that term is defined.¹³ The EEOC Study stated that three out of four individuals who experienced harassment never talked to a supervisor or manager about it.¹⁴ In short, the EEOC Study confirmed that the problem of workplace harassment is both widespread and underreported in workplaces throughout the nation, and—as the Chief Justice noted in his *Year-End Report*—there is no reason to believe that the Judiciary is immune.¹⁵

The information that the Working Group gathered is generally consistent with the EEOC Study. The Judicial Branch employs 30,000 individuals in a broad range of occupations. Based on input from the electronic mailbox, the advisory groups, and circuit surveys (much of which was anonymous), and from interviews with employees, including law clerks, the Working Group believes that inappropriate conduct, although not pervasive in the Judiciary, is not limited to a

¹² *EEOC Study*, *supra* note 6, at iv.

¹³ *Id.* at 8.

¹⁴ *Id.* at v.

¹⁵ As the EEOC Study points out, harassment for any reason is problematic, and the Working Group's references to harassment are therefore not limited to harassment of a sexual nature.

few isolated instances. This information suggests that, of the inappropriate behavior that does occur, incivility, disrespect, or crude behavior is more common than sexual harassment. As the EEOC Study noted, “incivility is often an antecedent to workplace harassment.” The Working Group agrees that, rather than focusing simply on eliminating unwelcome behavior, the Judiciary should “promot[e] respect and civility in the workplace generally.”¹⁶

The EEOC Study was useful in another important respect. It provided the Working Group with a cogent approach for assessing and addressing the problem of workplace harassment and inappropriate behavior within the Judiciary. The EEOC Study’s recommendations, which the co-chairs recently distilled in a *Harvard Business Review* article,¹⁷ identify five key steps that employers can take to end harassment:

- Demonstrate Committed and Engaged Leadership
- Require Consistent and Demonstrated Accountability
- Issue Strong and Comprehensive Policies
- Offer Trusted and Accessible Complaint Procedures
- Provide Regular, Interactive Training Tailored to the Organization.

Those elements provide a sound framework for evaluating the information that the Working Group received from its in-person interviews, electronic mailbox submissions, advisory council input, and other sources.

¹⁶ *EEOC Study*, *supra* note at 55.

¹⁷ Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, *Harvard Business Review* (2018), <https://hbr.org/2018/01/breaking-the-silence>. (*Breaking the Silence*).

A. *Does the Judiciary Demonstrate Committed and Engaged Leadership?*

The EEOC Study emphasizes that the leadership of an organization must show its commitment “to a diverse, inclusive, and respectful workplace in which harassment is not accepted.”¹⁸ Additionally, “leadership must come from the very top of the organization.”¹⁹

The Chief Justice’s formation of this Working Group, and the Judicial Conference’s interim review of the Working Group’s progress at the March 2018 Judicial Conference session, demonstrate a commitment “from the top” of the Judiciary.²⁰ But that leadership must extend throughout the Judiciary, beginning with judges. The Judicial Branch’s administration and management is dispersed through thirteen circuit courts, 94 district courts, and a host of other judicial entities. Many of those entities have already expressed a commitment to the goals of a welcoming and civil workplace. For example, several circuits and district courts already have launched their own workplace initiatives.²¹ Other circuits and district courts are following suit.

The Working Group received anonymous anecdotal reports about harassment or other inappropriate behavior that were not properly addressed. It is therefore vital that judges and court executives ensure, through educational programs, performance reviews, and other mechanisms for motivating positive change, that judges, executives, supervisors, and managers at every level throughout the Judiciary demonstrate the same strong commitment to workplace civility.

¹⁸ *EEOC Study*, *supra* note 6 at 31.

¹⁹ *Id.*

²⁰ *See* Appendix 6, *supra* note 11.

²¹ *See, e.g.*, Press Releases, Ninth Circuit Committee Begins Workplace Environment Review (Feb. 28, 2018) and Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations (May 21, 2018). *See also* United States Court of Appeals for the Seventh Circuit Announcement by Chief Judge Diane Wood appointing Committee to examine harassment claims process. (Dec. 29, 2017). On April 18, 2018, the District Court for the District of Utah issued recommendations for how to promote a respectful workplace in its court.

B. Does the Judiciary Require Consistent and Demonstrated Accountability?

The EEOC Study co-chairs have noted that “[e]mployees have to see that bad behavior will not stand and that everyone complicit in that behavior will be held responsible.”²²

Additionally, when an instance of harassment has been determined, “the discipline that follows must be proportionate.”²³ “There should be zero tolerance for harassment, but that does not mean that all harassers should be disciplined the same way—that is, by being fired.”²⁴

Judicial employees who are subject to harassment or other forms of workplace abuse currently have two principal mechanisms for seeking redress. First, if an employee is harassed or mistreated by a judge, the employee may file a written complaint under the Judicial Conduct and Disability Act (JC&D Act), 28 U.S.C. §§ 351-364, a statutory mechanism specifically designed for disciplining judges. The filing of a written complaint triggers a formal review process, which can result in sanctions ranging from a private reprimand to a recommendation of impeachment.²⁵ The JC&D Act and the Rules for Judicial Conduct and Judicial Disability Procedures (Conduct Rules) provide authority for a chief circuit judge to initiate an inquiry and identify a complaint even if that judge receives information about misconduct in a form other than a formal, signed complaint.²⁶

Alternatively, an employee subjected to misconduct, whether by a judge, supervisor, or other employee, may report the wrongful conduct or initiate a claim under one of the Employment Dispute Resolution Plans (EDR Plans) that have been established in all thirteen of the nation’s judicial circuits. An EDR Plan is a judicially created program, based on the

²² *Breaking the Silence*, *supra* note 17 at 5.

²³ *Id.*

²⁴ *Id.*

²⁵ See Appendix 7: An Executive Summary of the current JC&D Act.

²⁶ See Conduct Rule 5. This mechanism has been used in the past to initiate complaints against judges.

Judiciary’s Model Employment Dispute Resolution Plan (Model EDR Plan), for resolving a wide range of employee disputes.²⁷

The Judiciary has a good record for accountability under both of these disciplinary mechanisms. Under either system, a complaint, reported matter, or claim receives careful evaluation. In the case of the JC&D Act, very few complaints are filed alleging workplace harassment. Rather, the bulk of the complaints are filed by litigants who are dissatisfied with the outcome of their cases or incarcerated individuals challenging their confinement, both of which are not cognizable under the Act.²⁸ The Judiciary’s publicly reported data shows that, of the 1,303 judicial “misconduct” complaints filed nationwide under the JC&D Act procedures in fiscal year 2016, over 1,200 were filed by dissatisfied litigants and prison inmates. No misconduct complaints were filed under these procedures by law clerks or judiciary employees that year. And, none of the four complaints that were referred to a special committee for further investigation involved sexual misconduct. This pattern of filings is true year after year. But in those instances where complaints have identified judges as subjecting employees to sexual harassment or other forms of misconduct, the process has triggered a thorough investigation and, when the claim is substantiated, the process has resulted in reprimand, removal, or retirement of the judge.²⁹ An important feature of the JC&D Act process is that serious complaints that reach the investigative stage receive multiple levels of review by multiple panels of judges.

The Working Group found that the JC&D Act and the EDR Plans are effective *when their provisions are invoked*. But there is room for improvement in terms of transparency and accessibility. The Working Group received suggestions that the complainants should have

²⁷ See Appendix 8: Executive Summary of Model Employment Dispute Resolution Plan.

²⁸ 28 U.S.C. § 352(b)(1)(A)(i).

²⁹ See Appendix 4, *supra* note 9, at 9-17.

additional time under the EDR Plans for filing complaints, and complainants should receive more communication and updates during the investigatory phase of the proceedings. Confidence in court EDR Plans could be increased if those plans required chief district judges and chief bankruptcy judges to inform their chief circuit judge or circuit judicial council of reports of wrongful conduct by judges in their district and how those reports were addressed locally. Ensuring that the circuit court is informed of such reports would provide an additional incentive to investigate that report properly, could provide the basis for identification of a JC&D Act complaint, as discussed below, and would create a record at the circuit level that could prove relevant if there are future complaints against the same judge.

The Working Group found that public confidence in the JC&D Act would benefit if the Judiciary specifically identified harassment complaints in its statistical reports and made decisions on those complaints more readily accessible through searchable electronic indices. Some commenters noted that accountability could be strengthened through better communication about the outcome of disciplinary proceedings. Commenters noted the value of more regular employee input on workplace conditions and implementing exit interviews for employees who leave the workforce more consistently.

Law clerks and others with whom the Working Group spoke expressed concern about the seeming lack of punishment for a judge who, under allegations of serious misconduct, retires or resigns and thereby terminates the disciplinary proceeding. Some believe that if the disciplinary process compels a life-tenured judge to leave the bench under the cloud of alleged misconduct, then the process has produced an appropriate result, and the removal of that judge from the bench without much expense or delay is beneficial. But others noted that a judge who meets the service requirements for retirement benefits suffers no monetary penalty and may return to legal

practice. They have expressed the view that additional steps, such as a report to the local bar association, should be considered. More generally, commenters have noted that the termination of a disciplinary action should not prevent the Judiciary from continuing an institutional review to determine if there are systemic problems within a court or judicial organization that require correction.

The most significant challenge for accountability, however, arises from the reluctance of victims to report misconduct. Neither the JC&D Act nor the EDR Plans can ensure accountability if victims are unwilling to come forward. Victims are hesitant to report harassment and other inappropriate behavior for a variety of reasons, including lack of confidence that they will be believed, fear that no action will be taken, and concerns that a complaint will subject them to retaliatory action or affect future job prospects. Additionally, some forms of inappropriate conduct—such as isolated acts, insensitive comments, or unintentional slights—do not lend themselves to a formal complaint process and are better addressed through less formal mechanisms. As explained below, the Working Group found that the Judiciary must both reduce barriers to reporting and provide alternative avenues for seeking advice, counseling, and assistance.

Although the reluctance to report misconduct arises in all employment categories, it deserves special attention in the case of law clerks, most of whom serve in the courts for only one to two years. The Working Group met with law clerk representatives who provided invaluable insight into the problems they and their peers face when confronted with harassment. Law clerks, who are typically at the start of their legal careers, must step into a new, unfamiliar, and sometimes daunting work environment when they join a judge's chambers. They work in close quarters with their judge, providing confidential support in an isolating environment.

There is an acute “power disparity” between a life-tenured judge, who is a person of stature and influence, and a law clerk. Law clerks face strong disincentives to report inappropriate conduct. The law clerk who reports misconduct may understandably fear that the complaint will permanently destroy the bond of trust between the judge and clerk and cause unwelcome strife in the chambers. Law clerks know that a judge’s recommendation often plays a crucial role in the individual’s future job prospects. A judge’s rancor may result in embarrassment among peers, tarnish the clerk’s professional reputation, and curtail career opportunities. The Judiciary has a need to provide clear avenues for relief that recognize those legitimate concerns.

The Working Group believes that an important first step is vigilance on the part of judges themselves. Under the Code of Conduct for United States Judges, judges have a responsibility to promote appropriate behavior in the workplace, and that responsibility should extend beyond one’s own chambers. Judges respect one another’s independence, and each is reciprocally disinclined to intrude into another’s relationships with employees. But the virtues of mutual respect, independence, and collegiality should not prevent a judge from intervening when necessary to protect an employee from another judge’s inappropriate conduct.

The Working Group knows from firsthand experience that many judges, especially chief judges, take action when they observe, or become aware of, a colleague’s inappropriate behavior. But neither the Judiciary’s Code of Conduct nor its educational programs have provided sufficiently focused guidance on this matter. The Code of Conduct should make clearer that judges cannot turn a blind eye to a colleague’s mistreatment of employees, and the training programs for new and experienced judges should provide direction on how to navigate this sensitive issue without eroding the distinctive values of the Judicial Branch.

C. Does the Judiciary Have Strong and Comprehensive Policies?

The EEOC Study co-chairs have observed that employees in workplaces without express anti-harassment policies report the highest levels of harassment. They urge the adoption of anti-harassment policies that: (1) provide clear and simple explanations of prohibited conduct; (2) assure employees who report harassment that they will be protected from retaliation; (3) describe multiple avenues for making complaints; (4) provide confidentiality to the extent possible; (5) lead to prompt, thorough, and impartial investigations; and (6) result in proportionate corrective action.³⁰

The Judiciary has long had in place a number of codes of judicial and employee conduct and a large body of publications designed to maintain high standards of behavior and preserve the independence and integrity of the Judicial Branch. Those carefully conceived publications, individually and collectively, reflect the essential characteristics that the EEOC Study has highlighted. The Working Group found, however, that those codes and publications were not developed with the aim of addressing the particular issues of workplace harassment or incivility, and they do not take full account of the nuances of these problems. The Working Group identified a number of areas where the codes and publications warrant clarification and revision to leave no doubt that disrespect, abuse, and harassment are impermissible and should be reported without fear of retaliation or adverse consequences.

First, commenters noted that many employees are not aware of the codes, publications, other sources of information regarding appropriate workplace behavior, and the mechanisms for recourse that are available when workplace issues arise. That information is usually provided commingled with a large amount of other information at the commencement of the employee's

³⁰ *Breaking the Silence*, *supra* note 17, at 6.

tenure and, unless reinforced through regular training, may be overlooked or forgotten when inappropriate conduct arises.

Second, the codes and publications do not provide sufficiently clear advice on some pivotal questions respecting prohibited conduct and responses to harassment. For example, a number of commenters did not understand that the confidentiality provisions, which are designed to ensure the integrity of the judicial decision-making process, do *not* prevent an employee from reporting misconduct. Others noted that the codes and publications do not provide clear guidance on protection from harassment based on sexual orientation or gender identity. Still others suggested that the guidance documents do not highlight sufficiently the prohibitions on retaliation for reporting misconduct.

Third, law clerks and others expressed concern that efforts to avoid situations that might raise the potential for inappropriate behavior, or the perception of it, should not lead to diminished opportunities for any group of people. Efforts to promote a respectful workplace should promote, not detract from, an inclusive workplace.³¹

Fourth, commenters expressed a desire for simplified and easily accessible mechanisms for seeking relief from inappropriate behavior. The Working Group discusses those options in the following section. But for present purposes, there is also a strong desire to simplify and clarify, to the extent possible, the existing JC&D Act and EDR Plan processes. Among the proposals, commenters have suggested that: court websites should provide “one-click” electronic access to JC&D Act and EDR Plan information; information and the EDR Plans themselves should be clear and easy to understand; and the Administrative Office should develop

³¹ *SDNY Chief Judge Colleen McMahon Takes on Sexual Harassment* (Dec. 12, 2017), <https://finance.yahoo.com/news/sdny-chief-judge-colleen-mcmahon-163150749.html>.

concise visual flowcharts of the complaint processes under the JC&D Act and the EDR Plans. A graphical overview of the Judicial Conduct and Disability process, as well as a collection of frequently asked questions, already exist, but could be improved.³² A list of key contacts should be readily available in all relevant employee guidance publications, including the *Law Clerk Handbook* and other resources on the courts' intranet sites.

Fifth, commenters suggested programmatic improvements. They noted the need for better qualifications and training of EDR Coordinators who assist employees in navigating the EDR reporting and claims process. They proposed that the Judiciary develop mechanisms for separating alleged harassers or abusers from complainants during the investigation process and, if necessary, following resolution of the complaint. Commenters noted that law clerks may feel especially vulnerable if required to remain in close proximity to a judge during a misconduct inquiry, especially in small judicial districts, and there are currently no formal mechanisms for relocating law clerks to other chambers or work stations. Employees commented on the lack of options available to be reassigned or transferred during the pendency of a complaint or after a resolution finding misconduct occurred.

Finally, commenters noted the need for greater uniformity in approach across circuits. They noted, for example, that EDR Plans vary from circuit to circuit on coverage of chambers employees, law clerks, and interns/externs.

³² See FAQs: Filing a Judicial Conduct and Disability Complaint Against a Federal Judge (June 2016), <http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint>.

D. Does the Judiciary Provide Trusted and Accessible Complaint Procedures?

The EEOC Study co-chairs observe that institutions must not only create effective complaint procedures, but they should also offer workers multiple channels for seeking relief.³³ As previously discussed, the Judiciary employs two formal mechanisms for reporting misconduct: (1) the JC&D Act's statutory procedures for complaints against judges; and (2) the EDR Plans developed in each circuit, based on the Model EDR Plan approved by the Judicial Conference, for reporting and making claims against both judges and other judicial employees. The Working Group found that, while each of those procedures fulfills an important function, the Judiciary should develop additional, less formal alternatives for addressing inappropriate workplace behavior.

Judges, managers, and employees all recognized the virtue of having other options, apart from a formal complaint, for guidance, counseling, and relief related to workplace conduct issues. Inappropriate workplace behavior can take many forms, ranging from unconscious verbal slights to intentional physical assaults. There is a corresponding need to have a range of avenues for advice, counseling, mediation, and relief that are calibrated to the nature of the conduct. There is a need for response mechanisms at the local, regional, and national level.

The Working Group received suggestions that individual courts identify, enlist, and train trusted individuals within their workplace who can provide employees with informal and confidential counseling and mediation of disputes at the local level. The Working Group heard concerns that those employees also need to have avenues for advice and assistance from outside the local environment, and the Judiciary should therefore provide counseling and mediation services on a confidential basis as appropriate at the regional or national level by persons who

³³ *Breaking the Silence*, *supra* note 17, at 7.

are free from any perception of local bias. Commenters noted that law clerks and employees may need post-employment advice and assistance. Finally, the Working Group received suggestions that the courts strengthen their relationships with law schools, which receive feedback from former students who serve as law clerks about the working environment in the Judiciary to gain additional insights into the problem of workplace harassment of law clerks.

E. Does the Judiciary Provide Regular, Interactive Training Tailored to the Organization?

The EEOC Study identifies effective training as an essential component of an anti-harassment effort, but that training must be part of a holistic effort, coupled with committed leadership, demonstrated accountability, clear policies, and effective complaint procedures.³⁴ The EEOC Study co-chairs note that not all traditional anti-harassment training has proven effective, and the most promising programs focus on “compliance training,” “workplace civility,” and “bystander intervention.”

The Judiciary’s FJC has, as one of its core missions, the responsibility to “stimulate, create, develop, and conduct programs of continuing education and training for judges and employees of the Judicial Branch.”³⁵ Working with the Administrative Office and individual courts, the FJC has created a broad range of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility.³⁶ For example, the FJC has regularly provided training programs for court employees in individual districts. It offers a program entitled “Preventing Workplace Harassment” in two versions, one for managers and one for employees. It offers a program on workplace civility called “Respect in the Workplace,” and another on the Code of Conduct. These programs each use an FJC-designed

³⁴ *EEOC Study*, *supra* note 6, at 45.

³⁵ 28 U.S.C. § 620(b)(3).

³⁶ See Appendix 9: List of Federal Judicial Center training resources.

lesson plan and materials tailored specifically to the judicial workplace and delivered by FJC-trained faculty. Since 2016, the FJC has arranged for these three programs to be conducted nearly 200 times in courts around the country. The Judicial Conference's Committee on Codes of Conduct also provides programs on a variety of ethical issues, including the duty to report misconduct.

The Administrative Office, through its Office of the General Counsel, Office of Fair Employment Practices, and Office of Human Resources, provides training through the Human Resources Academy and by videoconference on the employee dispute resolution process, employment laws, wrongful conduct, and unconscious bias, as well as other relevant topics. Furthermore, individual circuits, courts, and various committees have taken the initiative to develop their own training programs, building on the materials and resources provided by the FJC and the Administrative Office.

Although the Judiciary has very vigorous training programs, the Working Group found several areas in which those efforts could be improved or refined. First, the Judiciary would benefit from a more focused emphasis on workplace civility training as part of the orientation program for *all* new employees, including law clerks and judges, with “refresher” training repeated at regular intervals. Use of the current programs varies from court to court and even within individual court systems. Second, there may be opportunities to integrate training on those subjects into existing programs on judicial management, court administration, and courtroom practices, emphasizing that civility is a responsibility—not an option—and each judge and employee should actively promote appropriate workplace conduct as an integral element of their day-to-day duties. Third, judicial managers could benefit from increased emphasis on proactive measures, including how to encourage civility and identify the risk factors for abusive

work environments before problems develop. Fourth, the Judiciary should place greater emphasis on “bystander intervention,” encouraging all who witness misconduct to take action through channels for reporting and response. Finally, the Working Group endorsed the observation of the EEOC Study’s co-chairs that training programs should be continuously evaluated to determine their effectiveness, paying close attention to new learning, techniques, and developments in this field.

II. RECOMMENDATIONS

The Judiciary has already taken important steps under each of the EEOC Study’s benchmarks for preventing harassment. The Judiciary has shown leadership in responding to reported sexual harassment, and it has demonstrated a genuine commitment to accountability through its past disciplinary actions. The Judiciary has detailed codes of conduct and guidance documents for judges and other judicial employees, and it has carefully reticulated complaint procedures that have proven effective when invoked. The Judiciary also has a variety of judicial and employee training programs to address the problems of fair employment practices and to promote workplace civility.

But meeting those benchmarks is not enough, nor has it proven sufficient to address the issue fully. The Judiciary should set as its goal the creation of an exemplary environment in which every employee is not only free from harassment or inappropriate behavior, but works in an atmosphere of civility and respect. The Judiciary cannot guarantee that inappropriate behavior will never occur, but when it does, the Judiciary should ensure that every employee has access to clear avenues to report and to seek and receive remedial action free from retaliation.

The Working Group offers recommendations in three discrete areas that are central to achieving these goals: (1) substantive standards; (2) procedures for seeking advice, assistance,

or redress; and (3) educational efforts. First, the Judiciary should revise its codes and other published guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behavior. Second, the Judiciary should improve its procedures for identifying and correcting misconduct, strengthening, streamlining, and making more uniform existing processes, as well as adding less formal mechanisms for employees to seek advice and assistance. Third, the Judiciary should supplement its educational and training programs to raise awareness of conduct issues, prevent harassment, and promote civility throughout the Judicial Branch. These efforts will require the concerted efforts and collaboration of the Administrative Office, the FJC, and the Judicial Conference. Those organizations have all expressed strong support for this undertaking, and significant work in many areas already is underway.

A. Codes of Conduct and Guidance Documents

The Judicial Conference has adopted the Code of Conduct for United States Judges as a set of ethical principles to guide judges in the conduct of their responsibilities. The Code consists of five basic Canons and related commentary.³⁷ The captions of the five Canons capture their essential themes: (1) A Judge Should Uphold the Integrity and Independence of the Judiciary; (2) A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities; (3) A Judge Should Perform the Duties of the Office Fairly, Impartially, and Diligently; (4) A Judge May Engage in Extrajudicial Activities that Are Consistent with the Obligations of Judicial Office; and (5) A Judge Should Refrain from Political Activity.³⁸

³⁷ See *Code of Conduct for United States Judges*, Committee on Codes of Conduct, Judicial Conference of the United States (rev. Mar. 2014).

³⁸ *Id.*

Canon 1 of the Code sets out the most fundamental principle:

A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the Judiciary may be preserved.

As the commentary to Canon 1 explains, the Canons are rules of reason. They are aptly described as an “aspirational” set of standards that judges should follow to promote public confidence in the integrity of our judicial system.³⁹ They may provide standards of conduct for application in proceedings under the JC&D Act, but not every violation of the Code should lead to disciplinary action, nor is the Code designed or intended as a basis for civil liability or criminal prosecution.⁴⁰

The Canons contain a number of provisions that indicate, either expressly or by clear implication, that judges have a duty to refrain from and prevent harassment and other inappropriate workplace conduct. For example, Canon 2 notes that “[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁴¹ The associated commentary notes:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.⁴²

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at Canon 2A.

⁴² *Id.* at Canon 2A Commentary.

Canon 2 does not specifically mention employee harassment or inappropriate workplace behavior. But the lack of specificity is not surprising. The commentary explains, “[b]ecause it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code.”⁴³ Canon 3 addresses the matter of incivility with greater specificity. In addressing a judge’s adjudicative responsibilities, Canon 3 states that “[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”⁴⁴ But Canon 3 does not provide a similar prescription when addressing a judge’s administrative responsibilities, including supervision of chambers employees, and interactions with other court employees.⁴⁵ Rather, as the Commentary to Canon 2 indicates, the Code has relied on the ability of judges to discern that incivility is harmful or otherwise wrong in the administrative setting.

The Working Group does not doubt that judges and judiciary employees should be able to discern that harassment and other inappropriate workplace behavior is impermissible in any setting. But public confidence in the Judiciary would be strengthened if the Code made clear, through express language in the Canons or the associated commentary, that judges have an obligation to promote civility and maintain a workplace that is free from harassment. The Code of Conduct was last substantially revised in 2009. The time is ripe for the Judicial Conference’s Committee on Codes of Conduct to consider revisions to the Canons and their commentary that would provide more specific guidance to judges regarding their responsibilities. The Working Group does not propose specific language because that is the province of the Committee.

⁴³ *Id.*

⁴⁴ *Id.* at Canon 3A(3).

⁴⁵ *Id.* at Canon 3(B).

Significant work in this area already is underway. The Working Group believes that the Committee should clarify three key points.

First, the Code should make clear that a judge has an affirmative duty to promote civility, not only in the courtroom, but throughout the courthouse. As the EEOC Study indicated, leadership is critical to the prevention of harassment. Judges set the tone for conduct in the judicial workplace. They must demonstrate, through their words and actions, their own commitment to high standards of conduct. Canon 3 admonishes judges to show patience, dignity, respect, and courtesy to litigants, jurors, witnesses, lawyers, and others. The Code should impress upon judges that those virtues are vital in their chambers and throughout the court building as well.

Second, the Code should expressly recognize that a judge should neither engage in nor tolerate workplace misconduct, including comments or statements that could reasonably be interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The Committee should examine whether a more specific statement is needed in proscribing harassment, bias, or prejudice based on race, color, religion, national origin, sex, age, disability, or other bases. For example, studies reveal high rates of harassment in the private workforce based on sexual orientation or gender identity.⁴⁶ The Committee should indicate that harassment on those bases is impermissible.

Third, the Committee should provide additional guidance on a judge's responsibility to curtail inappropriate workplace conduct by others, including other judges. Canon 3B(5) of the Code currently states that "a judge should take appropriate action upon learning of reliable

⁴⁶ See, e.g., *Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide* (Christine Michelle Duffy, Denise M. Visconti, D'Arcy Kemnitz and National LGBT Bar Association eds., 2014).

evidence indicating the likelihood that a judge’s conduct contravened this Code[.]” The Committee should clarify that the obligation to take appropriate action extends to inappropriate treatment of court employees, including chambers employees. The Judiciary would benefit from explicit recognition that the judicial virtues of mutual respect, independence, and collegiality should not prevent a judge from intervening when necessary to protect an employee from another judge’s inappropriate conduct. The Canon 3B(5) Commentary states that “appropriate action” can include “direct communication with the judge” or “reporting the conduct to appropriate authorities,” noting that “a judge should be candid and honest with disciplinary authorities.” The Committee could usefully clarify that “appropriate action” depends on the circumstances, but that action should be reasonably likely to address the misconduct, prevent harm to those affected by it, and promote public confidence in the integrity and impartiality of the Judiciary.

The Working Group suggests that the revision of the Code of Conduct for United States Judges be the first of several steps to clarify substantive standards. There are other codes and guidance documents that require comparable revisions. For example, the Judiciary maintains a Code of Conduct for Judicial Employees (Code for Employees), which similarly consists of an aspirational set of standards expressed through five Canons that mirrors the Code for Judges.⁴⁷ Like Canon 3 of the Code for Judges, Canon 3C of the Code for Employees provides guidance

⁴⁷ The captions of those five Canons state: (1) A Judicial Employee Should Uphold the Integrity and Independence of the Judiciary and of the Judicial Employee’s Office; (2) A Judicial Employee Should Avoid Impropriety and the Appearance of Impropriety in All Activities; (3) A Judicial Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office; (4) In Engaging in Outside Activities, A Judicial Employee Should Avoid the Risk of Conflict with Official Duties, Should Avoid the Appearance of Impropriety, and Should Comply with Disclosure Requirements; and (5) A Judicial Employee Should Refrain from Inappropriate Political Activity. See *Code of Conduct for Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States (Mar. 2014).

on an employee's responsibility to those who use the courts, but does not expressly address the employee's responsibility to fellow employees:

A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control.⁴⁸

The Code for Employees would similarly benefit from more specific direction regarding the duty of employees—and especially supervisors—to promote workplace civility, avoid harassment, and take action when they observe misconduct by others. The Committee on Codes of Conduct should consider additional changes to the Code for Employees to ensure that both judges and judicial employees understand that confidentiality obligations should never prevent any employee—including law clerks—from revealing abuse or reporting misconduct by any person. Canon 3D of the Code for Employees currently states:

A judicial employee should never disclose any confidential information received in the course of official duties except in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.⁴⁹

As the Working Group noted in its findings, some law clerks have misunderstood their obligation of confidentiality to require that they refrain from reporting misconduct. The Committee should make revisions to the Code to cure that misunderstanding and make

⁴⁸ *Id.*

⁴⁹ *Id.*

absolutely clear that the general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee from revealing abuse or reporting misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person. Those revisions should also make clear that retaliation against a person who reports misconduct is itself serious misconduct that will not be tolerated.

The Judiciary has a wide range of guidance documents, policy statements, and instructions issued by the Administrative Office, individual courts, and other Judicial Branch entities that should be revised in parallel fashion to ensure that the Judiciary's substantive standards of workplace conduct are set out and explained in a consistent and cohesive manner. As one example, the Working Group reviewed a model confidentiality statement that was posted on the Judiciary's internal website. The Working Group found that this statement contained ambiguous language that could unintentionally discourage law clerks or other employees from reporting sexual harassment or other workplace misconduct. The Judicial Conference, at the recommendation of its Committee on Codes of Conduct, removed that model statement from the internal website and its text is in the process of being reviewed. The Judiciary has already revised language in the *Law Clerk Handbook* to clarify that nothing in applicable confidentiality provisions precludes consulting about instances of misconduct or the filing of a misconduct complaint.

The Working Group recommends that the Administrative Office and the FJC take on the challenge of reviewing all of their guidance respecting workplace conduct and civility to ensure that they provide a consistent, accessible message that the Judiciary will not tolerate harassment or other inappropriate conduct. Those efforts should include both traditional publications and electronic information that employees can access through Judiciary websites. All employees

need to know that they have access to a variety of mechanisms, including those described in the following section, to obtain relief without fear of retaliation.

B. Procedures for Identifying and Correcting Misconduct

The Judicial Conference promulgated the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees to set out the substantive standards of conduct for judges and employees. As explained in the Working Group’s findings, judges are subject to discipline through the statutory procedures set out in the JC&D Act, which the Judicial Conference has implemented through its Conduct Rules.⁵⁰ In addition, both judges and employees are subject to EDR Plans already in place in all thirteen circuits. The Working Group suggests some changes to both of these procedures. But the Working Group concludes that, beyond those changes, there is a pressing need to develop responsive informal processes to counsel employees and rectify inappropriate behavior. The Judiciary should also recognize the value, in appropriate cases, of systemic institutional review of workplace misconduct apart from individual disciplinary proceedings.

1. The Judicial Conduct and Disability Act

The JC&D Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct “prejudicial to the effective and expeditious administration of the courts” or has become, by reason of a mental or physical disability, “unable to discharge all the duties” of the judicial office.⁵¹ Congress enacted the statute to provide “a fair and proper procedure whereby the Judicial Branch of the Federal Government can keep its own house in order” by identifying and correcting instances of judicial misconduct and disability that do not involve

⁵⁰ See *Guide to Judiciary Policy*, Vol. 2E, Ch. 3 (as amended Sept. 17, 2015), <http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability>.

⁵¹ 28 U.S.C. §§ 351-364.

impeachable offenses.⁵² The Judicial Conference has formulated its Conduct Rules to provide mandatory and nationally uniform provisions for implementing the JC&D Act.⁵³

In 2004, Chief Justice Rehnquist established a study committee to examine the effectiveness of the JC&D Act. The study committee submitted a comprehensive report in 2006 that found “no serious problem with the judiciary’s handling of the vast bulk of complaints under the Act,” but that recommended a number of changes in the Conduct Rules to further enhance the effectiveness of the Act.⁵⁴ The Judicial Conference’s Committee on Judicial Conduct and Disability drafted proposed changes, which the Judicial Conference adopted.⁵⁵ The Working Group has found that the JC&D Act procedures generally work well in addressing workplace misconduct in the instances when they are invoked. Like the Chief Justice’s study committee, the Working Group sees no need for any legislative changes. The Working Group does recommend, however, that the Judicial Conference’s Committee on Judicial Conduct and Disability consider clarifying amendments to the Conduct Rules and publications describing the JC&D Act procedures. The Committee is in the best position to determine whether the clarifications should be implemented through the Rules themselves, the associated commentary, or other publications. That Committee has in fact already begun examination of some of those matters.

First, the Working Group recommends that the Conduct Rules or associated commentary state with greater clarity that traditional judicial rules respecting “standing”— viz., the requirement that the complainant himself or herself must claim redressable injury from the

⁵² S. Rep. No. 96-362, (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4325.

⁵³ See Appendix 7, *supra* note 25, for a more detailed description of the JC&D Act and its associated Conduct Rules.

⁵⁴ *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, The Judicial Conduct and Disability Act Study Committee (Sept. 2006).

⁵⁵ JCUS-MAR 08, p. 21.

alleged misconduct—do not apply to the JC&D Act complaint process. The Conduct Rules currently provide that “[a] complaint is . . . a document that . . . is filed by *any person* in his or her individual capacity or on behalf of a professional organization” (emphasis added).⁵⁶ The Committee on Judicial Conduct and Disability and individual circuit judicial councils have regularly stated in their decisions that traditional standing requirements do not apply to judicial conduct and disability proceedings. *See, e.g., In re Complaints of Judicial Misconduct*, No. 93-372-001 (U.S. Jud. Conf. Nov. 2, 1993). Nevertheless, the Conduct Rules or commentary should state so expressly to ensure that complainants understand that they need not themselves be the subject of the alleged misconduct. That clarification should encourage and facilitate early reporting and action on potential misconduct.

Second, the Working Group suggests that the Conduct Rules or commentary include express reference to workplace harassment within the definition of misconduct.⁵⁷ The Working Group has previously suggested that the Committee on Codes of Conduct should consider more specific substantive guidance on the subject of harassment and impermissible behavior in the codes of conduct for judges and employees, including a clear proscription on harassment based on sexual orientation or gender identity. The Committee on Judicial Conduct and Disability should adopt language and examples in its procedural rules that are congruent with any changes in the codes.

Third, the Working Group proposes that the Committee on Judicial Conduct and Disability make clear through the Conduct Rules, commentary, or other guidance documents that confidentiality obligations should never be an obstacle to reporting judicial misconduct or

⁵⁶ *See* Appendix 7, *supra* note 25, Conduct Rule 3(c)(1).

⁵⁷ *See id.* Conduct Rule 3(h)(1) (providing a non-exclusive list of actions that constitute misconduct).

disability. The Conduct Rules discuss confidentiality primarily in the context of protecting the complainant and judge from publicity during the investigatory process.⁵⁸ But complainants additionally need to understand that the obligations of confidentiality that judicial employees must observe in the course of judicial business do not shield a judge from a complaint under the JC&D Act. To promote this goal, the Committee should consider clarification that the confidentiality provisions in both the JC&D Act and the Conduct Rules relate to the fairness and thoroughness of the judicial conduct and disability complaint process, and not to reporting or disclosing judicial misconduct or disability.

Fourth, the Working Group recommends that the Committee on Judicial Conduct and Disability provide additional guidance, consistent with the proposal to the Committee on Codes of Conduct, on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation. These substantive obligations, which are critical in maintaining public confidence in the Judiciary, warrant repetition in the Conduct Rules. If judges ignore or conceal potential misconduct, they undermine employee and public respect for the justice system. The Conduct Rules and commentary or associated guidance should reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct.

Fifth, the Working Group recommends that the Judiciary as a whole consider possible mechanisms for improving the transparency of the JC&D Act process. As the Working Group noted in its findings, employees—as well as members of the press and public—seek greater insight on the progress of individual complaints and the complaint process generally. In some circumstances, the most appropriate remedy for misconduct—particularly for minor or unintentional infractions—is a private reprimand. But in other cases, there is considerable value

⁵⁸ See *id.* Conduct Rule 23.

in revealing disciplinary action so that the complainant, other judicial employees, and the public can see that misconduct is met with a proportionate response. Chief circuit judges should be mindful of their authority under Conduct Rule 23(a) to “disclose the existence of a proceeding...when necessary or appropriate to maintain public confidence in the judiciary’s ability to redress misconduct or disability.” As previously noted in the Working Group’s findings, public confidence in the JC&D Act will benefit from efforts, already agreed upon by the Administrative Office to identify harassment complaints in its statistical reports. Individual circuits should seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.

2. Employment Dispute Resolution Plans

The Judicial Conference, through its Committee on Judicial Resources, has developed the Model EDR Plan to set out recommended policies and procedures for resolving a wide range of employee disputes. The Model EDR Plan specifically provides at Ch. II, § 1:

Discrimination against employees based on race, color, religion, sex (including pregnancy and sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited. Harassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited. All of the above constitute “wrongful conduct.”

Although individual court units may create their own EDR Plans, most follow the parameters of the Model EDR Plan. Judiciary employees may report wrongful conduct, which will result in a confidential investigation and possible disciplinary action.⁵⁹ Employees who believe they have been harassed or discriminated against on the basis of race, color, religion,

⁵⁹ See Appendix 8, *supra* note 27, Model EDR Plan Ch. IX.

national origin, sex, age, or a disability may seek remedies through the dispute resolution procedures of their court's EDR Plan.⁶⁰ The Model EDR Plan's dispute resolution procedure consists of counseling and mediation, a hearing before the chief judge of the court (or a designated judicial officer), and a review of the hearing decision under procedures established by the judicial council of the circuit.⁶¹ When an employee files a claim against a district judge under the Model EDR Plan, the claim is handled by the relevant circuit council, and the claim may be transferred for disposal to a court in the circuit other than the judge's own court.

As noted in its findings, the Working Group received comments from former and current employees concerning the accessibility, visibility, ease of use, and coverage limitations under the Model EDR Plan. Based on those concerns, the Working Group recommends the Judicial Conference consider amendments to the Model EDR Plan as described below. As in the case of the Working Group's proposed revisions to the Codes of Conduct and the Conduct Rules, the Model EDR Plan amendment process will involve initial consideration by the relevant Judicial Conference committee—in this case the Committee on Judicial Resources. The Working Group recommends revisions in several general areas.

First, the Working Group recommends that the Committee on Judicial Resources examine whether EDR Plans can be rendered more "user-friendly." Commenters observed that the existence of EDR Plans is not well publicized, the text of individual EDR Plans is difficult to locate, and the language is sometimes difficult to understand. The Committee should examine whether the Model EDR Plan, and court plans based on it, can be featured more prominently on Judiciary websites, and whether the text can rely to a greater extent on "plain English" that is

⁶⁰ See *id.* Model EDR Plan, Ch. X.

⁶¹ See Appendix 8, *supra* note 27, for a more detailed description of the procedures established in the current Model EDR Plan.

more easily comprehensible. The Model EDR Plan might be helpfully shortened to prescribe more clearly and succinctly the steps to be followed in the employment dispute resolution process. The Model EDR Plan could, for example, include a one-page flowchart of the EDR claims process and could include answers to frequently asked questions.

Second, the Working Group recommends that the EDR Plans' scope of coverage be consistent throughout the Judiciary. For example, under the current Model EDR Plan, the term "employee" excludes interns and externs providing gratuitous service. Interns and externs are typically new to the Judiciary's workforce and may be at higher risk than other employees in encountering discrimination, harassment, and inappropriate behavior.⁶² The Working Group recommends treating interns and externs as "employees" for purposes of EDR Plans, consistent with the coverage of the Code of Conduct for Judicial Employees. Some circuits exclude chambers employees from EDR Plan coverage. The Working Group recommends that the Committee on Judicial Resources ensure that EDR Plans uniformly cover all Judiciary employees, including those working in chambers.

Third, the Working Group recommends examination of the Model EDR Plan's reference to "sex discrimination." The current Model EDR Plan inartfully describes sex discrimination as "including pregnancy and sexual harassment."⁶³ That provision should be rewritten to describe sex discrimination in accord with established legal definitions and separately indicate that harassment, without regard to motivation, is wrongful conduct. The Working Group also recommends that various statements respecting sexual harassment, including a separate sample sexual harassment policy currently posted on the Judiciary's internal website as part of the

⁶² See *EEOC Study supra* note 6, at 27 (discussing youth and relative inexperience of some employees as a risk factor for encountering workplace harassment).

⁶³ See Appendix 8, *supra* note 27, Model EDR Plan, Ch. II, § 1.

Model EDR Plan, be removed and replaced with consistent statements of policy concerning harassment, which can be incorporated into a revised Model EDR Plan. Similarly, there should be a consistent definition of “wrongful conduct” in the workplace throughout the Judiciary.

Fourth, the Working Group notes that the EDR Plans provide an avenue for employees to report wrongful conduct without filing a claim for redress. The Working Group recommends that Chapter IX of the Model EDR Plan be revised to state that, when a chief district judge or chief bankruptcy judge receives a report of wrongful conduct that could constitute reasonable grounds for inquiry into whether a judge has engaged in misconduct under the JC&D Act, the chief judge should inform the chief circuit judge of the report and any actions taken in response.

Fifth, the Working Group recommends that the Committee on Judicial Resources extend the time for initiating an EDR claim. Currently, employees must request counseling—the first step in initiating an EDR claim—within 30 days of the alleged violation or within 30 days of the time the employee became aware of the alleged violation. The Working Group recommends extending the time limit to 180 days from the date of the alleged violation or when the complainant became aware of the violation to accommodate the additional time employees may reasonably need to ascertain and assess their options under the EDR Plan.

Sixth, the Working Group recommends that the Committee on Judicial Resources consider steps to improve the training and qualifications of EDR Coordinators. The Model EDR Plan envisions that each court will identify an EDR Coordinator who is responsible for overseeing the effectiveness of the program. The EDR Coordinator provides information and training to employees regarding their rights under the EDR Plan and assists them in accessing the claims procedures.⁶⁴ Given the critical role that EDR Coordinators play in the EDR process, the

⁶⁴ See *id.* Model EDR Plan Ch. X, § 6.

Working Group recommends the Judiciary set forth minimum qualification requirements for EDR Coordinators and institute nationwide training of EDR Coordinators at regular intervals.

3. Alternative Informal Procedures

The JC&D Act and the EDR Plans provide useful formal mechanisms for responding to serious cases of harassment and workplace misconduct, but the Working Group found that they are not well suited to address the myriad of situations that call for less formal measures. For example, an employee may be uncomfortable with a well-meaning supervisor's familiarity or avuncular physical contact and seek advice on how to express discomfort. Or an employee may encounter crude or boorish behavior from a coworker and not want to file a formal complaint, but may want a supervisor to step in and curtail the conduct. Or an employee may encounter sexual advances from a judge and seek confidential advice on what support is available if a formal complaint is filed, such as placement in another chambers. Or a former law clerk, now in private practice, may seek advice on application of the Judiciary's confidentiality requirements in deciding whether to file a misconduct claim. Neither the JC&D Act procedures nor the EDR Plans are designed to address those situations.

It is clear from these examples, and from the input the Working Group received from employees in meetings, mailbox comments, and questionnaires, that there is a need for the Judiciary to develop multiple informal mechanisms that can provide a broad range of advice, intervention, and support to employees. This is consistent with the EEOC Study recommendation that "Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment."⁶⁵ Accordingly, the Working

⁶⁵ *EEOC Study supra* note 6, at 43.

Group recommends the establishment of offices at both the national and circuit level to provide employees with advice and assistance with their concerns about workplace misconduct apart from the JC&D Act and EDR Plans. The assistance will range from a discussion of options to address their concerns, to intervention on their behalf with appropriate court personnel and similar support. One goal of these offices will be to address problems and concerns in an earlier stage, before more serious issues evolve.

In that regard, at the national level the Administrative Office is establishing an internal Office of Judicial Integrity to provide counseling and assistance regarding workplace conduct to all Judiciary employees through telephone and email service. This office should provide advice on a confidential basis to the extent possible. It should also be able to assist in resolving a matter when requested by an employee or when otherwise warranted. The newly created position at the Administrative Office could be combined with existing offices there that help ensure the integrity of the Judiciary. These offices provide and coordinate independent financial auditing and management analysis services to the courts to prevent and expose waste, fraud, and abuse in the Judiciary.⁶⁶

At the circuit level, the Ninth Circuit Judicial Council recently announced the creation of a new office for a Director of Workplace Relations to oversee workplace issues and discrimination and sexual harassment training in that circuit.⁶⁷ The Working Group recommends that the Judicial Conference encourage and approve funding through its budgeting process for all other circuits to provide similar services for their employees.

⁶⁶ See Appendix 10: Letters from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley (Jan. 12, 2018, and Jan. 22, 2018).

⁶⁷ Press Release, United States Courts for the Ninth Circuit, Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations (May 21, 2018).

The Working Group believes that every employee should have the benefit of knowledgeable and responsive advisers who can counsel the employee on workplace rights and suggest practical solutions to the broad range of workplace issues that can arise, both in chambers and in the other offices that provide the courts with administrative support. The advisers must have sufficient rank and stature to engage actively with judges and supervisors. They must have the training necessary to initiate the difficult conversations that invariably result in addressing inappropriate workplace behavior. They must be independent of influence from local human resources and management. And they must have access to the resources necessary to engage in effective problem solving. Former employees should have access to guidance on the scope of the confidentiality requirements.

In addition to these national and circuit-level resources, every court should clearly identify for its employees local sources to which they can turn for advice or assistance about workplace conduct issues. Such sources could include the chief judge, another judge, a unit executive, or other persons. There could be multiple sources, particularly in large courts. Any such persons should be trained in conducting sensitive conversations and be thoroughly familiar with formal and informal options including the complaint process and remedies.

The Working Group believes that the introduction of innovations to respond to workplace misconduct will be effective only if those processes are well publicized, readily available to all employees, and considered a vital part of the Judiciary's existing human resources programs. The Working Group therefore recommends that the Judicial Conference should incorporate informal employee protection programs into its training and educational initiatives.

Protection programs should include contingency plans and funding to provide for a transfer or alternative work arrangements for an employee, including a law clerk, when

egregious conduct by a judge or supervisor makes it untenable for the employee to continue to work for that judge or supervisor. The absence of such a remedy can be a significant deterrent to reporting misconduct.

4. Systemic Evaluations

The JC&D Act and the EDR Plans provide avenues to resolve specific misconduct complaints. They may lead to a wide range of disciplinary actions depending on the nature of the misconduct, and they do not foreclose the possibility, in cases of truly serious misconduct, of tort liability, separate disciplinary action by bar associations or other licensing bodies, criminal prosecution, or impeachment. But the Judiciary also has an institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition. The Working Group believes that the Judicial Conference and the individual circuit judicial councils have ample authority to conduct such systemic reviews as part of their respective responsibilities to promote "the expeditious conduct of court business," 28 U.S.C. § 331, and to "make all necessary and appropriate orders for the effective administration of justice within [each] circuit." 28 U.S.C. § 332(d)(1). Systemic reviews of this sort can shed useful light on whether existing procedures are sufficient, whether workplace practices should be modified, and whether further training or other preventative measures are necessary. This Working Group's efforts, and those of individual circuits and courts, are in fact examples of that type of systemic institutional review.

5. Follow-up Procedures

The Working Group received substantial input on the need for follow-up procedures when Judiciary employees, including law clerks, leave their positions for other employment. They may have valuable information about their experiences or have observed instances of harassment or other workplace misconduct that for whatever reason they chose not to report or share during the pendency of their employment. Exit interviews are useful for that purpose. Methods to capture that data can be useful not only in preventing future occurrences but may lend credence and support to a similar report or complaint that another employee might file. Follow up with law schools, which often keep track of experiences their former students had as law clerks, would also be useful.

C. Education and Training Programs

The Working Group believes that rigorous and recurrent education programs are essential to cultivate and maintain a respectful workplace for all employees throughout the Judiciary. The Judiciary already has in place vibrant educational and training programs for judges, supervisors, and other employees. Those programs, managed by the FJC, the Administrative Office, and individual courts, include a wide array of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility. Nevertheless, there are several areas related to education and training in the Judiciary that would benefit from further direction and refinement.

First, the Judiciary should ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation program, with “refresher” training conducted at regular intervals. The Working Group received numerous comments demonstrating a lack of awareness at all levels of the Judiciary about the existence of the JC&D Act and EDR processes, how they work in practice, and how to obtain assistance in filing a complaint, report,

or claim. The FJC has developed high-quality educational programs, but they are not reaching all employees—in significant part, because they are not consistently offered throughout the Judicial Branch. These programs will need to be retooled to reflect any revisions that the Judicial Conference implements with respect to the current standards, procedures, and informal avenues for relief.

Efforts in this area already are underway. In December 2017, the FJC amended the *Law Clerk Handbook* to clarify that the duty of confidentiality does not prohibit a law clerk or other employee from reporting misconduct by a judge or other person. The *Handbook* and other publications will continue to be reviewed for potential revision or updating. The FJC has already placed most of its handbooks and other published guidance online. Since January 2018, the FJC has included workplace conduct sessions in each of the following programs for judges: one conference for chief district judges; one conference for chief bankruptcy judges; one national workshop for district judges; one national workshop for bankruptcy judges; one national workshop for magistrate judges; and three orientation seminars for new district and court of appeals judges. The FJC will include sessions on workplace conduct in scheduled educational programs for new chief circuit, district, and bankruptcy judges, and for court unit executives, as well as in additional national workshops and orientation seminars for judges, all to be held during 2018. The FJC is revising its curriculum for managers and supervisors, and for other court employees, including law clerks, to expand coverage of workplace harassment issues. Circuit judicial conferences in 2018 will include sessions to address workplace conduct. Several courts already have conducted internal education programs on workplace conduct as well.

Second, the FJC should develop advanced training programs specifically aimed at developing a culture of workplace civility. The FJC already is considering opportunities to

integrate civility training into existing programs on judicial management, court administration, and courtroom practices to make civility an essential component in all aspects of court operations. There is a particular need to train judicial managers on proactive measures to encourage civility and defuse abusive work environments before problems develop. Those efforts should include training on “bystander intervention,” which would encourage judges, supervisors, and other employees who witness misconduct to take action through channels for reporting and response.

Third, the FJC, the Administrative Office, and individual courts should continuously evaluate their educational programs to assess their effectiveness, paying close attention to new learning techniques and developments in the field. Those components should consider new or revised offerings on a number of specific topics of special relevance to the judicial workplace, including:

- Judicial codes of conduct;
- The Judiciary’s procedures for seeking advice and assistance, and filing a complaint;
- Risk factors that can contribute to problems in the judicial workplace;
- Peer-to-peer interactions and bystander intervention;
- Gray areas: differing perceptions of what is inappropriate behavior;
- Promoting respect; and
- Equal treatment and opportunity.

Where feasible, the FJC should tailor its advanced programs to specific groups.

FJC programs for new chief circuit, district, and bankruptcy judges should devote considerable attention to effective leadership principles and techniques. Those programs should specifically address the chief judge’s role in fostering a positive working environment and in

holding others accountable for maintaining that environment. That training should include a focus on risk factors that are highly relevant in chambers, such as power imbalances and isolated workplaces, and it should encourage all judges to exercise leadership in modeling exemplary behavior. Those programs should specifically address the judge's duty to take appropriate action when learning of an apparent violation of the Code of Conduct or professional responsibility standards by another judge. Consistent with the Working Group's proposal for creation of informal avenues for advice and assistance, those programs should address both formal and informal ways to deal with judges and employees who are suspected of inappropriate behavior.

FJC programs for court executives should address their leadership roles and how to conduct effective education and training in their courts. Managers and supervisors should understand that their efforts to cultivate a positive workplace environment will be recognized in evaluating their job performance. Education for managers and supervisors should emphasize the importance of their "front line" position in fostering a positive workplace and in detecting and acting on instances of inappropriate behavior. For all persons in leadership and management positions, education should include methods for conducting difficult conversations. Managers cannot be reluctant to approach someone suspected of misconduct because of uncertainty about how to engage the individual. If leaders build skill and confidence in carrying out such conversations, they will be more effective in achieving positive outcomes.⁶⁸

FJC programs for court employees, including law clerks, should emphasize standards and procedures, and highlight where and how to get advice and help. The FJC and the Administrative Office should develop materials on workplace conduct for courts to use in

⁶⁸ As previously noted, the EDR program would benefit from more focused training for EDR Coordinators. They, and others whose responsibilities include advising or assisting employees reporting misconduct, should be well versed in the applicable standards and procedures, and they should receive training on skills for dealing effectively with persons who may be fearful or lack trust in the system.

orienting new employees. Those materials should include guidance on persons to contact in seeking advice and clear explanations on procedures for reporting misconduct. Most courts conduct initial orientation programs for new employees that cover a broad range of unfamiliar subjects, such as building security, computer usage, health and retirement benefits, and time-keeping. Programs on workplace conduct, including what to do when experiencing or witnessing inappropriate conduct, should be distinct. Workplace conduct training should be timed and offered in a way that critical information about the Judiciary's workplace standards and remedies does not get lost in the swirl of other new employee training.⁶⁹

The Working Group notes concerns that some may try to avoid allegations or the appearance of harassment by simply reducing their interactions with members of a different gender, ethnicity, or other group. This would result in loss of opportunities for positions, mentoring, and professional growth for members of such groups. The Judiciary should strive to avoid this, primarily through education.

The Working Group took note of the many education and training opportunities already being developed in circuit and district courts across the country. The Working Group encourages the Judicial Conference, the Administrative Office, and the FJC to facilitate the sharing of best practices that can be tailored to the unique situations of individual courts, and further recommends that development of such programs be done in coordination with each circuit and with fellow courts.

⁶⁹ Orientation programs for law clerks deserve special attention. Given the relatively short duration of law clerks' employment, training on workplace conduct must be timely and focused. The FJC has prepared an online Interactive Orientation for Law Clerks (IOLC), which should be updated to include more extensive coverage of standards of conduct, the scope of the duty of confidentiality, and ways to seek help or file a complaint. But those principles can be usefully reinforced through an in-person session with a chief judge, or other experienced jurist, who can authoritatively emphasize the importance of those principles.

Education aimed at promoting a positive and respectful workplace and preventing harassment and abusive conduct requires a sustained effort. The FJC and other Judiciary providers of education and training should consistently reexamine their programs and materials to ensure their relevance and effectiveness.

CONCLUSION

The Judiciary should aspire to be an exemplary workplace, taking strong affirmative measures to promote civility, minimize the possibility of inappropriate behavior, remove barriers to reporting misconduct, and provide prompt corrective action when it occurs. The Working Group accordingly recommends that the Judicial Conference undertake an ongoing program, as described above, to promote a culture of mutual understanding and respect, through improvements to its standards of conduct, its procedures for addressing inappropriate behavior, and its educational and training programs for judges, supervisors, and employees. The Working Group remains committed to assisting with that effort and offers its continued service in whatever capacity the Chief Justice and the Judicial Conference direct.

APPENDIX 1

**Memorandum from James C. Duff, Director of the Administrative Office, to all
Judiciary Employees (Dec. 20, 2017)**



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

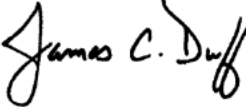
JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

December 20, 2017

MEMORANDUM

To: All United States Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers
Senior Staff Attorneys
Chief Circuit Mediators
Bankruptcy Administrators
Circuit Librarians
Judicial Assistants-Secretaries
Law Clerks

From: James C. Duff 

RE: WORKPLACE CONDUCT (**ACTION REQUESTED**)

The Chief Justice has asked me to establish a working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect court employees, including law clerks, from wrongful conduct in the workplace. I plan to establish a working group in the coming weeks that will produce its report and recommendations by May 1, 2018.

In the meantime, this memorandum provides a reminder that processes and procedures exist for *all* Judicial Branch employees to report concerns of wrongful workplace conduct, including sexual harassment. This memorandum also provides information on the educational tools and materials available to help prevent illegal and prohibited conduct in our workplaces. It is important that all employees, including judges, court unit executives, and law clerks be aware of the applicable rules, recourse, and resources, that are available. **Please share this memorandum with all staff.**

First, any aggrieved employee may file a complaint regarding wrongful conduct under the Judicial Conduct and Disability Act (JC&D) which can result in remedial action against the subject of the complaint. Moreover, the Judiciary's Model Employment Dispute Resolution (EDR) Plan, which every circuit court, all 94 district courts, and all bankruptcy courts have

adopted in whole or with local modifications, identifies the range of personnel actions that are prohibited and states the procedures to initiate, pursue, and obtain resolution of a complaint. The Model EDR Plan and related resources can be found on the JNet. Court employees should follow their own court's EDR Plan and/or the JC&D process when filing a complaint. Coupled with the JC&D, these EDR plans provide all employees protection from wrongful conduct and recourse.

Second, the Administrative Office (AO) through its Office of the General Counsel, Office of Fair Employment Practices, and Office of Human Resources has created a range of on-line training through the HR Academy by video conference or, upon request, in-person, that addresses the EDR process, employment laws, wrongful conduct, and unconscious bias, among other relevant topics for the workplace.

Third, the Federal Judicial Center (FJC) added a statement in the Law Clerk Handbook this week that makes clear that nothing in the Handbook, nor the Code of Conduct, prevents a law clerk or any Judiciary employee from revealing or reporting misconduct, including sexual harassment. The FJC offers many in-person and video presentations that address prohibited workplace discrimination, as well as techniques to ensure a respectful and inclusive workplace. In-district training on the topic of "Preventing Workplace Harassment" has been utilized by many courts. Districts may request this training by contacting Phyllis Drum at the FJC at PDrum@fjc.gov or at 202-502-4134. Several videos provide valuable information for managers and employees on how to prevent and counter instances of prohibited misconduct, including harassment. The trainings and videos cover topics ranging from the definition of wrongful conduct, to the responses to it, to reducing the threats of it. The videos also provide training on techniques for improving overall communication, teamwork and morale. And they provide prevention and response tools for unwelcome behavior and procedures for reporting misconduct. The FJC is also assembling a list of relevant videos on its homepage. These can be accessed at <http://fjc.dcn/content/326872/preventing-sexual-harassment> or by clicking on fjc.gov from this memorandum.

All of these resources are intended to help foster a safe, comfortable, and respectful workplace in the Judiciary. I encourage the courts to make full use of these resources and I also encourage all who are in the Judiciary to take action when they observe or encounter inappropriate conduct. Everyone who works in the Judiciary has recourse if they are subjected to inappropriate behavior.

As we re-examine our procedures, we welcome your input. You may contact me at 202-502-3000 or JDuff@ao.uscourts.gov with your suggestions.

**Chief Justice John G. Roberts, Jr., United States Supreme Court
Year-End Report on the Federal Judiciary (2017)**

**EMBARGOED until 6 p.m. E.S.T.
December 31, 2017 (No wires, TV,
radio, Internet, or other formats
before 6 p.m. E.S.T.)**

For further information, contact the
Public Information Office
pio@supremecourt.gov

2017 Year-End Report on the Federal Judiciary

In October 1780, while American patriots engaged the British in decisive battles for independence, a storm was brewing in the Caribbean. The Great Hurricane of 1780—the deadliest Atlantic hurricane on record—tracked a course from the Lesser Antilles to Bermuda, leaving a trail of destruction that touched both Florida and Puerto Rico. Historians estimate that more than 20,000 people died. The “Great Hurricane” was just one of several storms that ravaged the Caribbean and Gulf of Mexico that fall. In all, more than 28,000 perished.

Nearly two and a half centuries later, we remain vulnerable to natural catastrophes. Modern communication has enhanced our ability to learn of impending disasters, take precautions, and respond to those in need. But today’s news cycle can also divert attention from the continuing consequences of calamities. The torrent of information we now summon and dispense at the touch of a thumb can sweep past as quickly as the storm

itself, causing us to forget the real life after-effects for those left in misfortune's wake.

Federal disaster response is primarily the responsibility of the executive and legislative branches of the federal, state, and territorial governments, which can muster, fund, and deploy the resources needed to respond to emergencies. Still, during this season of holidays and celebrations, we cannot forget our fellow citizens in Texas, Florida, Puerto Rico, and the Virgin Islands who are continuing to recover from Hurricanes Harvey, Irma, and Maria, and those in California who continue to confront historic wildfires and their smoldering consequences. The courts cannot provide food, shelter, or medical aid, but they must stand ready to perform their judicial functions as part of the recovery effort. The federal judiciary has an ongoing responsibility to prepare for catastrophes and ensure that the third branch of government remains open and functional during times of national emergency.

Court emergency preparedness is not headline news, even on a slow news day. But it is important to assure the public that the courts are doing their part to anticipate and prepare for emergency response to people in need.

The Administrative Office of the United States Courts is the agency within the judicial branch responsible for providing the broad range of managerial and program support necessary for federal courts throughout the country. The Administrative Office staff addresses matters that span the federal court system, including human resources, information technology, and facilities stewardship. The Administrative Office has established an Emergency Management and Preparedness Branch that maintains continuity of operations programs within that agency and provides training and consulting functions for hundreds of court units across the country. That's no small task for a court system that employs 30,000 people and includes 12 regional courts of appeals, 94 district courts, 90 bankruptcy courts, and a collection of other specialized tribunals, probation and pretrial services offices, and federal defender offices.

Our federal courthouse communities vary in size. Some large cities, like Houston, are home to dozens of federal judges and have substantial support teams for busy dockets. Smaller locales, like Key West, may have only a single judicial officer and a handful of court employees. The deadly hurricanes of 2017 and other emergency events brought home the need for a national response capability to deal with emergencies on a scale both large and small. Preparation begins with planning. The judiciary must anticipate

the broad range of calamities that might strike, ranging from severe weather to earthquakes, from cyberterrorism to on-the-ground terrorist attacks. The planners must identify the particular risks and available resources by region and locality to calculate how to deploy manpower and maintain channels of communication. Plans must be scaled to enable prompt and flexible response to both foreseeable and unforeseeable consequences of emergency events.

The Emergency Management and Preparedness Branch provides critical consultation and planning support for federal courts throughout the country as they design their emergency plans and run drills. But the Branch also goes a step further by operating a Judiciary Emergency Response Team, which offers courts facing an emergency a single point of contact for logistical support. The Response Team serves as a principal node for communication and a clearinghouse for information. It provides a central source for assisting personnel and directing resources to support the affected court's administrative needs, including procurement, information technology, facilities, and security.

I recognize that this might sound like trying to fight fire with administrative jargon. But imagine yourself one of a handful of employees of the bankruptcy court in Santa Rosa, California, when raging wildfires

suddenly approach the courthouse where you work and state officials order evacuation—as happened this past September. The staff members did not face the emergency alone; they had at their disposal a professional response team to assist in making quick decisions to protect personnel, relocate services, and ensure continuity of operations.

The Administrative Office’s national support system includes the provision of remote information technology resources. These resources can enable courts to keep case management and electronic filing systems online for judges, attorneys, and court personnel, who can continue their work from safe locations during and after storms and other emergency events. These resources also allow courts with public websites to provide the bar and public with critical updates and notices about operations. During Irma, Harvey, and Maria, the Administrative Office’s communications team monitored the status of all affected courts and provided regular public updates on the judiciary’s own central website (<http://www.uscourts.gov>) and on the Administrative Office’s Twitter feed.

The courts are continuously enhancing and enlarging their response capabilities, building on gradual improvements over the past 30 years. The Administrative Office and individual courts learned valuable lessons from the Loma Prieta earthquake that struck San Francisco in 1989, the

September 11 terrorist attack in 2001, and Hurricanes Katrina and Rita, which devastated the city of New Orleans and other parts of Louisiana and Mississippi in 2005. Those upgraded emergency preparedness practices were put to the test by the 2008 floods in Cedar Rapids, Iowa, the 2012 Superstorm Sandy in New York and New Jersey, and the 2016 floods in Baton Rouge and surrounding parishes. The severe weather events of this past summer, affecting disparate parts of the country so close in time, placed unique challenges on our emergency response capabilities.

The hurricanes brought flooding, power outages, infrastructure damage, and individual hardship to Texas and Florida. But the judicial districts of the Virgin Islands and Puerto Rico were especially hard hit. Judges and court employees responded in dedicated and even heroic fashion. They continued to work even in the face of personal emergencies, demonstrating their commitment to their important public responsibilities.

The Judicial Emergency Response Team assisted local judges and court employees in finding missing court personnel, securing buildings, and continuing or resuming court operations. But the efforts did not stop there. The storm also affected persons subject to the courts' continuing jurisdiction. For example, the courts have responsibility to hear legal claims of individuals detained in criminal proceedings prior to sentencing, and

special measures were required for those in custody in Puerto Rico and the Virgin Islands. Before Hurricane Maria made landfall, the Justice Department's Bureau of Prisons moved more than 1,200 detained individuals to mainland facilities in Mississippi, Florida, Alabama, and Georgia. In addition to facilitating secure transport arrangements with the U.S. Marshals Service, judicial personnel made arrangements to ensure assignment of mainland judges to handle urgent proceedings, the provision of necessary language interpreter services, and continued access to lawyers in the Federal Defender system. I happened to be in Jackson meeting with Mississippi federal judges when word arrived that a large number of the detainees would be sent to that state. Many of the judges in the room raised their hands on the spot to volunteer to take on the extra work.

For individuals who had completed terms of imprisonment but were serving sentences of supervised release, the Administrative Office's Probation and Pretrial Services Office stepped in to assist. The office joined in tracking individuals and responding to location monitoring alerts in every district affected by the hurricanes when local staff was unavailable. The Probation Office for the Southern District of New York took the initiative to help colleagues in the District of Puerto Rico by monitoring electronic arrest

notices. That office's generous support freed local probation officers to tend to their own families and homes.

The Administrative Office and affected courts also learned some lessons about improving future response. They discovered gaps in our communications protocols for Puerto Rico and the Virgin Islands arising from widespread power outages, impaired cellular networks, and limited internet connectivity. The scope of infrastructure damage on those islands impeded efforts to reach key personnel during and immediately after storms. Going forward, the Administrative Office will do more to pre-position essential equipment, such as satellite telephones, batteries, generators, and emergency supplies on islands and other areas susceptible to hurricanes and flooding. The Administrative Office will also identify and develop better backup communications systems and networks to reach critical personnel when routine telecommunications services are down or mainline power is lost.

The most important lesson learned is a gratifying one. Judges and court employees responded to daunting challenges with extraordinary neighborliness, generosity, and dedication. For example, when the chief probation officer for the District of Puerto Rico made it to work on the second business day following Hurricane Maria's destructive passage

through San Juan, he discovered 25 members of the District’s probation staff already at the office, raring to go. They assembled search parties to fan out across the city and nearby areas to find the 40 staff members unaccounted for at that time. Another example comes from the Virgin Islands. Court employees in St. Thomas, who endured catastrophic damage from Hurricane Irma, took up a collection to assist their counterparts in St. Croix when it was hit by Hurricane Maria two weeks later—even as they themselves coped with their own loss of homes, food, clothes, and personal effects. Court employees around the country not only assisted with the workloads of the affected courts, but also contributed funds and sent care packages to help their colleagues struggling with loss or damage to their homes. And many other court employees have made generous contributions to disaster relief charities, directly or through the Combined Federal Campaign.

The courts also received critical assistance from our colleagues in the Executive Branch. The judiciary owes special thanks to the United States Marshals Service and the General Services Administration (GSA). Among other duties, the Marshals Service provides security for judges and staff. Deputy marshals and court security officers around the country safeguard our facilities and our people. The GSA, which manages the hundreds of courthouses and other federal buildings, worked with local court employees

to confront flooding, mold, damage to power generators, and the inherent challenge of operating when public electric and water services are unavailable. All these public servants helped us restore operations as quickly as possible.

Congress has provided that, “All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” 28 U.S.C. § 452. On fair weather days, it is easy to take that provision for granted. When disaster strikes, it can be honored only through the tireless efforts of judges, court employees, Administrative Office staff, and the many friends of the judiciary. I know full well that many members of the public, including members of our court family, continue to face hardship. We should continue to keep them in our thoughts and prayers.

Last year, in my annual report, I noted that federal trial judges must often work alone, without the benefit of collegial decision-making or the comfort of shared consensus. But this year, we have many rich examples of federal judges working together, with the support of court employees and Administrative Office staff, to keep courthouses open and operational. Those examples are a reminder that we have a national court system that can

work collectively to address challenges that would overwhelm individual courts.

* * *

We have a new challenge in the coming year. Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune. The judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.

I have asked the Director of the Administrative Office to assemble a working group to examine our practices and address these issues. I expect the working group to consider whether changes are needed in our codes of conduct, our guidance to employees—including law clerks—on issues of confidentiality and reporting of instances of misconduct, our educational programs, and our rules for investigating and processing misconduct complaints. These concerns warrant serious attention from all quarters of the judicial branch. I have great confidence in the men and women who comprise our judiciary. I am sure that the overwhelming number have no

tolerance for harassment and share the view that victims must have clear and immediate recourse to effective remedies.

Once again, I am privileged and honored to be in a position to thank the judges, court staff, and judicial personnel throughout the Nation for their continued excellence and dedication. Let's not forget the victims of the disasters that occurred over the past year. I hope we can all find opportunities to assist our fellow citizens who remain in need.

Best wishes to all in the New Year.

Appendix

Workload of the Courts

In the 12-month period ending September 30, 2017, the number of cases filed in the Supreme Court decreased. The number of cases filed in the regional appellate courts, the district courts, and bankruptcy courts also decreased. Cases activated in the pretrial services system declined, as did the number of persons under post-conviction supervision.

The Supreme Court of the United States

The total number of cases filed in the Supreme Court decreased by 2.63 percent from 6,475 filings in the 2015 Term to 6,305 filings in the 2016 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased by 3.47 percent from 4,926 filings in the 2015 Term to 4,755 filings in the 2016 Term. The number of cases filed in the Court's paid docket increased from 1,549 filings in the 2015 Term to 1,550 filings in the 2016 Term. During the 2016 Term, 71 cases were argued and 68 were disposed of in 61 signed opinions, compared to 82 cases argued and 70 disposed of in 62 signed opinions in the 2015 Term. The Court also issued one *per curiam* decision during the 2016 Term in a case that was not argued.

The Federal Courts of Appeals

In the regional courts of appeals, filings fell 16 percent to 50,506. Appeals involving pro se litigants, which amounted to 50 percent of filings, declined 20 percent. Total civil appeals increased one percent. Criminal appeals fell 14 percent, appeals of administrative agency decisions decreased five percent, and bankruptcy appeals declined four percent.

Original proceedings in the courts of appeals, which include prisoner requests to file successive habeas corpus proceedings in the district court, dropped 60 percent this year to 5,486, accounting for most of the overall caseload decline. These filings had spiked in 2016, after the Supreme Court's decision in *Welch v. United States*, No. 15-6418 (Apr. 16, 2016), which provided a new basis for certain prisoners convicted under the Armed Career Criminal Act to challenge their sentences.

The Federal District Courts

Civil case filings in the U.S. district courts fell eight percent to 267,769. Cases with the United States as defendant decreased 29 percent. That reduction returned filings to typical levels, following a spike in 2016 caused by post-*Welch* challenges to criminal sentences. Cases with the United States as plaintiff increased five percent because of actions related to foreclosures. Cases involving diversity of citizenship (i.e., disputes between

citizens of different states) fell seven percent as personal property damage cases dropped 40 percent.

Filings for criminal defendants (including those transferred from other districts) changed little, decreasing less than one percent to 77,018.

Defendants charged with property offenses fell six percent, mainly in response to a five percent drop in defendants charged with fraud.

Defendants accused of immigration violations declined two percent, with the southwestern border districts receiving 77 percent of national immigration defendant filings. Drug crime defendants, who accounted for 32 percent of total filings, fell one percent, although defendants accused of crimes associated with drugs other than marijuana rose four percent. Reductions also were reported for filings involving sex offenses, general offenses, and violent crimes. Filings for defendants prosecuted for firearms and explosives offenses rose 11 percent. Increases also occurred in filings related to traffic offenses, regulatory offenses, and justice system offenses.

The Bankruptcy Courts

Bankruptcy petition filings decreased two percent to 790,830. Fewer petitions were filed in 56 of the 90 bankruptcy courts. Consumer petitions dropped two percent, and business petitions fell six percent. Filings of petitions declined two percent under Chapter 7 and five percent under

Chapter 11. Filings under Chapter 13 remained relatively stable, decreasing one percent.

This year's total for bankruptcy petitions is the lowest since 2007, which was the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last seven years.

The Federal Probation and Pretrial Services System

A total of 134,731 persons were under post-conviction supervision on September 30, 2017, a reduction of two percent from one year earlier. Of that number, 116,708 persons were serving terms of supervised release after leaving correctional institutions, a one percent decrease from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, declined three percent to 88,750.

**Press Release, Federal Judiciary Workplace Conduct Working Group Formed
(Jan. 12, 2018)**

Federal Judiciary Workplace Conduct Working Group Formed

Published on January 12, 2018

James C. Duff, Director of the Administrative Office of the U.S. Courts, has established a Federal Judiciary Workplace Conduct Working Group to review the safeguards currently in place within the Judiciary to protect employees from inappropriate conduct in the workplace.

Chief Justice John G. Roberts, Jr., noted in his 2017 Year-End Report on the Federal Judiciary that he asked Director Duff to form the working group, observing, “The Judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure exemplary workplace conduct for every judge and every court employee.”

Chief Justice Roberts directed the working group to examine whether changes may be needed to the Judiciary’s codes of conduct; its guidance to employees – including law clerks – on issues of confidentiality and reporting instances of misconduct; its educational programs; and its rules for investigating and processing misconduct complaints.

Working Group Members are:

James C. Duff, Director of the Administrative Office of the U.S. Courts, Chairman. As Director and Secretary to the Judicial Conference, Mr. Duff has been involved in several high profile judicial misconduct matters and oversees staff support to Judicial Conference Committees, including the Codes of Conduct Committee and the Judicial Conduct and Disability Committee. Mr. Duff served as counselor to the Chief Justice during the Presidential impeachment trial in 1999.

Chief Judge Jeffrey R. Howard, First Circuit. Chief Judge Howard is a member of the Judicial Conference of the United States. As Circuit Chief, he has the statutory authority to review all judicial misconduct and disability complaints and presides over the Circuit Council. Before becoming a judge, he had been chair of the New Hampshire Governor’s Commission on Domestic Violence and Sexual Assault, which developed interdisciplinary response protocols that became the model for programs in a number of other states.

Judge M. Margaret McKeown, Ninth Circuit. Judge McKeown chaired the Judicial Conference Codes of Conduct Committee, is chair of the newly formed Ninth Circuit Workplace Environment Committee, and served on various committees, working groups, and panels related to workplace and gender discrimination while on the bench and in private practice.

Chief Judge Julie A. Robinson, District of Kansas. Judge Robinson served on the Tenth Circuit Judicial Council and was a member of the committee that developed the 2010 and 2015 Strategic

Plan for the Federal Judiciary, which dealt with workplace issues, ethics, and integrity, as well as other topics.

Judge Sarah S. Vance, Eastern District of Louisiana. Judge Vance is a former Chief Judge of the district and a former member of the Fifth Circuit Judicial Council. She also was a member of the Executive Committee of the Judicial Conference of the United States and the Board of the Federal Judicial Center.

Margaret A. Wiegand, Circuit Executive for the Third Circuit. Ms. Wiegand supports the Chief Circuit Judge in administering the Judicial Conduct and Disability Act and manages and supports the workplace complaint process under the Consolidated Equal Employment Opportunity and Employee Dispute Resolution Plan. She also chairs the federal Judiciary's Human Resources Advisory Council.

Jeffrey P. Minear, Counselor to the Chief Justice for the past 11 years. Previously Mr. Minear clerked for a federal appellate judge and before joining the Supreme Court, held a variety of policy, legislative, and appellate positions at the Department of Justice.

John S. Cooke, Deputy Director of the Federal Judicial Center for the last 12 years. Before joining the center in 1998 as Director of Judicial Education, Mr. Cooke was the Chief Judge of the Army Court of Criminal Appeals. In 2013-2014 he served on a committee established by the Secretary of Defense to study responses to sexual assault in the armed forces.

Sheryl Walter, General Counsel at the Administrative Office of the U.S. Courts, will serve as counsel to the working group. She previously held senior positions at the Department of Justice and Department of State and on the staff of the Senate Judiciary Committee. She also clerked for a federal appellate judge.

In the course of its review, the working group will examine workplace relations practices in the public and private sectors and consult with other authorities as appropriate. The group will also solicit input from federal judges, law clerks, and other judicial employees. In addition, the group will coordinate its efforts with those of other federal courts that are reviewing similar matters. It will submit a written report and recommendations to the relevant committees of the Judicial Conference of the United States.

**Letter from James C. Duff, Director of the Administrative Office, to
Chairman Charles E. Grassley and Ranking Member Dianne Feinstein
(Feb. 16, 2018)**



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

February 16, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Senator Feinstein:

Thank you for your letter of last Friday, February 9, 2018, concerning the status of the Federal Judiciary Workplace Conduct Working Group (Working Group). As the Chief Justice said in his 2017 year-end report, "Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made it clear that the Judicial Branch is not immune." We have acted quickly on this. At the national level, I established the Working Group. Our group is actively examining policies and procedures within the Judiciary to protect employees from inappropriate workplace conduct and, where necessary, developing enhancements to those protections. Some of the circuits and district courts have similar initiatives in progress and we are coordinating closely with them. We, of course, not only share your interest in this serious issue, we have been working on it in earnest since the formation of the Working Group in January and are pleased to update you on our progress. We certainly appreciate your staffs' willingness to discuss these matters with us and look forward to continuing that dialogue. We will address your questions in order.

1. *On December 31, 2017, Chief Justice Roberts announced that he was creating a working group to examine protections against sexual harassment in the Judiciary. The working group was directed to explore whether the Judiciary has proper procedures in place that protect law clerks and other courtroom employees from sexual harassment.*

a. How were the seven members of the working group chosen?

Immediately upon receiving direction from Chief Justice Roberts to form a working group to examine our practices and address these issues, I identified and assembled a diverse team of leaders in the Federal Judiciary who are uniquely qualified for this important task. The seven individuals I appointed to the Working Group and the group's counsel have a breadth of experience in a wide range of judicial operations, the utmost respect from all who work in the Judicial Branch, and subject matter experience and expertise in the matters before our Working Group. Enclosed is a summary of the credentials of the Working Group and its counsel.

b. How often will the working group meet?

The Working Group has held one day-long in-person meeting and has another in-person meeting scheduled in two weeks. We will meet in person as often as needed, and we communicate in between meetings on a regular if not daily basis. We have set a very aggressive schedule to complete our work.

c. When will the working group begin to make recommendations?

The answer is immediately. In fact, we already have acted on several matters, including:

- revising the Confidentiality provisions in several employee/law clerk handbooks to reflect that nothing in those provisions prevents the filing of a complaint;
- establishing a comment mailbox on the uscourts.gov public website for current and former law clerks and other employees to send comments and suggestions to the Working Group;
- removing temporarily the Model Confidentiality Statement from the courts' intranet website in order to revise it and clarify that nothing in that statement prevents law clerks or employees from reporting sexual harassment or other workplace misconduct and filing a complaint relating to that conduct;
- enhancing and raising awareness of the data the Judiciary collects and publishes relating to judicial misconduct complaints under the Judicial Conduct and Disability (JC&D) Act to identify specifically any complaints filed relating to sexual harassment. (In many years, including 2016, there have been zero.)

Additional steps will be taken throughout our review and some issues likely will be addressed in the form of recommendations to the Judicial Conference of the United States.

d. Will the working group make their recommendations publicly available?

All final recommendations will be publicly available. We will make some recommendations public during our review. Others will be announced after the Judicial Conference considers and acts upon them.

2. Will the working group seek input from current and former law clerks and other court employees?

Yes, representatives from the group of law clerks, both current and former, who wrote to us in January, along with other court employees, will attend our next Working Group meeting to provide us with their comments and suggestions for improving our policies and processes. We are also soliciting comments through the Judiciary's Advisory Groups. Additionally, as mentioned above, we are creating a comment mailbox on the uscourts.gov website for input from current and former law clerks and court employees.

3. Will the working group consider changes in sexual harassment training and staff development?

Yes. The Federal Judicial Center (FJC) has several initiatives underway. There are three programs relating to workplace harassment that the FJC conducts in courts throughout the country. Preventing Workplace Harassment; Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct for U.S. Judges. These programs use a lesson plan developed by the FJC and are conducted by FJC-trained faculty in courts that request them.

Meet on Common Ground: Speaking Up for Respect in the Workplace

- FY 16: 3 programs;
- FY 17: 20 programs;
- FY 18 (to date): 6 programs

Code of Conduct

- FY 16: 14 programs;
- FY 17: 24 programs;
- FY 18 (to date): 5 programs

Preventing Workplace Harassment

- FY 16: 49 programs;
- FY17: 45 programs;
- FY18 (to date): 24 programs

The FJC will train additional trainers this spring for the Preventing Workplace Harassment program to meet increased demand.

For judges, sessions on the Code of Conduct are included in all orientation seminars and in general-subject continuing education workshops. Henceforth, these seminars and workshops will include sessions specifically devoted to workplace harassment; the first one was held in an orientation for new district judges earlier this month. Sessions devoted to workplace harassment are also scheduled for in-person education programs for chief district and bankruptcy judges this spring and for new chief judges of all kinds in the fall.

An FJC national conference for court unit executives in the fall will include workplace harassment training.

The FJC provides an online orientation for new law clerks each year. This is now being revised to include a separate segment on workplace harassment.

In addition to a change made in the Law Clerk Handbook in December, to clarify that law clerks' duty of confidentiality does not extend to misconduct by a judge, the FJC will make further revisions in this and other publications to address workplace harassment, including reporting procedures.

The Working Group also has under consideration changes in training for EDR counselors and others who may advise or assist court personnel about workplace harassment issues.

4. *What action, if any, has the AO taken following the allegations to strengthen the employee resolution process?*

The Working Group will be specifically examining all aspects of the Employment Dispute Resolution process to look for areas for possible enhancements as part of its key objectives. In an example of the Judiciary's commitment to this principle, the AO, with direct senior leadership involvement, recently finalized a years-long initiative on behalf of the Judicial

Conference to ensure that all courts have protection against retaliation for whistleblowers and to incorporate these protections into their local EDR Plans. As a result, all circuit courts, all district courts, and all bankruptcy courts have whistleblower retaliation prohibitions.

5. *What current policies for sexual harassment training are currently in place in the Judiciary? Do law clerks and court employees participate in training?*

Orientation programs for new judges, annual continuing education workshops, and periodic ethics advisories from the Code of Conduct Committee of the Judicial Conference have for many years included training on ethics and the Code of Conduct for judges.

In our response to Chairman Grassley's letter to me of December 6, 2017, we provided a detailed response, including a lengthy chart, outlining numerous types of training provided to judges, law clerks, and court staff on a variety of management and oversight responsibilities, including training on prohibited personnel practices, ethics, and general court management. (See my letter to Chairman Grassley, January 12, 2018, response to question 5 (enclosed).)

This year, the Federal Judiciary's orientation programs for new judges include specific training on "Respect in the Workplace" (a program that includes the topic of harassment). This training will also be included in continuing education workshops for judges, as well as in other programs for new and experienced judges.

Staff training includes Preventing Workplace Harassment, Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct for Judiciary Employees. Law clerks are trained on the Code of Conduct through in-person and video training. There will also be harassment training at upcoming sessions for court unit executives. And there will be training for Chief District Judges in a March 2018 training session.

The FJC is also revising the Law Clerk Handbook and online orientation for new law clerks to address harassment directly, including harassment reporting procedures.

The Office of Fair Employment Practices (OFEP) also provides the following training:

- “Managing Employee Dispute Resolution Issues in the Judiciary” is web-based training the OFEP created with the Office of Human Resources that covers Title VII, sexual harassment, and sex-based harassment as part of the discussion of the “Nine Laws” applicable to the EDR Plans. This is typically directed at EDR coordinators (who are court employees).

- “EDR Training for the Judiciary” is in-person training the OFEP provides upon request to court units, generally those responsible for overseeing or those responsible for carrying out duties in the EDR process. It covers Title VII, sexual harassment, and sex-based harassment, as part of the discussion of the “Nine Laws” applicable to the EDR Plans.

- “Harassment in the Workplace” is in-person training or video conference training the OFEP provides, upon request, to court units that is customized to the needs of the court unit. It has been done, for example, with the FJC, and involved preparation of training for all employees, all managers, and judges (where the OFEP was responsible for the judges’ portion).

6. *Do anti-retaliation statutes protect law clerks or courtroom employees if they report sexual harassment against federal judges?*

The Rules for Judicial-Conduct and Judicial-Disability (RJCD) Proceedings, which along with the Judicial Conduct and Disability (JC&D) Act of 1980, 28 U.S.C. §§ 351–364, establish standards and procedures for addressing conduct and disability complaints against a federal judge, prohibit retaliation against a law clerk or courtroom employee for reporting sexual harassment by a federal judge. Specifically, Rule 3(h)(1)(H) provides that “retaliating against complainants, witnesses, or others for participating in [the conduct and disability] complaint process” constitutes “cognizable misconduct.” See Guide to Judiciary Policy, Vol. 2, Part E, Ch. 3, § 320, Article I(3)(h)(1)(G).

As I previously provided to you in correspondence on January 12, 2018, the Federal Judiciary also has put in place comprehensive protections for its employees generally including law clerks against retaliation (by judges or other judiciary employers) that mirror anti-retaliation statutes. Thus, retaliation against any Federal Judiciary employee, including law clerks or courtroom employees, for reporting sexual harassment by a federal judge is prohibited under the Federal Judiciary’s policies. Specifically, harassment against any employee based on certain protected classes, including sex, or retaliation for engaging in any protected activity is expressly prohibited under the Model Employment Dispute Resolution Plan (“Model EDR Plan”) as adopted by the Judicial Conference of the

United States. See question 7 for a discussion of our efforts to ensure the EDR plans cover all law clerks.

7. Some federal court districts allow law clerks to participate in the Judiciary's employee dispute resolution program. How many districts allow this type of dispute resolution? Why might a district not allow their law clerks to participate in this program?

The Judiciary's Model EDR Plan explicitly covers law clerks. Nine of the eleven federal circuits have included law clerks in the EDR plans for all of the courts within their jurisdiction. The only two federal circuits that do not currently cover law clerks within the EDR plans of their individual courts are the Seventh and Eleventh circuits. Those circuits have not covered law clerks in their EDR process because law clerks may raise allegations regarding harassment by a judge through the Judicial Conduct and Disability Act complaint process. Nonetheless, the Working Group is encouraging both the Seventh and Eleventh circuits to update their EDR plans to include law clerks. Both the Seventh Circuit and the Eleventh Circuit are now reviewing their EDR plans and are considering that action.

8. How many complaints alleging sexual harassment or misconduct are filed by courtroom staff and federal law clerks each year? How many of these complaints are investigated? How many result in findings for and against judges?

There are two ways in which the Judiciary typically compiles complaints from courtroom staff and federal law clerks alleging sexual harassment by a judge: the Judicial Conduct and Disability ("JC&D") complaint process and the Employment Dispute Resolution ("EDR") program.

In 2016, there were no complaints alleging sexual harassment by a federal judge filed by courtroom staff or law clerks under the JC&D Act procedures.

In 2016, there was one EDR claim alleging sexual harassment by a judge filed by a law clerk. In accordance with the applicable EDR plan, the employee initiated an action by requesting counseling. As set forth in the Model EDR Plan, which is attached in our response to Question 10, counseling involves a designated EDR counselor discussing the employee's concerns, eliciting information regarding the matter, advising the employee of his/her rights and responsibilities and the procedures applicable to the EDR process, evaluating the matter, and assisting the employee in achieving an early resolution of the matter, to the extent possible. In this situation from 2016, the employee and the employing office were

able to achieve an equitable resolution of the matter during the EDR counseling process, which concluded the matter prior to the initiation of further fact-finding.

9. Describe the process the Judiciary uses to investigate a claim of misconduct.

Misconduct claims can be filed under the JC&D Act or under the Model EDR Plan.

Complaints of judicial misconduct are governed by the JC&D Act, 28 U.S.C. §§ 351–364, and the JC&D Rules. Any person can file a complaint or a circuit chief judge can identify a complaint. Every complaint is reviewed and considered by the circuit chief judge. The circuit chief judge must refer a complaint raising factual issues to a special committee of district and circuit judges for an investigation as extensive as necessary. The special committee then submits a report, including fact-finding and recommendations to the judicial council, for consideration. A complainant can file a petition for review from a judicial council's order following appointment of a special committee to the Judicial Conduct & Disability Committee. Where a judicial council determines that a subject judge may have engaged in conduct that might constitute grounds for impeachment, the judicial council must certify such a determination to the Judicial Conference, and the Judicial Conference – if it concurs – must certify and transmit the determination and record of the proceeding to the House of Representatives.

The Model EDR Plan includes a reporting provision that encourages any judiciary employee who experiences or observes sexual harassment or other wrongful discrimination to report that to one of the court's EDR Coordinators, a unit executive or supervisor, a human resource manager or the Chief Judge. Any of those persons who receive a report of harassment are obligated to immediately notify the Chief Judge, who will then ensure that an appropriate investigation is conducted by an impartial investigator. Retaliation against any employee making such a report is prohibited. The goal of this reporting provision is to bring to the court unit's attention any sexual, racial, or other discriminatory harassment so that it can promptly be prevented or corrected.

10. Please supply all rules and procedures that may govern a claim of misconduct against a judge.

Copies of the Model EDR, the JC&D statute, and the RJCD are enclosed with this letter.

11. News reports have pointed to several specific investigations of judges accused of sexual misconduct. For each of the following individuals, please describe what action, if any, the Judiciary took to investigate and resolve these claims.

The following summaries are provided in response to this question. All of the judges you have identified are no longer on the bench. Relevant decisions and orders are enclosed.

a. U.S. District Court Judge Walter Smith on the U.S. District Court for the Western District of Texas, who in 1998 was accused of sexual harassment by a deputy court clerk.

Judge Walter S. Smith, Jr. (W.D. Tex.): Matter Investigated and Judge Resigned. On September 8, 2014, attorney Ty Clevenger filed a complaint alleging Judge Smith engaged in abusive sexual conduct toward a clerk's office employee on January 22, 1998.

The Chief Judge of the Fifth Circuit appointed a Special Committee on October 28, 2014. The Special Committee began its investigation in January 2015, and interviewed witnesses and took depositions throughout the first part of that year. The investigation was completed by mid-May. Judge Smith met with the Committee and testified under oath on August 18, 2015. In October 2015, the Special Committee provided its Report to the Judicial Council.

The Judicial Council issued an order on December 3, 2015, finding the following: (1) Judge Smith "made inappropriate and unwanted physical and non-physical sexual advances toward [the clerk's office employee];" (2) Judge Smith "does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts;" and (3) Judge Smith "allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation." The Judicial Council issued a reprimand to Judge Smith, instructed the Clerk of Court for the Western District of Texas to suspend the assignment of new cases to Judge Smith for one year, and directed Judge Smith to complete sensitivity training.

Mr. Clevenger filed a petition for review to the JC&D Committee on January 18, 2016, in which he requested the Committee "suspend Judge Smith from the bench immediately and recommend impeachment."

Mr. Clevenger also noted he submitted “the names of witnesses to other alleged incidents wherein Judge Smith sexually harassed women in the courthouse” and alleging that “the assault of [the court employee] was [not] an isolated incident.”

On July 8, 2016, the JC&D Committee issued a decision returning the matter to the Fifth Circuit Judicial Council to make additional findings related to the other individuals who allegedly witnessed other instances of Judge Smith’s sexual harassment of women in the courthouse, which raised the question whether there was a “pattern and practice of such behavior,” and requesting “additional findings and recommendations as to the manner in which Judge Smith’s conduct adversely impacted or interfered with the inquiry, if at all.”

The Special Committee re-engaged its prior investigators. In the second investigation, over the course of approximately two months, the investigators ensured that all witnesses identified by the complainant, as well as all witnesses potentially having information relevant to the issues raised in the order of remand, were interviewed. The investigators obtained statements or affidavits from, and/or conducted depositions of, all people having relevant information. Overall, the investigators communicated with, received statements or affidavits, from or deposed over 50 people.

Before the Committee could conduct hearings, Judge Smith retired from office under 28 U.S.C. § 371(a) on September 14, 2016. Following Judge Smith’s retirement, the Judicial Council concluded

Mr. Clevenger’s complaint against Judge Smith on September 28, 2016, on the basis that a judge who retires under Section 371(a) is “no longer a judicial officer” and is “no longer subject to the disciplinary procedures of [the Act] and the remedies they prescribe.” The JC&D Committee denied Mr. Clevenger’s subsequent petition for review, concluding that “[t]he Circuit Judicial Council properly concluded the conduct and disability proceeding was unnecessary because Judge Smith . . . retired under 28 U.S.C. § 371(a).”

b. U.S. District Court Judge Edward Nottingham on the U.S. District Court of Colorado faced a judicial misconduct complaint involving allegations that he spent thousands of dollars at strip clubs and was involved in a prostitution ring.

Judge Edward W. Nottingham (D. Colo.): Matter Investigated and Judge Resigned. In August 2007, following media reports regarding allegations against Judge Nottingham, the then Chief Circuit Judge identified a misconduct complaint against Judge Nottingham. The complaint alleged that Judge Nottingham spent more than \$3,000 at a sexually oriented nightclub in one evening, that he could not

remember how he had spent that much money because he had a lot to drink, and that this conduct may have brought disrepute to the Judiciary and constituted misconduct. Based on other allegations in the news, the complaint also alleged that Judge Nottingham may have violated court policy by viewing sexually explicit images on his court computer. The Circuit Chief Judge referred the matter to a Special Committee.

On September 19, 2007, a separate misconduct complaint was filed alleging that Judge Nottingham had parked illegally in a handicapped parking space and, in an ensuing conversation with the complainant, had misused his authority by identifying himself as a federal judge and threatening to call the U.S. Marshals. The Circuit Chief Judge also referred this complaint to the Special Committee.

The Special Committee determined that Judge Nottingham may have made false statements in his initial response to the allegations regarding computer use and in a transcribed interview, and expanded the scope of the complaint to include these alleged false statements.

In March 2008, the Circuit Chief Judge and the Special Committee learned from news reports of allegations that Judge Nottingham had solicited prostitutes. Following an informal investigation into these allegations and two hearings, the Circuit Chief Judge identified a misconduct complaint against Judge Nottingham on October 1, 2008, alleging that he had been a client of prostitution businesses in violation of Colorado law, had misused his court-owned cell phone in making calls to prostitutes, and had made false statements during the investigation. This matter was referred to a new Special Committee. On October 8, 2008, the two Special Committees submitted a joint report to the Judicial Council.

On October 10, 2008, another misconduct complaint was filed against Judge Nottingham. The complainant alleged that she had been a prostitute and that Judge Nottingham had been one of her clients. She further alleged that on February 29, 2008, Judge Nottingham asked her to lie to federal investigators about the nature of their relationship and not to disclose that she was a prostitute whom he paid in exchange for sex.

Judge Nottingham resigned his commission as a United States district judge effective October 29, 2008. The Judicial Council found that the resignation was in the interest of justice and the Judiciary. The Judicial Council further noted that the misconduct procedures apply only to federal judges, and determined that the misconduct complaints should be concluded because Judge Nottingham's resignation made further proceedings unnecessary.

c. U.S. District Court Judge Richard Cebull on the U.S. District Court of Montana, accused of making racist jokes and disparaging statements about women and certain allegations.

Judge Richard F. Cebull (D. Mont.): Matter Investigated and Judge Retired. In February 2012, Judge Cebull used his court email account to forward a racist joke about President Obama to six acquaintances, which prompted widespread reporting in the local and national press. When the incident became public, Judge Cebull wrote a letter of apology to the President and asked the Chief Judge of the Ninth Circuit to identify a complaint against him. A judge from another circuit court also filed a complaint against Judge Cebull based on the same incident. The Chief Judge of the Ninth Circuit referred both complaints to a Special Committee.

The Special Committee issued its Report on December 17, 2012, describing its investigation, which included: (1) retrieval, review, and analysis of approximately four years of Judge Cebull's emails; (2) interviews with over 25 witnesses; (3) analysis of Judge Cebull's cases (with particular attention to sentencing practices, civil rights cases, and appeals); and (4) an interview with Judge Cebull and materials submitted by his counsel. The Special Committee's investigation found that there were hundreds of inappropriate emails, including a significant number of emails concerning women and/or sexual topics that were disparaging of women. The Special Committee's investigation found no evidence of bias in Judge Cebull's rulings or in his sentencing practices, and no cases that were "troubling." The Order noted the Special Committee interviewed "key individuals in Montana's legal community, court staff and Judge Cebull's professional and social contacts," and found that "[w]itnesses generally regarded Judge Cebull as a good and honest trial lawyer, and an esteemed trial judge."

On March 15, 2013, the Ninth Circuit Judicial Council issued an Order finding that Judge Cebull engaged in misconduct, as defined under the JC&D Act, and violated Canon 2 of the Code of Conduct for U.S. Judges, and issuing sanctions against Judge Cebull. The Judicial Council issued a public reprimand, ordered that no new cases be assigned to Judge Cebull for 180 days, and ordered Judge Cebull to complete training on judicial ethics, racial awareness, and elimination of bias. Further, the Judicial Council condemned Judge Cebull's initial apology as insufficient and required that he issue a second apology, approved by the Judicial Council that would "acknowledge the breadth of his behavior and his inattention to ethical and practical concerns surrounding personal email." Two members of the Judicial Council wrote a concurring statement that "the Judicial Council should request that Judge Cebull voluntarily retire from the Judiciary under 28 U.S.C. § 371(a) in recognition of the severity of his violation and the breadth of the public reaction."

On April 2, 2013, the Ninth Circuit Judicial Council announced that Judge Cebull had decided to retire, effective May 3, 2013. On May 13, 2013, the Judicial Council issued an Order vacating its March 15 Order as moot in light of Judge Cebull's retirement and stating it would "consider appropriate revisions" at a forthcoming meeting. The judge complainant filed a Petition for Review to the Judicial Conduct and Disability Committee seeking review of the May 13 vacatur.

On July 2, 2013, the Judicial Council issued an Order that "dismissed the complaints as moot," declared that the "intervening event of Judge Cebull's retirement "conclude[d] these proceedings," and that the vacatur of the March 15 Order had been predicated on "changed circumstances" resulting from Judge Cebull's retirement. The July 2 Order presented a truncated version of the March 15 Order's findings, including the description of the inappropriate emails. The judge complainant filed a second Petition for Review on July 23, 2013, incorporating the first Petition and requesting review of the July 2 Order based on the judge's "concern about the propriety of a Judicial Council issuing a final order making detailed findings of extensive judicial misconduct and then, after the subject judge retires, sua sponte vacating its own final order and issuing a new order that effectively conceals the judicial misconduct that previously had been identified and detailed."

On review, the Judicial Conduct and Disability Committee concluded that the March 15 Order was subject to the publication requirements under the JC&D Act because it was "a final decision on the merits" and Judge Cebull's retirement was not an "intervening event" because it came after the adjudication of the merits. The Judicial Conduct and Disability Committee ordered publication of the Judicial Council's March 15 Order as the final order disposing of the complaints on the merits while recognizing that the provisions commanding Judge Cebull to take remedial action were inoperative.

d. U.S. District Court Judge Samuel Kent on the U.S. District Court for the Southern District of Texas, indicted on three counts of abusive sexual contact and attempted aggravated sexual abuse. Judge Kent later pled guilty to a lesser offense.

Judge Samuel B. Kent (S.D. Tex.): Matter Investigated; Judge faced remedial action; Matter reinvestigated; Judge pled guilty to criminal charges; Matter referred for impeachment; Judge impeached and resigned. A judicial misconduct complaint was filed on May 21, 2007, against Judge Kent alleging sexual harassment of a judicial employee. The Chief Judge of the Fifth Circuit appointed a Special Committee. The Special Committee recommended reprimanding the

judge, as well as other remedial actions. The Judicial Council accepted the recommendations of the Special Committee and concluded the proceedings because appropriate remedial action had been taken, including the judge's four-month leave of absence from the bench, reallocation of the Galveston/Houston docket, and other measures. The Judicial Council also reprimanded Judge Kent based on the conduct described in the Special Committee report. See September 28, 2007 Order.

The complainant filed a motion for reconsideration, seeking a determination that Judge Kent may have engaged in conduct in violation of specific federal criminal statutes that might constitute one or more grounds for impeachment, and also asked the Council to certify such a determination, if made, to the Judicial Conference of the United States. The complainant also alleged that there was additional evidence of misconduct by Judge Kent, including inappropriate behavior toward other judiciary employees.

The Judicial Council noted that the U.S. Department of Justice had subsequently initiated a criminal investigation, with which the Council was cooperating. The Council noted that the propriety of further judicial discipline, or a certification to the Judicial Conference of the United States, could not be fairly evaluated without adversarial proceedings in which the witnesses would be subjected to cross-examination. The Council further determined that conducting adversarial proceedings while a criminal investigation was underway could prejudice the judicial misconduct investigation. The Council deferred action on the complainant's motion for reconsideration in light of the ongoing criminal investigation. During the pendency of the criminal investigation, Judge Kent agreed not to handle any civil or criminal cases in which the United States was a party or in which sexual misconduct of any kind was alleged. See December 20, 2007 Order.

On August 28, 2008, a United States Grand Jury handed down a three count indictment charging Judge Kent with felonies for conduct which had been the subject of the misconduct investigation of the Special Committee and the sanctions imposed by the Council as a result of that misconduct. On January 6, 2009, the same Grand Jury issued a superseding indictment charging Judge Kent with committing additional misconduct beyond the misconduct the Special Committee and the Judicial Council had discovered or considered when issuing its earlier sanction.

Based on these developments, the Judicial Council granted the complainant's motion seeking reconsideration of the sanctions imposed against Judge Kent. The Judicial Council further determined that, following the trial of the criminal charges

pending against Judge Kent, (including Kent's obstruction of the Council's own investigation) the Council would investigate the additional charges of misconduct alleged in the superseding indictment and any supplemental investigation of the misconduct alleged in the original indictment. The Judicial Council would then consider potential further sanctions in light of the result of the investigation.

On May 27, 2009, the Judicial Council issued an order noting that Judge Kent "has pled guilty to obstruction of justice in violation of 18 U.S.C. § 1512I(2) and has thus by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution, and so certifies its determination to the Judicial Conference of the United States." The Judicial Council further determined that "the foregoing events and certification, together with the facts that Judge Kent has voluntarily moved out of his chambers and ceased handling cases, moot this Council's reopening of the disciplinary proceeding against Judge Samuel B. Kent."

e. U.S. District Court Judge Richard Roberts on the U.S. District Court for the District of Columbia, accused of raping a 16 year-old witness while he was a prosecutor.

Matter Investigated as to disability; found not to have committed misconduct as a judge; Judge retired on permanent disability. On March 14, 2016, and May 26, 2016, the Utah Attorney General's Office and Terry Mitchell filed judicial misconduct complaints against Judge Richard Roberts (D-DC). Terry Mitchell alleged in part that Judge Roberts, prior to his judicial appointment, "used his authority and status as a federal prosecutor to manipulate and coerce [then-]sixteen-year-old Terry Mitchell"—a witness in a 1981 trial—"into numerous sex acts before and throughout the trial." The Utah Attorney General made similar serious allegations.

Within a matter of days of the Utah Attorney General's judicial misconduct complaint, Judge Roberts retired based on a permanent disability. On March 18, 2016, the Acting Chief Judge of the DC Circuit dismissed the Utah Attorney General's complaint on the ground that Judge Roberts's recent retirement "render[ed] . . . the allegations moot or [made] remedial action impossible."

The Utah Attorney General filed a Petition for Review of the Acting Chief Judge's dismissal of its complaint. Upon request from the DC Circuit Judicial Council, the Chief Justice transferred to the Tenth Circuit the Utah Attorney General's complaint and any related matters (including the subsequent complaint filed by Terry Mitchell). Terry Mitchell's complaint also alleged that Judge Roberts dishonestly asserted a disability to retire and avoid the consequences of these

allegations.

The Tenth Circuit Judicial Council granted in part the Utah Attorney General's Petition for Review. Specifically, it vacated the dismissal order after determining that Judge Roberts's retirement "does not preclude him from coverage under the Judicial Conduct and Disability Act," and returned the complaint to the Chief Judge of the Tenth Circuit for further action. The Chief Judge of the Tenth Circuit consolidated the two complaints and appointed a Special Committee to determine whether the claims fell within the scope of the Judicial Conduct and Disability Act and, if so, to investigate the allegations and underlying facts.

Following the Special Committee's investigation and submission of its Report, the Tenth Circuit Judicial Council dismissed the Utah Attorney General's and Terry Mitchell's judicial misconduct complaints, concluding that Judge Roberts's pre-appointment conduct is not justiciable under the Judicial Conduct and Disability Act, and further that Judge Roberts did not dishonestly assert a disability.

Neither the Utah Attorney General nor Terry Mitchell filed a petition for review of those determinations. Judge Roberts, however, filed a Petition for Partial Review in which he objected to the Judicial Council's inclusion of the medical diagnosis underlying his disability retirement. On review, the JC&D Committee denied Judge Roberts's request to strike that specific medical diagnosis from the record on the basis that "Judge Roberts's medical diagnosis ha[d] been placed directly at issue due to the timing of his departure from judicial office, occurring within days of the filing of the Utah Attorney General's judicial misconduct complaint and Terry Mitchell's federal civil complaint." JC&D Order at 6.

On the Judicial Council's request, the JC&D Committee forwarded a copy of the Judicial Council's Order and its Decision denying Judge Roberts's Petition for Partial Review to the House Judiciary Committee, the House Oversight Committee, the Senate Judiciary Committee, and the Senate Finance Committee in recognition of "the importance of ensuring that governing bodies with clear jurisdiction [were] aware of the complaint."

f. U.S. Circuit Court Judge Alex Kozinski on the Ninth Circuit accused of sexual harassment and misconduct by several women.

Judge Alex Kozinski (9th Cir.): Retired immediately following referral for investigation. On December 14, 2017, the Chief Judge of the Ninth Circuit identified a misconduct complaint against then-Circuit Judge Kozinski "based on allegations contained in a December 8, 2017, Washington Post article entitled 'Prominent 9th Circuit Judge Accused of Sexual Misconduct' and any other

related articles.” On December 15, 2017, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council.

Three days later, on December 18, 2017, then-Judge Kozinski relinquished his commission as a United States circuit judge by retiring, effective immediately, under 28 U.S.C. § 371(a).

On February 5, 2018, the Second Circuit Judicial Council concluded the proceeding on the basis of the aforementioned retirement, stating that “Because Alex Kozinski has resigned the office of circuit judge, and can no longer perform any judicial duties, he does not fall within the scope of persons who can be investigated under the Act.” Given the seriousness of the conduct alleged, however, the Judicial Council “acknowledge[d] the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint” and requested that “the Committee on Judicial Conduct and Disability . . . forward a copy of this order to any relevant Congressional committees for their information.”

12. A CNN report reviewed 1,303 misconduct complaints filed in 2016. They concluded: “of those, only four were referred to special committee for the most serious level of investigation.” The report found a similar pattern in 2015.

a. Why were so few complaints fully investigated by the Judiciary?

See answer to (b) below.

b. Do these news reports accurately reflect the pervasiveness of sexual harassment and misconduct within the Judiciary?

The media report you cite above is wildly misleading and I am pleased to have the opportunity to correct it. Any suggestion that the Judiciary does not take sexual misconduct complaints seriously is irresponsible and simply wrong.

Here are the facts: The Judicial Conduct and Disability Act and the Rules do not provide for review of case related judicial decisions. Of course, that authority resides in the courts of appeals. Nevertheless, the vast majority of the complaints we receive under the JC&D Act are complaints related to a judge’s decision. Our publicly reported data shows that of the 1,303 judicial “misconduct” complaints filed nationwide under the JC&D procedures in fiscal year 2016, cited in the media report you have referenced, over 1,200 of them were filed by dissatisfied litigants and prison inmates. No misconduct complaints were filed under these procedures by law clerks or Judiciary employees in 2016, the year cited in the

media report. Moreover, none of the four complaints in 2016 that were referred to a special committee for further investigation, as provided under the statute, involved sexual misconduct.

This has been true in most years. And it is a reason we have not created a separate category for sexual harassment in our annual published statistical report on JC&D complaints – in most years there simply have been no complaints relating to sexual harassment. Nonetheless, we will create a separate statistical category for sexual harassment complaints under the JC&D and report that data.

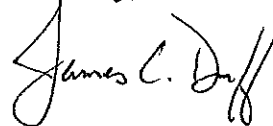
There are over 30,000 employees in the Federal Judiciary. The sad fact is that, just as in other public and private workplaces, sexual harassment issues are often not reported. Our Working Group is addressing this issue by removing barriers to filing complaints and educating employees about the options they have available.

13. What, if any, statutory recommendations does the Judiciary have for improving the current statutes involving the Judiciary's complaint process, codified in 28 U.S.C. §§ 351-353?

Our Working Group does not have any statutory recommendations concerning the Judiciary's complaint process to make to Congress at this time. We will continue to examine the statutory framework for judicial misconduct and disability complaints. We have preliminarily identified areas of potential modifications and clarifications to our codes of conduct guidelines, EDR processes, training and orientation programs to address the issues we have seen during our review.

We will continue to work on these important issues.

Sincerely,



James C. Duff
Director

Enclosure

**Letter from James C. Duff, Director of the Administrative Office, to
Chairman Charles E. Grassley and Ranking Member Dianne Feinstein
(Mar. 8, 2018)**



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

March 8, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Senator Feinstein:

This is a follow up to my letter to you of February 16, 2018, on actions by the Judiciary's Workplace Conduct Working Group (Working Group) in its examination of policies and procedures within the Judiciary to protect employees from inappropriate workplace conduct and develop enhancements to those protections.

Our Working Group held its second in-person meeting on March 1, 2018. Our meeting included productive sessions with representatives from current and former law clerks, as well as a cross section of other Judiciary employees. We will meet again in about three weeks.

The Working Group made progress on several initiatives. In addition to actions we already have taken to revise law clerk and employee guidelines and handbooks, seek online comments from current and former Judiciary employees, and refine our data collection relating to misconduct complaints, we resolved to work with the Judicial Conference of the United States to:

1. Improve law clerk and employee orientations with increased training on workplace conduct rights, responsibilities, and recourse that will be administered in addition to, as well as separately from, other materials given in orientations.
2. Provide "one click" website access to obtain information and reporting mechanisms for both Employment Dispute Resolution (EDR) and Judicial Conduct and Disability Act (JC&D) claims for misconduct.

3. Create alternative and less formalized options for seeking assistance with concerns about workplace misconduct, both at the local level and in a national, centralized office at the Administrative Office of the U.S. Courts to enable employees to raise concerns more easily.
4. Provide a simplified flowchart of the processes available under the EDR and JC&D.
5. Create and encourage a process for court employee/law clerk exit interviews to determine if there are issues and suggestions to assist court units in identifying potential misconduct issues.
6. Establish a process for former law clerks and employees to communicate with and obtain advice from relevant offices and committees of the Judiciary.
7. Continue to examine and clarify the Codes of Conduct for judges and employees.
8. Improve communications with EDR and JC&D complainants during and after the procedures.
9. Revise the Model EDR Plan to provide greater clarity to employees about how to navigate the EDR process.
10. Establish qualifications and expand training for EDR Coordinators.
11. Lengthen the time allowed to file EDR complaints.
12. Integrate sexual harassment training into existing Judiciary programs on discrimination and courtroom practices.

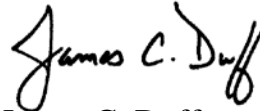
We also have added instructive programs on our policies and procedures for the upcoming meetings of the chief district court judges at the Federal Judicial Center (FJC) on March 16, 2018, as well as at FJC workshops and upcoming circuit conferences of judges throughout the country this spring. There also will be judge training at the FJC national workshops for district judges this summer.

Honorable Charles E. Grassley and Honorable Dianne Feinstein

Page 3

Following our March 1, 2018, Working Group meeting we were pleased to meet with your respective staff to summarize these developments. We were grateful both for their time and helpful suggestions for making further improvements in our policies and practices. We will continue to work closely with them and will keep you informed of our progress.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive, slightly slanted style.

James C. Duff
Director

cc: Judiciary Workplace Conduct Working Group

**Press Release, Judicial Conference Receives Status Report on
Workplace Conduct Review (Mar. 13, 2018)**

Judicial Conference Receives Status Report on Workplace Conduct Review

Published on March 13, 2018

Nearly 20 reforms and improvements have been implemented or are under development to help address workplace conduct concerns in the federal judiciary, James C. Duff, Chair of the [Federal Judiciary Workplace Conduct Working Group \(/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed\)](#), reported today at the biannual meeting of the Judicial Conference.

In introducing Duff before he delivered his report, Chief Justice John G. Roberts, Jr., who is the Conference's presiding officer, told the group, "I would like to reiterate what I stated in my year-end report. I have great confidence in the men and women who comprise the federal judiciary. I am sure that the overwhelming number have no tolerance for harassment and share the view that victims must have a clear and immediate recourse to effective remedies. The Work of this group will help our branch take the necessary steps to ensure an exemplary workplace for every court employee."

Duff, who is Director of the Administrative Office of the U.S. Courts, by statute also serves as the Secretary to the Judicial Conference.

"Any harassment in the judiciary is too much," Duff said in his report to the Conference. He told the Conference that the Working Group hopes to simplify and develop additional options, at both the national and local levels, for employees to seek assistance with workplace conduct matters.

Duff reported that the Working Group has held two meetings since its formation in January, and will meet again in early April. Representatives of current and former law clerks and a cross-section of current judiciary employees met with the Working Group at its most recent meeting and had what Duff described as "an informative and productive discussion."

The Working Group also is receiving input via a [mailbox \(/workplace-conduct-comment\)](#) on [uscourts.gov](#), through which current and former judiciary employees can submit comments relating to the policies and procedures for protecting all judiciary employees from inappropriate workplace conduct. Similarly, the Working Group has reached out to more than 250 current employees who serve on various groups and councils.

Duff wrote to Senators Charles Grassley, Chair, and Diane Feinstein, Ranking Member, of the Senate Judiciary Committee on [March 8, 2018 \(/file/24080/download\)](#), and [February 16, 2018 \(/file/24043/download\)](#), to provide them status reports on the Working Group and an in-depth explanation of the employee dispute and judicial conduct resolution procedures.

In addition, some circuits and districts have established similar initiatives, and the Working Group is coordinating closely with them.

All final recommendations will be made public. Some will be shared in the course of the Group's review. Others will be announced after the Judicial Conference considers and acts on them. It is anticipated that the Working Group will submit its report in May 2018.

The following either have been accomplished or are in progress:

- Provided a session on sexual harassment during the ethics training for newly appointed judges in February.
- Established an online mailbox and several other avenues and opportunities for current and former judiciary employees to comment on policies and procedures for protecting and reporting workplace misconduct.
- Added instructive in-person programs on judiciary workforce policies and procedures and workplace sexual harassment to the curricula at Federal Judicial Center programs for chief district and chief bankruptcy judges this spring and upcoming circuit judicial conferences throughout the country this spring and summer.
- Removed the model confidentiality statement from the judiciary's internal website to revise it to eliminate any ambiguous language that could unintentionally discourage law clerks or other employees from reporting sexual harassment or other workplace misconduct.
- Improve law clerk and employee orientations with increased training on workplace conduct rights, responsibilities, and recourse that will be administered in addition to, as well as separately from, other materials given in orientations.
- Provide "one click" website access to obtain information and reporting mechanisms for both Employment Dispute Resolution (EDR) and Judicial Conduct and Disability Act (JC&D) claims for misconduct.
- Create alternative and less formalized options for seeking assistance with concerns about workplace misconduct, both at the local level and in a national, centralized office at the Administrative Office of the U.S. Courts, to enable employees to raise concerns more easily.
- Provide a simplified flowchart of the processes available under the EDR and JC&D.
- Create and encourage a process for court employee/law clerk exit interviews to determine if there are issues and suggestions to assist court units in identifying potential misconduct issues.
- Establish a process for former law clerks and employees to communicate with and obtain advice from relevant offices and committees of the judiciary.
- Continue to examine and clarify the Codes of Conduct for judges and employees.
- Improve communications with EDR and JC&D complainants during and after the claims process.
- Revise the Model EDR Plan to provide greater clarity to employees about how to navigate the EDR process.

- Establish qualifications and expand training for EDR Coordinators.
- Lengthen the time allowed to file EDR complaints.
- Integrate sexual harassment training into existing judiciary programs on discrimination and courtroom practices.
- Review the confidentiality provisions in several employee/law clerk handbooks to revise them to clarify that nothing in the provisions prevents the filing of a complaint.
- Identify specifically the [data \(/statistics/table/s-22/judicial-business/2016/09/30\)](/statistics/table/s-22/judicial-business/2016/09/30) that the judiciary collects about judicial misconduct complaints to add a category for any complaints filed relating to sexual misconduct. The data shows that of the 1,303 misconduct complaints filed in fiscal year 2016, more than 1,200 were filed by dissatisfied litigants and prison inmates. No complaints were filed by law clerks or judiciary employees and no misconduct complaints related to sexual harassment.

The 26-member [Judicial Conference is the policy-making body \(/about-federal-courts/governance-judicial-conference/about-judicial-conference\)](/about-federal-courts/governance-judicial-conference/about-judicial-conference) for the federal court system. By statute, the Chief Justice of the United States serves as its presiding officer and its members are the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year to consider administrative and policy issues affecting the court system, and to make recommendations to Congress concerning legislation involving the Judicial Branch.

Summary of Judicial Conduct and Disability Act

EXECUTIVE SUMMARY:

JUDICIAL CONDUCT AND DISABILITY ACT

Filing a Judicial Conduct or Disability Complaint Against a Federal Judge

The Judicial Conduct and Disability Act of 1980 (“Act”), 28 U.S.C. §§ 351–364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (“Rules”) govern the complaint process.

Initiation of Complaint

Under the Act and the Rules, any person may file a complaint alleging a federal judge has committed misconduct or has a disability that interferes with the performance of his or her judicial duties. 28 U.S.C. § 351(a). Alternately, a circuit chief judge may identify a complaint where the circuit chief judge finds probable cause to believe that misconduct has occurred or that a disability exists and no informal resolution is achieved or is feasible. *Id.* § 351(a); R. 5(a). A circuit chief judge must identify a complaint where the circuit chief judge finds clear and convincing evidence that misconduct has occurred or that a disability exists and no informal resolution is achieved or is feasible. *Id.*

Covered Judges

A federal judge includes a judge of a United States district court, a judge of a United States court of appeals (including the Court of Appeals for the Federal Circuit), a judge of a United States bankruptcy court, United States magistrate judges, a judge of the Court of Federal Claims, and a judge of the Court of International Trade. 28 U.S.C. § 351(d)(1); R. 4.

Misconduct

“Misconduct” is “conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a); R. 3(h)(1). A “disability” is a temporary or permanent condition, either mental or physical, that makes the judge “unable to discharge all the duties” of the judicial office. *Id.* R. 3(e). Examples of judicial misconduct may include the following:

- using the judge’s office to obtain special treatment for friends or relatives;
- accepting bribes, gifts, or other personal favors related to the judicial office;
- having improper discussions with parties or counsel for one side in a case;
- treating litigants, attorneys, or others in a demonstrably egregious and hostile manner;

- engaging in partisan political activity or making inappropriately partisan statements;
- soliciting funds for organizations;
- retaliating against complainants, witnesses, or others for their participation in this process;
- or
- violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

R. 3(h)(1). This list does not include all the possible grounds for a complaint.

Judicial misconduct may also include actions taken by a judge outside his or her official role as a judge only if “the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.” R. 3(h)(2). Judicial misconduct does not include an allegation that is directly related to the merits of a decision or procedural ruling. R. 3(h)(3).

Circuit Chief Judge’s Review

In most instances, the chief judge of the circuit where the complainant filed their complaint will consider the complaint. 28 U.S.C. § 352(a); R. 11. A circuit chief judge generally will not consider a complaint against him- or herself. R. 25(b). In determining what action to take, the circuit chief judge may conduct a limited inquiry into the facts alleged, which may include witness interviews and the review of additional information. 28 U.S.C. § 352(a); R. 11(b). After considering the complaint, the circuit chief judge will (a) dismiss or conclude the complaint, or (b) appoint a special committee of judges to investigate the complaint. 28 U.S.C. § 352(b); R. 11(c)–(f).

(a) Circuit Chief Judge Dismissal or Conclusion of Complaint; Review by Judicial Council

The circuit chief judge must dismiss a complaint where it alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office; is directly related to the merits of a decision or procedural ruling; is frivolous; is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists; is based on allegations that are incapable of being established through investigation; or has been filed in the wrong circuit. 28 U.S.C. § 352(b)(1); R. 11(c). There are other circumstances where a circuit chief judge may dismiss a complaint, as explained in the Rules and the Commentary on the Rules. *See* Rule 11(c). The circuit chief judge may conclude a complaint if the subject judge voluntarily takes corrective action or if intervening events have made further action unnecessary. 28 U.S.C. § 352(b)(2); R. 11(d)–(e).

If the circuit chief judge dismisses or concludes a complaint, the complainant may petition the judicial council of the circuit for review of that order. 28 U.S.C. § 352(c); R. 11(g)(3). A complainant must petition the judicial council within 42 days from the date of the circuit chief judge's order. R. 18(b). After considering a petition for review, the judicial council can affirm the circuit chief judge's dismissal or conclusion of the complaint, return the matter to the circuit chief judge for additional inquiry or for appointment of a special committee, or take other action, as discussed in the Rules. R. 19(b). If the judicial council unanimously affirms the circuit chief judge's dismissal or conclusion of a complaint, the complaint is terminated and the complainant has no right to further review. 28 U.S.C. § 352(c); R. 19(e). If one or more judicial council members dissents from the circuit chief judge's dismissal or conclusion of a complaint, the complainant may request review by the Committee on Judicial Conduct and Disability, as discussed in further detail below. R. 19(e).

(b) Circuit Chief Judge Appointment of Special Committee; Review by Judicial Council and Committee on Judicial Conduct and Disability

If the circuit chief judge refers a complaint to a special committee, that special committee will investigate the complaint and report on it to the circuit judicial council. 28 U.S.C. § 353(a); R. 11(g)(1); A special committee generally will consist of the circuit chief judge and an equal number of circuit and district judges. R. 12(a). A special committee conducts an investigation as extensive as it considers necessary, which may include interviews, hearings and oral arguments, and expeditiously files a comprehensive written report with the judicial council of the circuit, which presents both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council. 28 U.S.C. § 353(c); R. 13–17.

After the judicial council considers a special committee's report, it will generally issue an order on a complaint. 28 U.S.C. § 354(a); R. 20. The order may dismiss the complaint, or the order may conclude the complaint because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary. 28 U.S.C. § 354(a)(1)(B); R. 20(b)(1)(A)–(B). If the order does not dismiss or conclude a complaint, the order may sanction the judge by:

- censuring or reprimanding the judge, either by private communication or by public announcement;
- ordering that no new cases be assigned to the judge for a limited, fixed period;
- in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the judicial council, including the initiation of removal proceedings;
- in the case of a bankruptcy judge, removing the judge from office;
- in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived;

- in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge so that an additional judge may be appointed;
- in the case of a circuit chief judge or district chief judge, finding the judge temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge; and
- recommending corrective action.

28 U.S.C. § 354(a)(2); R. 20(b)(1)(D). The judicial council may take other action, such as requesting the special committee conduct an additional investigation. R. 20(c).

Federal judges appointed under Article III of the U.S. Constitution hold office for life pending good behavior. Only Congress can remove an Article III judge from office. 28 U.S.C. § 354(a)(3)(A). If the judicial council finds an Article III judge's conduct may warrant impeachment, it must refer that finding to the Judicial Conference. 28 U.S.C. § 354(b). On referral, the Judicial Conference will determine whether to certify the matter to Congress, which will then decide whether to initiate impeachment proceedings. 28 U.S.C. § 355(b).

When a judicial council issues an order after it considers a special committee's report, in most circumstances a complainant may petition the Committee on Judicial Conduct and Disability for review of that order. 28 U.S.C. § 357(a); R. 21(b)(1). A complainant must file that petition for review within 42 days from the date of the judicial council's order. R. 22(c). There is ordinarily no oral argument or personal appearance before the Committee on Judicial Conduct and Disability. R. 21(e). In its discretion, the Committee on Judicial Conduct and Disability may permit written submissions. *Id.* The Committee on Judicial Conduct and Disability will conduct further investigation only in extraordinary circumstances. R. 21(d). A complainant has no right to review of any order issued by the Committee on Judicial Conduct and Disability.

Confidentiality and Publication

The complaint process is confidential, with limited exceptions. 28 U.S.C. § 360(a); R. 23. Generally, orders regarding a complaint will be made public only after final action on the complaint has been taken and the complainant has no additional right of review. *Id.* § 360(b); R. 24. Such orders will be made publicly available in the clerk's office of the relevant regional circuit and on that court's website. Any decision by the Committee on Judicial Conduct and Disability will be available on www.uscourts.gov and in the clerk's office of the relevant regional circuit. R. 24(b). Public orders usually will not disclose the name of the complainant and will disclose the name of the subject judge only where the complaint is finally disposed of by remedial action by the circuit judicial council (other than a private censure or reprimand), as described in the Act and the Rules. *See* R. 24(a).

Summary of Model Employment Dispute Resolution Plan

EXECUTIVE SUMMARY: THE MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN

General

The Model Employment Dispute Resolution (EDR) Plan sets forth the Judicial Conference's recommended policies and procedures for providing judiciary employees with rights, protections, and remedies similar to those provided under the Family Medical Leave Act of 1993 (FMLA), Uniformed Services Employment and Reemployment Rights Act (USERRA), Title VII of the Civil Rights Act of 1964 (Title VII), Age Discrimination in Employment Act of 1967, Americans with Disabilities Act (ADA)/Rehabilitation Act of 1973 (Rehab Act), Occupational Safety and Health Act of 1970 (OSHA), Worker Adjustment and Retraining Notification Act (WARN), and Employee Polygraph Protection Act of 1988 (EPPA).

Judicial Conference policy requires all courts to adopt and implement a plan based on the Model EDR Plan. Although courts are not required to adopt and implement the Model EDR Plan in its entirety, any modifications to the Model EDR Plan must be approved by the judicial council of its circuit.

Coverage

The Model EDR Plan, or similarly adopted plans, are intended to be the Judicial Branch employees' exclusive remedy for alleged violations of the FMLA, USERRA, Title VII, ADEA, ADA/Rehab Act, OSHA, WARN, and EPPA. The Model EDR Plan applies to all:

- Article III judges and other judicial officers of the U.S. courts of appeals, district courts, bankruptcy courts, Court of Federal Claims and Court of International Trade, as well as to judges of any court created by an Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States;
- Employees of the U.S. courts of appeals, district courts, bankruptcy courts, Court of Federal Claims and Court of International Trade, as well as to judges of any court created by an Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States; and
- Staff of judges' chambers, court unit heads and their staffs, circuit executives and their staffs, federal public defenders and their staffs, and bankruptcy administrators and their staffs (including applicants and former employees).

The Model EDR Plan does not apply to interns or externs providing gratuitous service, or applicants for bankruptcy judge or magistrate judge positions.

EDR Process

The Model EDR Plan sets forth the procedural stages¹ of the EDR process, which includes:

- Informal Dispute Resolution
 - o Counseling and/or
 - o Mediation
- Formal Complaint
- Hearing and Decision
 - o Conducted by the chief judge or a designated judicial officer (i.e. a judge appointed under Article III of the Constitution, a U.S. bankruptcy judge, a U.S. magistrate judge, a judge on the Court of Federal Claims, or a judge of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the U.S.) including, where appropriate, a judicial officer from outside the court where the complaints arose or the parties are employed.
- Review of the Decision
 - o Review of the presiding judicial officer's decision
 - o Review by a judicial officer

Remedies

Remedies may be provided to successful complainants. Remedies are tailored as closely as possible to the specific violation. Remedies include retrospective relief to correct a past violation; and/or prospective relief to ensure compliance with rights protected under the Model EDR Plan. Compensatory and punitive damages are prohibited under the Model EDR Plan. Payment of attorney's fees are also impermissible, except as authorized under the Back Pay Act.

EDR Coordinators

EDR Coordinators are court employees who are designated by the court to serve as the EDR Coordinator for that court. EDR Coordinators are responsible for:

- Providing information to the court and its employees regarding the rights and protections afforded under their EDR Plan;
- Coordinating and shepherding the proper EDR complaint procedures;
- Maintaining the court's official files of claims and related matters initiated and processed under the court's EDR Plan;
- Coordinating employee counseling, and serving as a counselor, in the initial stage of the claims process. The EDR Coordinator's responsibilities during the counseling stage are:

¹ The procedural rights set out in the Model EDR Plan correspond to those established under the administrative EEO process available to federal employees in the executive branch, and are similar to the counseling and mediation requirements imposed on legislative branch employees in its administrative hearing process under the Congressional Accountability Act of 1995 (CAA).

- Obtaining preliminary information from the aggrieved employee, including a written statement about the allegations, requested relief, and any jurisdictional matters;
 - Advising the aggrieved employee of his/her rights and responsibilities under the EDR Plan;
 - Explaining procedures available under the EDR Plan;
 - Providing a copy of the request for counseling to the relevant unit executive and chief judge of the court;
 - Obtaining pertinent information from the employing office or others as needed to evaluate the matter, consistent with the employee's right to confidentiality;
 - Making an initial effort to reach a voluntary, mutually satisfactory resolution;
 - Reducing to writing record of all contacts made by the EDR Coordinator during the counseling phase.
 - Notifying the employee, in writing, of the end of counseling and of his/her right to continue to pursue a claim.
- Collecting, analyzing, and consolidating statistical data and other information relating to the court's EDR process.

Wrongful Conduct

- Under the Model EDR Plan, employees are encouraged to report discrimination, harassment, and retaliation through the wrongful conduct process. Chief judges and unit executives are to assure that allegations of wrongful conduct are promptly investigated.

**Federal Judicial Center Trainings Related to Fair Employment Practices and
Workplace Civility**

The Federal Judicial Center has compiled the following resource list to aid court units in training and education related to prohibited discrimination, which includes workplace harassment. As we acquire or develop additional relevant resources, we will add them to the list.

The FJC offers several in-district training programs delivered by FJC-trained facilitators. Each of the in-district programs listed below addresses, in some way, either sexual harassment and other forms of prohibited discrimination or techniques to ensure that employees develop the skills to foster a respectful workplace. To schedule an in-district training program, contact Phyllis Drum at pdrum@fjc.gov or (202) 502-4134. The FJC covers the costs of participant materials and trainer travel and subsistence.

The list also includes training videos that can be used as local resources to hold discussions and conduct training on issues related to prohibited discrimination, including sexual harassment. In addition, we include a number of video resources that address topics such as overcoming bias, valuing diversity, facilitating teamwork, effective feedback, leadership in challenging situations, and strategies to enhance respectful communications. Efforts to incorporate these behaviors may also serve to foster an environment less tolerant of prohibited discrimination. To request a video from the list below, click on the hyperlinked title, which will take you to a page where you can read a more comprehensive description and place an order. A downloadable version of this list is available [here](#).

Sexual and Workplace Harassment

In-District Programs

[Preventing Workplace Harassment](#) (Employee Version, 4 hours)

This program focuses on employee awareness of workplace harassment. Participants learn what workplace harassment is and what it is not, the kinds of behavior that may be interpreted as workplace harassment, how a workplace can become a hostile environment, and how to minimize the occurrence of workplace harassment. Participants learn how to deal with harassment if it arises and what to do if they are involved in a workplace harassment investigation.

[Preventing Workplace Harassment](#) (Management Version, 4 hours)

This program emphasizes managers' responsibility to maintain an environment free of hostility, where courtesy and mutual respect are the basis for communication and conflict resolution. Participants learn what workplace harassment is and what it is not, the kinds of behavior that may be interpreted as workplace harassment, and how a workplace can become a hostile environment. Managers also learn how to minimize the occurrence of workplace harassment, how to handle an allegation or incident, what to do during an investigation, how to handle a false or spiteful claim of workplace harassment, and how organizations can minimize the occurrence of harassment.

Videos Available from FJC Current Collection

[Court Web: What You Do Not Know About Harassment Could Hurt You!](#) (2017, 5523-V/17, 1 hour 12 mins.)

While covering behaviors that should always be avoided, this webcast focuses heavily on some of the gray areas where people without bad intent have offended others. The webcast also addresses how employees—including leaders—should respond to harassing or other unacceptable behavior.

[It's Still Not Just About Sex Anymore: Harassment & Discrimination in the Workplace](#) (2016, 5559-V/16, 21 mins.)

This program will educate employees about the many forms of workplace harassment and discrimination. It provides dramatizations of harassment behaviors, demonstrating how these behaviors can lead to formal charges and result in serious consequences for the individuals involved. The program also teaches what is and is not acceptable in today's workplace and what each individual's responsibilities are toward his or her colleagues.

[Sexual Harassment: The "Takeaway" for Managers](#) (2016, 5511-V/16, 12 mins.)

This program for managers defines sexual harassment according to the law and explains why it's important to take a proactive approach to this problem. The program includes short vignettes that illustrate and dramatize the material presented. This program focuses on four key learning points: the legal definition of sexual harassment; a proactive response; the importance of documentation; and the fear of retaliation.

Videos Available from FJC Archives

[Harassment and Diversity: Respecting the Differences—Employee Version](#) (2007, 5163-V/07, 16 mins.)

Harassment is not only about sex and gender. It can also involve various cultural differences, race, religion, age, disabilities, and other protected characteristics. The video focuses on employee sensitivity and awareness. It teaches why a harassment policy that emphasizes a respect for coworker differences is not only required by the law, but is also the right thing to do.

[Harassment & Diversity: Respecting Differences—Manager Version](#) (2005, 5164-V/05, 20 mins.)

Managing in a diverse workplace can be a challenge, but every manager has the responsibility to maintain a harassment-free workplace. Diversity in business should be celebrated, but our differences can carry the potential for harassment. Cultural backgrounds, age, religious beliefs, nationalities, and physical abilities are all targets for workplace discrimination, but they are also categories that are protected under law. The video shows an all-too-common situation, where friction between employees grows from "just kidding around" into illegal harassment, and explains that your company should have a zero-tolerance harassment policy that protects every employee.

[Harassment Hurts: It's Personal](#) (2009, 5100-V/09, 21 mins.)

Harassment Hurts: It's Personal explores the pain and cost of harassment, covering such topics as age, race, sexual orientation, political affiliation, pregnancy, ethnicity, and sexual harassment. This program explains harassment and uses personalized stories and detailed legal and policy definitions to cover all types of harassment in organizations and

workplaces. This program explores issues of harassment, their ramifications, and their remedies.

Also included is *Opening Lines: Exploring Sexual Harassment*, which can be used as a new-employee orientation tool or as a meeting opener or closer for any harassment, respect, or diversity training. You can use it as a quick and concise refresher course for your organization's anti-harassment policy or to just introduce the fundamental and important concepts of respect, diversity, and inclusion in the workplace.

[In This Together: An Engaging Look at Harassment and Respect](#) (2000, 5508-V/00, 18 mins.)

This video looks at harassment and respect in the workplace. Seven front-line employees from a variety of organizations speak directly to their peers as they discuss the issues of respect and harassment. The program features insightful looks at real situations that will help employees to make better choices.

[It's UP to YOU: Stopping Sexual Harassment for Employees](#) (2005, 5459-V/05, 23 mins.)

This program uses real-world situations to help employees understand and stop sexual harassment behavior.

[It's UP to YOU: Stopping Sexual Harassment for Managers](#) (2005, 5460-V/05, 27 mins.)

This program uses real-world situations to help managers understand and stop sexual harassment behavior.

[Let's Get Honest: A Sexual Harassment Training Package](#) (2006, 4992-V/06, 41 mins.)

Program One: Let's Get Honest. This video offers honest solutions to a variety of workplace issues, ranging from flirting and dating to clueless behavior and predatory harassment.

Program Two: He Said, She Said. In this video, seven scenarios challenge employees' beliefs and perceptions regarding sexual harassment and inappropriate behavior at work. As the stories unfold, employees explore the facts, read between the lines, and hear from witnesses and experts.

[The Right Side of the Line: Creating a Respectful and Harassment-Free Workplace](#) (2005, 4845-V/05, 22 mins.)

Everyone in an organization is responsible for creating a respectful and harassment-free workplace. This program addresses harassment in all its forms, giving employees the tools to resolve situations before they escalate. The program helps participants take a proactive approach to creating and maintaining respectful organizational cultures in order to remain legally compliant, to ensure adherence to organizational policies, and to thrive and prosper. The video contains six vignettes that address situations that are unprofessional, prohibited by policy, and unlawful. Through these vignettes, employees

learn what to do and how to respond if they are victims of, or witnesses to, any form of harassment or discrimination.

Respectful Workplaces

In-District Programs

Code of Conduct (2.5 – 3 hours)

This program helps court employees deal with a range of ethical issues. It is divided into two segments: a review of the Code of Conduct for Judicial Employees, and discussion of ethics scenarios.

Dealing with Difficult Situations (4 hours)

This program helps supervisors and managers decide how to promptly and appropriately respond to some difficult employee relations problems. Participants discuss the issues involved and evaluate possible responses to a number of situations, including accusations of discrimination; charges of sexual harassment; possible substance abuse on the job; personal problems that interfere with performance; and equitable allocation of resources.

Meet on Common Ground: Speaking Up for Respect in the Workplace (4 hours)

This program explores thorny workplace situations that involve disrespect. Participants learn a four-step approach to resolving differences and fostering a respectful and tolerant workplace: Make time to discuss the situation; Explore differences; Encourage respect; and Take responsibility.

Personality Temperament Instrument Training (4 hours)

In this program, participants complete an instrument that identifies four common personality types. Through individual and group exercises, participants explore the four personality types and examine ways the different types can communicate and interact effectively with each other in the workplace.

Videos Available from FJC Current Collection

Consciously Overcoming Unconscious Bias (2014, 5512-V/14, 8 mins.)

This program shows how unconscious bias, micro-inequities, and micro-affirmations overlap in the workplace and helps participants to recognize their own biases and the micro-inequities that express them. The program shares helpful tips, like Listening, Including, Valuing, and Engaging, (or L-I-V-E) to improve participants' workplaces.

Diversity 101: The Complete Series (2016, 5560-V/16, 36 mins.)

This series, composed of eight short vignettes, teaches the core components of diversity, inclusion, and respect in the workplace. It covers issues such as unconscious/hidden bias, intolerance, crude jokes, and disrespectful comments, which can surface in any organization.

Diversity: Respect at Work (2013, 5297-V/13, 16 mins.)

This program helps employees understand, accept, and value differences. The program shows participants how to: realize that open-mindedness can benefit the bottom line; understand, identify, and manage biases; recognize that disrespect can happen even

without the offender knowing it; create a more inclusive workplace; adopt a “think before you speak” mindset; and resolve conflicts respectfully.

[How To Be a Terrible Team Member](#) (2015, 5507-V/15, 44 mins.)

Teamwork is defined as the combined actions of a group of people, especially when they are effective and efficient. Total harmony is not necessarily a defining trait of the most effective teams, as creative conflict about the work, when well managed and focused, has a decidedly positive effect on team efforts and outcomes. The trick is learning how to identify which traits and behaviors contribute to creative thinking, problem-solving, learning, and growth and which hinder those things. This program identifies nine damaging work styles that are barriers to effective teamwork.

[Leadership Feedback: What employees want to tell you . . . but don't!](#) (2014, 5457-V/14, 17 mins.)

This program is based on extensive interviews with actual employees who gave candid feedback about the leaders they worked for. Because the interviews were anonymous, employees were free to honestly discuss which leadership behaviors were motivating—or demotivating. Six key issues of leader–employee interaction emerged from this research and are illustrated in the video. For each issue, the video shows two scenarios—one with an ineffective leader, the other with an effective one.

[Leading More with Less](#) (2011, 5196-V/11, 17 mins.)

This program demonstrates six critical leadership skills that can inspire employees through difficult times. The video demonstrates both right and wrong leadership examples and the effect they have on employees.

[Manager's Moments: How to Excel in Tricky Situations](#) (2015, 5456-V/15, 34 mins.)

To keep teams motivated and running smoothly, managers need to recognize potentially troublesome employee situations and quickly take action. This program offers practical wisdom to busy professionals on everyday management challenges. The topics include: How to Curb Employee Gossip; How to Deal with Difficult Peers; How to Manage Upward; How to Manage Time Thieves; and How and When to Delegate.

[Managing the Workplace Bully](#) (2013, 5510-V/13, 19 mins.)

This video addresses the issue of abusive conduct at work, providing practical solutions that help managers put an end to bullying behavior in their subordinates—and also in themselves. Five realistic scenes in a range of workplaces show what to do when someone seeks help or there is repeated conflict among employees.

[Ouch! Your Silence Hurts](#) (2009, 5107-V/09, 10 mins.)

Many people say they want to speak up when they see others stereotyped, disrespected, or demeaned, but all too often they stand by silently because of discomfort or the fear of saying the wrong thing. This video motivates bystanders to use their voice to speak up for respect on behalf of someone else.

[Ready. Set. Change! Reacting Smarter. Adapting Faster. Engaging Together](#)

(2012, 5513-V/12, 29 mins.)

This program helps employees positively and productively navigate through change—big or small.

[The Respectful Communicator: The Part You Play](#) (2011, 5294-V/11, 15 mins.)

Effective communication is at the heart of organizational performance. In a diverse workplace, a number of things can undermine successful communication, including a perceived lack of respect or inclusion. This program shows how taking a few extra steps can keep misunderstandings to a minimum. The program includes how improved interpersonal communication can improve productivity and morale; provides practical learning on the sometimes abstract concepts of respect and inclusion; and illustrates how to communicate clearly (without demeaning, devaluing, or offending others)

[The Respectful Workplace: It Starts with You](#) (2011, 5295-V/11, 18 mins.)

This program explores respect in the workplace through four important skill points. Wrong-way scenes depict the negative impact of disrespect while right-way scenes inspire positive, respectful, inclusive behavior.

[What To Say When](#) (2012, 5387-V/12, 4–6 mins.)

Problems with workplace communication can lead to low productivity, high stress, and tension between coworkers. This four-DVD series includes thirty learning modules. Each module offers strategies that participants can use to better manage workplace relationship challenges.

*Videos Available from FJC Archives***[Drop by Drop](#)** (2008, 5102-V/08, 19 mins.)

This program demonstrates how small slights, subtle discriminations, and tiny injustices can add up to big problems in your workplace. Minor negative gestures are called “micro-inequities” and they occur in organizations every day. These small communications of disrespect, prejudice, and inequality aren’t overt, but they can be destructive. The video instructs how to show regard for all races, religions, cultures, and ages and how to be open to information about different cultures, customs, and perspectives.

[Generations and Work](#) (2010, 5458-V/10, 34 mins.)

This video addresses accepting people who are different and understanding how to interact with them in ways that increase satisfaction and productivity. It contains four interactive learning experiences: Working with Millennials; Engaging All the Generations; Succeeding with Younger Workers; and Connecting Across Differences. Using workplace and on-the-street interviews, vignettes, and expert commentaries, the program addresses such topics as, coaching, work processes, technology, feedback, change, productivity, and sales.

[Not Everyone Gets a Trophy](#) (2010, 5157-V/10, 29 mins.)

This video aims to equip managers with the knowledge and tools they need to effectively manage young, inexperienced employees. With humor and entertaining examples, the

program addresses the challenges of managing younger workers and defines what it means for managers, employees, and organizations when young workers join the team.

[Ouch! That Stereotype Hurt](#) (2007, 5034-V/07, 30 mins.)

Staying silent in the face of demeaning comments, stereotypes, or bias allows these attitudes and behaviors to thrive, undermining the ability to create an inclusive workplace where all employees are welcomed, treated with respect, and able to do their best work. This program teaches employees how to speak up.

**Letters from James C. Duff, Director of the Administrative Office, to
Chairman Charles E. Grassley (Jan. 12, 2018; Jan. 22, 2018)**



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 12, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your letter of December 6, 2017, concerning allegations about the mechanisms for reporting fraud, waste, or abuse, and prohibited personnel practices at the Administrative Office of the United States Courts (AO). Judge Timothy Tymkovich, Chief Judge of the Tenth Circuit, and I also thank your staff, Mike Davis, Kasey O'Connor, and Steven Kenny, for meeting with us on November 17, 2017, prior to receiving your letter to discuss these and other matters, and again with them on December 12, 2017, along with Katherine Nikas, after I received your letter, to review the subjects of it. I also appreciate the additional time you allowed us over the holidays to prepare this response because of the volume of material we are providing. As we discussed with your staff, in addition to addressing your questions in this letter, we will submit in a separate letter a general discussion of the Judicial Branch's extensive and effective processes and safeguards that already provide, at significant taxpayer expense, the protections you propose in S. 2195, the Judicial Transparency and Ethics Enhancement Act of 2017.

At the outset, and as Judge Tymkovich and I raised with your staff in November, we appreciate that your interest in the Judiciary's practices has contributed to improvements we have made in our processes and procedures over the years, including in the past month since our meetings.

I. BACKGROUND OF OVERSIGHT OF JUDICIAL BRANCH PROCESSES

The Federal Judiciary puts very significant resources and effort into independent oversight and programs to prevent fraud, waste, or abuse of

government resources. The Judicial Branch has processes and procedures for individuals to raise claims of fraud, waste, or abuse; judicial misconduct; discrimination; harassment, or other wrongful conduct. Additionally, the Judicial Branch provides non-retaliation protections to its employees. In response to your staff's observations, as of December 20, 2017, the public website (uscourts.gov), and the Judiciary's internal webpages where fraud, waste, or abuse reporting is discussed have been updated. We also have published our policies on fraud, waste, or abuse reporting and fair employment practices on uscourts.gov. We appreciate your observations and welcome any others.

II. RESPONSES TO QUESTIONS

1. Please provide a description of the current process for contractors and Pre-Act and Post-Act employees seeking to report waste, fraud, abuse, and prohibited personnel practices, including a description of current protections for employees who report; and copies of all policies, procedures, internal manuals or memoranda, and training guidance related to this process and protections. Please explain how conflicts of interest are accounted for.

Fraud, Waste, or Abuse

As the Director, I am responsible for the operations of the AO and its components, including the authority to investigate allegations of fraud, waste, or abuse. The policy (enclosure 1) provides for the investigation of allegations made by AO employees or contractors of fraud, waste, or abuse regarding AO staff and its activities. The Deputy Director of the AO provides initial oversight and resolution of AO allegations. As stated in the policy, I report the filing and action taken on fraud, waste, or abuse allegations made regarding the AO, courts, and federal public defender organizations (FPDO) to the Judicial Conference Committee on Audits and AO Accountability (AAOA Committee), thus allowing independent review of all such allegations reported to the AO. There are six federal judges from six different courts on the AAOA Committee who have no management role in the AO and therefore provide an independent oversight role.

The policy and our process do not distinguish between allegations made by AO employees, whether they are Pre- or Post-Act, or contractors. The status of an employee's employment rights has no bearing on fraud, waste, or abuse reporting or review. If any conflicts of interest arise, they are handled case by case. We have policy and mechanisms to delegate review responsibilities within the AO.

When investigating, the AO, pursuant to its policy, offers confidentiality to any complainant who reports fraud, waste, or abuse unless disclosure becomes unavoidable. If disclosure is unavoidable, the complainant would be notified prior to disclosure unless such notification would be contrary to law. Allegations can and have been reported anonymously. As described in our policy, we treat all allegations according to the same procedures regardless of source.

There is a page on the AO's intranet website informing any employee, or contractor working for the AO who has access to the Judiciary intranet, how to report allegations through an email address or online form. Allegations by an employee, contractor or the public can also be reported by using the email link found on the public uscourts.gov website. A copy of the webpages and the form used for reporting are in enclosure 2.

Annually, the Deputy Director of the AO sends a memorandum to employees reminding them of their responsibility to report fraud, waste, or abuse. The AO's Personnel Act also prohibits (whistleblower) retaliation against employees who report fraud, waste, or abuse.

Prohibited Personnel Practices

As reflected in the attached sections of the *AO Manual*, Volume 4, Chapter 3 (enclosure 3), individuals have several established, formal processes described through which to pursue their concerns. Where prohibited personnel practices include a discrimination allegation, employees may use the Fair Employment Practices Complaint Process (FEP-CP). The FEP-CP provides explicit, clear directions on how to report concerns and how to proceed once a claim is filed. In addition to providing sections of the *AO Manual* describing our process, I have attached a flow chart (enclosure 4) outlining the current process for filing a claim with the Fair Employment Practices (FEP) Office.

The FEP-CP allows for informal counseling, an opportunity to file a formal complaint, and an opportunity to request a hearing after an investigation. It is important to point out that the investigation is conducted by a trained neutral investigator from outside the AO and that the hearing officer, if the matter proceeds to a hearing, must be an independent, non-government attorney with specialized subject matter expertise and must also be a neutral party. Throughout the process, professionals are available in multiple AO offices if there are questions or concerns. No investigations are closed without thorough review and at any time in the process a claimant may be represented by counsel.

Although there are not different processes for Pre-Act and Post-Act employees seeking to report fraud, waste, or abuse, there are differences in the FEP appeal right procedures for Pre-Act employees. These differences are provided in the *AO Manual*, Volume 4, Chapter 3, § 330.60 (see enclosure 3).

Training

The table below provides a list of recent and currently available trainings and guidance for AO employees seeking to report fraud, waste, or abuse, and prohibited personnel practices.

Trainings and Guidance for Employees Seeking to Report Waste, Fraud, Abuse, and Prohibited Personnel Practices			
Format; Target Audience	Title	Topic(s)	Description
In-Person; AO Staff	Fair Employment Practices Process Training	Prohibited Personnel Practices	This town hall focused on the Fair Employment Practices process, discrimination, harassment, and how to report violations.
In-Person; AO Staff	AO Harassment Training	Prohibited Personnel Practices	This training was provided to AO managers and covered sexual harassment in the workplace, the relevant guidelines, and responsibilities of AO managers.
Web-Based; AO Staff	Virtual Town Hall: Updated HR Volume of <i>AO Manual</i>	General Human Resources	The virtual town hall was held to address questions about the updated volume of the <i>AO Manual</i> . Updates to the HR volume included: prohibited personnel practices, merit principles, whistleblowing, and Fair Employment Practices procedures.
In-Person; AO Staff	Town Hall Question and Answer Session: <i>AO Manual</i> Fair Employment Practices Chapter	Fair Employment Practices	This town hall featured staff from the FEP Office and the Office of General Counsel to facilitate discussion and answer any questions on the draft Fair Employment Practices Chapter of the <i>AO Manual</i> .
Web-Based; AO Staff	Guidance on Sexual Harassment	Prohibited Personnel Practices	This training provides the applicable definitions, guidance, and employee responsibilities related to sexual harassment in the workplace.

Format; Target Audience	Title	Topic(s)	Description
Web-Based; AO Staff and Contractors with Access to AO Web	Guidance on Fraud, Waste, and Abuse Reporting	Fraud, Waste, or Abuse	This guidance provides an outline of policies and procedures for reporting fraud, waste, or abuse and the AO's processes for responding to complaints, including prohibition against retaliation.
Web-Based; AO Staff	Annual Reporting Requirements	Fraud, Waste, or Abuse	Annual memorandum from the Deputy Director to all employees reminding them of their responsibility to report fraud, waste, or abuse with links to helpful instructions.

2. What internal safeguards exist at the local, regional, and national levels to deter waste, fraud, and abuse of judicial resources? Please explain and provide all relevant policies or procedures governing the administration of these safeguards.

The Judicial Branch has a wide range of policies and procedures at the local, regional, and national levels that deter fraud, waste, or abuse of judicial resources. They include broad, organization-wide strategies, national policies, and local procedures. These safeguards evolve and improve based on experience and ongoing assessment of risks. Informed by the results of past investigations, audits, program reviews, and industry and government best practices, we have made improvements to reduce the risk for fraud, waste, or abuse.

The core safeguards are listed below. The first section of the chart discusses specific policies and procedures. The second section discusses other, more general policies and procedures that also contribute to deterring fraud, waste, or abuse.

Reporting and Follow-up on Allegations and Other General Safeguards

Safeguard	Description
Core Safeguards	
Monitoring of Policies, Procedures, and Internal Controls	See responses to question #3 for details of Financial Audit Programs, and question #4 for details of reporting to AAOA Committee.
Codes of Conduct	The respective codes of conduct for judges, court staff, FPDO, and the AO speak to the integrity of the Judiciary, procurement integrity, and the use of government property among a number of other matters that emphasize accountability and good stewardship of Judiciary resources.
Fraud, Waste, or Abuse Policies	The Judiciary has policies for the courts, the federal public defenders, and the AO that address how to report allegations of fraud, waste, or abuse (enclosure 5).
Fraud, Waste, or Abuse Reporting Intranet Pages	The Judiciary intranet pages provide information regarding how to report fraud, waste, or abuse; points of contact for such reporting; and a form to submit concerns regarding fraud, waste, or abuse including an option to submit anonymously. Based on the concerns your staff raised, we have updated these pages to more clearly explain the reporting and investigative procedures.
Fraud, Waste, or Abuse Reporting Reminders	Annually, the chair of the AAOA Committee sends a memorandum to chief judges and all court unit executives asking them to remind their staff of the means to report fraud, waste, or abuse (enclosure 6). The Deputy Director of the AO annually sends a memorandum to all AO employees reminding them of their obligation to report fraud, waste, or abuse (enclosure 7).
Internal Control Policy	The Judiciary’s internal control program requires that the AO and each unit have financial and administrative procedures. The executive is required to keep the procedures current and conduct a comprehensive review annually. The procedures are also reviewed by auditors during the organization’s cyclical audit.
Internal Control Self Assessments	The Judiciary’s internal control program requires an annual self-assessment of the organization’s internal controls. The auditors review the completed assessments during the organization’s cyclical audit.
Program Reviews	AO staff conduct voluntary and mandatory reviews of Judiciary programs (e.g., clerk’s office, jury administration, probation office, human resources administration) and such reports serve to improve operations in the specific office, and may also identify best practices that are shared broadly. These are reported to the AAOA Committee and noted in question #4.

Safeguard	Description
Internal Control Tools	The AO has developed guidance systems and best practices to help executives and financial managers identify internal control risks.
Reporting & Follow-up on Allegations	As described in the response to question #4, the AO provides an extensive semi-annual report to the judges on the AAOA Committee, which has an independent role in monitoring and reviewing reports of fraud, waste, or abuse, as well as financial audits and special investigations. Their oversight and the judges' expectation that management at the AO and the courts will complete appropriate investigative activities is a deterrent. The AO also provides investigation reports and other information regarding the allegations to the Office of Audit so that the relevant internal controls and activities can be reviewed during a future audit to ensure that weaknesses in internal controls have been addressed.
Strategic Planning	The Judiciary's Strategic Plan emphasizes standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; and effective and efficient use of resources. The AO's Strategic Direction emphasizes strengthening AO accountability through improvements to internal control, audit, and risk management initiatives.
General Safeguards	
Financial Reporting Requirements	Financial reporting requirements are in place and designed to ensure accountability for funds, including managing, expending, and receipting funds. Monthly, quarterly, and annual reports are required to be filed by court units and FPDOs; reports are reviewed, and financial statements are audited in accordance with Judiciary policy.
Financial System Controls	Financial system controls are in place to ensure that only authorized persons can process transactions, which are safeguards that prevent unauthorized personnel from executing transactions outside their approvals. These safeguards also assist executives in ensuring the appropriate separations of duties.
Formal Delegations of Authority	Delegations are designed to ensure that persons with the appropriate training and knowledge carry out certain responsibilities. Judiciary delegations are defined for every administrative area, including certifying officers, contracting officers, and personnel actions.
Local Budget and Financial Management Policies and Procedures	The AO, courts, and FPDOs are required to establish local budget and financial management policies and procedures to ensure that funds are expended in accordance with local governance rules.

Safeguard	Description
Local Fraud, Waste, or Abuse Policies	Courts have implemented local fraud, waste, or abuse policies and procedures based on their local governance processes and procedures. The AO has posted examples of these policies and procedures on the Judiciary’s intranet page for courts to reference.
Training	Training is provided regarding some of the specific safeguards above, some of which is mandatory for certain authorities such as certifying officer, contracting officer, etc. For a more extensive discussion of training, see response to question #5.

3. Please provide a description of the financial audit processes – internal and external – for individual courts and the AOUSC, including the frequency of audits and details of the processes utilized.

Judiciary Audit Program

The Director of the AO has the statutory responsibility under 28 U.S.C. § 604(a)(8) to disburse appropriations and other funds for the maintenance and operations of Judiciary organizations, as well as the responsibility under 28 U.S.C. § 604(a)(11) to audit accounts and vouchers of the courts. The Director of the AO has assigned the responsibility for administering the Judiciary’s audit program to the AO’s Office of Audit. This Office of Audit, along with the Office of Management, Planning and Assessment, was once called the “Office of Inspector General.” The office titles have changed over time, but the important functions remain.

The Office of Audit is organized as an independent internal audit office as defined under the Government Accountability Office’s Generally Accepted Government Auditing Standards (GAGAS). The AO’s Office of Audit conducts financial-related performance audits and contracts with independent external audit firms to perform financial statement audits and other attest engagements that require a level of independence, as defined in professional auditing standards, which must be provided by independent certified public accounting (CPA) firms. Audits are conducted in accordance with GAGAS and Generally Accepted Auditing Standards.

The Judiciary is not only responsible for appropriated funds, but also for filing fee receipts and funds held in trust for retirees, crime victims, and parties involved in disputes. The Judiciary also makes statutory payments to bankruptcy trustees and the recipients of Criminal Justice Act grants. Judiciary responsibilities for these funds include the proper handling of transactions

involving these funds as well as the safeguarding of these assets while they are held.

The Judiciary's audit programs reflect its wide-ranging responsibilities for the handling of appropriated and non-appropriated funds at the national and local levels. The Judiciary produces a series of financial reports and statements reflecting these responsibilities, and it audits them on a regular basis. In many cases, expenditure transactions will be examined at multiple levels. For example, an expenditure may be reviewed at the national level in an appropriations audit and at the local level in a cyclical court audit, where the actual disbursement was initiated.

1. Cyclical Financial Audits

Independent CPA firms conduct cyclical financial audits of court units and FPDOs with contractual oversight provided by the Office of Audit. The audit cycle is four years for smaller and lower-risk units, and two and one-half years for higher-risk units, including large courts. Audit reports include an auditor's opinion on financial statements and a report on internal controls over financial reporting and compliance with Judiciary policies and procedures for all offices. The audits also review certain administrative functions, including procurement, property management, financial systems access, and other areas.

2. Change-of-Court Unit Executive and Other Special Request Audits

Staff from the AO's Office of Audit conduct financial-related performance audits to document the transfer of accountability when a court has a change in its court unit executive, or when there is an executive change such as a bankruptcy administrator. Courts may also request audits when there is a change in the financial administrator, to follow up on prior audit issues, or to examine a particular area or process where a court has identified potential risk.

3. National Financial Statement Audits

The Office of Audit oversees the work of external auditors as they conduct financial statement audits, performance audits and other attest engagements of certain Judiciary appropriations, AO financial systems, and national programs.

Judiciary Appropriations. The Office of Audit contracts with an independent CPA firm to conduct financial audits for Judiciary

appropriation accounts, which fund the operations of the U.S. courts, defender programs, and the AO. The primary objectives of the audits are to: 1) determine whether the financial statements related to these appropriation accounts are presented fairly in all material aspects; 2) assess internal controls over financial reporting; and 3) assess compliance with significant and applicable laws and regulations. To assess internal controls, the CPA firm examines key financial reporting internal control policies and processes at the AO and at the court unit or federal public defender level, and reviews controls over information technology relevant to the preparation and presentation of financial statements. Appropriations audits are conducted on a two-year cycle.

Retirement Funds. The Office of Audit contracts with independent CPA firms to conduct annual financial statement audits of the Judiciary's four retirement funds: the Judicial Survivors' Annuities System, which provides death benefit coverage for survivors of participating justices and judges; the Judicial Officers' Retirement Fund, which provides retirement and disability benefits for participating federal bankruptcy and magistrate judges; the Court of Federal Claims Judges' Retirement System, which provides retirement benefits for participating United States Court of Federal Claims judges; and the Judicial Retirement System, which provides retirement benefits to participating Article III judges retiring under 28 U.S.C. §§ 371(a) and 372(a), and judges of the territories.

Registry Investments. Courts are required to deposit and invest registry funds safely until the resolution of a case, at which time the courts return the deposits, plus interest, to the appropriate parties. The Court Registry Investment System (CRIS) was established by a district court in 1988 to relieve individual courts from the risks and administrative burdens associated with investment of registry funds locally. This voluntary program was transferred to the AO in 2011 and the AO now manages registry funds for 166 district and bankruptcy courts. Financial statements for CRIS are audited annually by an independent CPA firm under contract with the Office of Audit.

Public Access to Court Electronic Records (PACER). The Office of Audit contracts with an independent CPA firm to perform annual financial audits of the PACER program receipts. PACER is an electronic public access service that allows registered users to obtain case and docket information online from federal appellate, district, and bankruptcy courts and the PACER Case Locator. As mandated by Congress, the Judiciary's

electronic public access program is funded entirely through user fees set by the Judicial Conference.

Central Violations Bureau (CVB). The Office of Audit contracts with an independent CPA firm to perform annual financial audits of CVB receipts. The CVB is a national center responsible for processing violation notices (tickets) issued and payments received for most petty offenses and some misdemeanor cases charged on a federal violation notice.

4. Audit of AO Administrative Functions

Contract Audits. The Office of Audit contracts with independent CPA firms to conduct performance audits of the AO's contract administration and reporting functions. The primary objectives of the reviews are to determine whether (1) operational safeguards and internal controls over the contracting process were adequate to ensure compliance with procurement and programmatic requirements of the contract, and (2) costs charged to the contract were allowable and supported. A selection of contracts are audited in most years.

Other Administrative Functions. Office of Audit staff or independent CPA firms may conduct audits of other AO administrative functions, such as procurement or property management.

5. Audits of Community Defender Organization Grantees

An independent CPA firm under contract with the Office of Audit conducts financial audits of Criminal Justice Act (CJA) grants to the 17 community defender organizations (CDOs). Each CDO is audited annually. The objectives of the audits are to:

- evaluate internal accounting controls;
- evaluate grant activity for compliance with grant agreements, Judiciary policy, and other relevant policies;
- assure that personnel are authorized and paid at authorized levels;
- review property inventory and procurements;
- review reporting to the AO's Defender Services Office;
- review budgetary restrictions; and
- review the return of unused funds.

6. Audits of Chapter 7 Bankruptcy Trustees

The Office of Audit also contracts with an independent CPA firm to conduct performance audits of Chapter 7 bankruptcy trustees. The audits are performed with oversight provided by the Office of Audit in support of the bankruptcy administrators located only in the states of North Carolina and Alabama, which are under the Judicial Branch. This audit program began in fiscal year 1994 and is similar to the Department of Justice's program for audits of Chapter 7 trustees in the other 48 states which are under the United States Trustee Program. The audits are conducted on a three-year cycle. The primary objectives are to evaluate whether the trustees have a system of internal controls to protect estate funds and assets, adhere to specific case administration and financial compliance requirements, and present financial information in accordance with Judicial Conference policy.

7. Audits of Chapter 13 Bankruptcy Trustees

Financial audits and agreed-upon procedures (AUP) engagements of Chapter 13 bankruptcy trustees are conducted by another independent CPA firm under contract with the Office of Audit in support of the bankruptcy administrators in North Carolina and Alabama. The audits evaluate whether the trustee's annual report fairly presents the position of the trusteeship during the audit period. Chapter 13 bankruptcy trustees are audited annually. The audit reports include the auditor's opinion on the trustee's annual report, and a report on internal controls and compliance with relevant laws, regulations, and Judiciary policy. This centrally managed audit process is similar to the Department of Justice's program for audits of Chapter 13 trustees in the other 48 states.

Chapter 13 bankruptcy trustees also undergo AUP engagements each year. The AUP engagements are an other attest engagement provided by independent public accounting firms, and a separate report is issued for these engagements. AUPs report on various prescribed procedures as developed by management to assess the Chapter 13 trustee's compliance with relevant program policy and requirements. AUPs have a lesser scope than an audit, because they provide no assurance on the processes or items under review.

8. Debtor Audit Program

The Office of Audit contracts with an independent CPA firm to conduct debtor audits of Chapter 7 and Chapter 13 bankruptcy filings by individuals in the states of North Carolina and Alabama. Some filings selected for audit are randomly selected from filings, while others are selected from cases with debtors who have high incomes or high expenses, compared to the statistical norm in the district. A filing may also be targeted for audit by a bankruptcy administrator if it exhibits characteristics that may be associated with fraud or undisclosed assets.

9. Previous Audits or Attestation Engagement Follow-Up Activities

As outlined in the GAGAS standards, auditors should evaluate and determine whether audited entities have taken appropriate corrective actions to address prior findings. The Office of Audit tracks and follows up on implementing corrective actions in court units, defender organizations, and the AO to ensure that audit findings are addressed. Findings identified in final audit reports are tracked and listed as “open” until documentation is submitted that describes actions implemented to address the issue. The tracking system also includes the audit recommendations associated with each finding. One finding may have multiple recommendations. The Office of Audit marks the item as “closed” if the implemented actions as described address all of the related recommendations and would resolve the condition.

4. Please provide all financial audits, program reviews, and special investigations reported by the AOUSC to the Judicial Conference Committee on Audits and Administrative Office Accountability from FY 2013 – FY 2017.

The AAOA Committee meets twice per year to oversee and review the AO’s audit, review, and investigative assistance activities. At each meeting, the AO reports on all audits, program reviews, and investigative activities for the period ending March 31 (for the Committee’s June meetings) or September 30 (for the Committee’s January meetings). Attached are ten summaries of the reports that have been provided to the AAOA Committee for its January 2013 meeting through its June 2017 meeting (enclosure 8).

5. Please provide a description of all in-person or web-based training for chief judges and unit executives offered by the Federal Judicial Center (FJC) and the AOUSC on their management and oversight responsibilities.

The AO and the FJC regularly provide a broad range of training and educational programs to Federal Judiciary staff on judicial administration, court administration, and organizational leadership and management topics.

The AO delivers online and in-person training programs on topics pertaining to the administrative responsibilities of judges, court unit executives (CUEs), and other Judiciary staff. Staff at the AO also appear at forums of private, affiliated organizations such as the Federal Court Clerks Association and the National Conference of Bankruptcy Clerks to discuss court administration topics. Because the AO develops and administers new procedures pertaining to court administration, it is primarily responsible for training in the management and oversight responsibilities requested in your letter. Typical training topics include budget management, internal controls, information technology and security, procurement, and human resources management.

The FJC was established in 1967 with the mandate to provide orientation and continuing education programs on judicial administration, specialized areas of the law, and organizational leadership and management skills. The FJC regularly provides online and in-person orientation and continuing education programs to judges and employees of the federal courts. FJC programs cover certain judicial administration topics (e.g., criminal litigation and procedure, complex litigation, case management, alternative dispute resolution, and juries), court management and leadership topics (e.g., court administration, change leadership, and organizational culture), and specialized areas of the law (e.g., national security, law and technology, and the environment). The FJC also coordinates educational programs for federal public defenders and probation and pretrial services officers.

The following table is a list of in-person and web-based trainings offered by the AO and the FJC in 2016 and 2017 for chief judges and court unit executives in their management and oversight responsibilities. As described above, “management” training is offered in many forms, but in responding to this question, we focused on training that emphasized “management and oversight” in administrative responsibilities and accountability.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Court Unit Executive	Court Unit Executives and Chief Deputies Training	General Court Management	This four-day training convened CUEs and chief deputies for a biennial conference. Topics included records management, court reporting, public access to court electronic records, audit issues and top audit findings, maintaining a robust internal control environment, travel policy, procurement and contract management, property management, budget execution, human resources and employee relations, work measurement, and information technology topics.
In- Person; Court Unit Executive	New Court Unit Executive and Chief Deputy Orientation	General Court Management	This orientation is held annually to familiarize new CUEs and chief deputies with the AO and the FJC, and the myriad of services provided. Participants have the opportunity to meet directly with AO staff and attend topic-specific breakout sessions with AO subject matter experts. Topics included finance and budget, human resources, internal control and audit, and the court review program.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Court Unit Executive	Internal Control Self- Assessment Tool Training	Internal Controls	The Internal Control Evaluation (ICE) System is a software application that helps court unit executives and federal public defenders evaluate compliance with specific internal control requirements. In-person training on this system takes 1.5 days and is designed to introduce the system to new staff and instruct them on how the tool can be used to support a sound internal control environment.
In- Person; Court Unit Executive	Financial Forum	Budget Management, Internal Controls	The Financial Forum is a recurring event, hosted by the AO, that provides training to financial personnel, unit executives, and staff in the areas of financial management, accounting and software programs used within the Judiciary, and fosters working relationships between AO and court staff. Recent topics have included: applying internal controls in a court environment; audit basics and lessons learned; and protecting your customers' credit card information.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Court Unit Executive	District and Bankruptcy Operational Practices Forum	Internal Controls	AO staff delivered a presentation at this forum on internal controls, the self-assessment tool developed by the AO, and the roles of judges and unit executives in the maintaining effective internal controls.
In- Person; Court Unit Executive	New Federal Defender and Administrative Officer Orientation	General Court Management; Internal Controls	This multi-day training includes management, human resources, budget and accounting, audit issues and top audit findings, internal controls, travel, procurement and contract management, property management, human resources and employee relations, work measurement, code of conduct, and information technology topics. It includes meetings with each offices assigned budget analyst and other AO staff.
In- Person; Court Unit Executive	Resources, Budget, and Finance Educational Workshop	Internal Controls	AO staff delivered a presentation on audit processes, internal control policy, and internal control tools to a joint conference of the Federal Court Clerks Association and the National Conference of Bankruptcy Clerks in Washington DC.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Court Unit Executive	Federal Defender Conference	General Court Management; Internal Controls	The annual three-day federal defender conference includes sessions on management and internal controls. Previous agendas have included sessions on audit compliance, employee disputes resolution, developing FPDO internal policy manuals, Community Defender Organization (CDO) employment law, fair employment practices, and managing FPDO budgets.
In- Person; Court Unit Executive	Human Resource Leadership- Employee Relations	Prohibited Personnel Practices	This in-person course uses workplace scenarios to reinforce concepts and principles related to managing employee relations and human resources policies and best practices.
Web- based; Court Unit Executive	Appropriations Law for US Courts	Procurement	This course introduces the basic principles of appropriations law and Judiciary policy for spending appropriated funds.
Web- based; Court Unit Executive	Judiciary Executive Procurement Oversight Seminar	Procurement	This course provides an overview of procurement in the Judiciary. Topics include key procurement policies, procedures, guidance, tools, and minimum internal control requirements.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
Web-based; Court Unit Executive	Internal Control Self-Assessment Tool Training	Internal Controls	The ICE System is a software application that helps court unit executives and FPDOs evaluate compliance with specific internal control requirements. In addition to in-person training on this system, there are four electronic learning modules that guide the participant through exercises using key system functionality and measures user comprehension after each module.
Web-Based; Court Unit Executive	Court Registry Investment System	Financial Management	The CRIS is a national investment program managed by the AO for Registry Funds. CRIS is designed to manage risks to the clerks of court charged with investing and protecting the funds. The AO makes available resources and tutorials on managing these funds.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
Web-based; Court Unit Executive	Managing Employee Dispute Resolution Issues in the Judiciary	Prohibited Personnel Practices	Employment Dispute Resolution (EDR) coordinators perform an important role in the courts. They serve as the conduit for reporting, processing, and conducting investigations for some types of employee disputes. Unlike standard human resource procedures, the EDR coordinator handles claims where bias, retaliation, harassment, and other fair employment practices become involved. This course addresses the nine laws covered by the EDR Plan, provides resources for an EDR coordinator, including a checklist of duties, and provides real-life case scenarios with follow-up question and answers.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
Web- Based; Court Staff	Individualized Guidance on Prohibited Personnel Practices	Prohibited Personnel Practices	The FEP Office prepares individualized guidance to courts on a weekly basis on topics related to equal employment opportunity, EDR claim processing, implicit bias, court demographics, and related topics. This was accomplished in direct court –to-FEP Office consultations with legal staff; judicial orientation sessions for new chief judges and judicial nominees; and in-person and videoconference training sessions for court personnel.

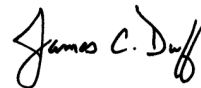
Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Chief Judge	New Chief Judge Orientation	General Court Management	The AO sponsors a 1.5 day New Chief Judge Orientation Program that addresses the administrative, management, and governance responsibilities of a chief judge and introduces the chief judge to the AO and FJC staff and resources available to assist them. During the program, the FEP Office reviews the court's employee dispute resolution plan and the Office of Audit reviews the court's last audit report. Staff from the Budget, Accounting, and Procurement Office, and the Human Resources Office also provide briefings. Court unit executives are invited to attend the program with their chief judge.
In- Person; Chief Judge	Chief Judge Education Program	General Court Management	The FJC's chief judge education programs emphasize the leadership and management roles of chief judges, as well as topics that relate to specific administrative responsibilities, including internal controls.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Chief Judge	Conference for Chief Judges of the U.S. District Courts	General Court Management	This two-day FJC conference examined the leadership and management roles of chief district judges. The conference also gave the chief judges the opportunity to learn about best practices from their peers and distinguished speakers. The conference agenda was developed in collaboration with a planning committee of current and former chief judges.
In- Person; Chief Judge	Conference for Chief Judges of the U.S. Bankruptcy Courts	General Court Management	The FJC held this two-day program for chief judges of bankruptcy courts to equip bankruptcy judges to best lead their courts now and in the future through competency in key management areas.
In- Person; Chief Judge	Leadership Seminar for New Chief Judges	Ethics; General Court Management	This FJC program is a four-day leadership seminar held biannually for chief judges who have held that position for less than two years. It covers leadership and management topics, including court leadership, strategic planning, and organizational culture.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Judge	New Judge Nominee Orientation	Ethics, General Court Management, Prohibited Personnel Practices	The AO sponsors a one day Article III Judge Nominee Orientation Program that addresses the administrative, management, and governance responsibilities of a judge and introduces the judge to the AO and FJC staff and resources available to assist them. During the program, the FEP Office reviews the court's employee dispute resolution plan.

Thank you for the opportunity to set forth our oversight processes and procedures both at the AO and throughout the Judicial Branch as a whole to expose and prevent fraud, waste, or abuse and prohibited personnel practices. We will be pleased to meet with you and your staff to answer further questions or respond to suggestions for improvements you may have as we have done in the past.

Sincerely,



James C. Duff
Director

Enclosures

cc: Honorable Dianne Feinstein
Honorable John G. Roberts, Jr.
Honorable Timothy M. Tymkovich



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 22, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

During productive meetings Chief Judge Timothy Tymkovich and I had with your staff in November and December, we were encouraged to write to you to address generally the Judicial Branch's opposition both to S. 2195, the Judicial Transparency and Ethics Enhancement Act of 2017 (IG bill), which was introduced on December 6, 2017, and to previous whistleblower proposals that would allow aggrieved employees to file lawsuits directly into federal district courts to address retaliation.

At the outset, I want to thank you for your and the Judiciary Committee's attention to the management of the Judicial Branch. Your observations and questions over the years have contributed to improvements we have made within the Judicial Branch. For example, and as described in more detail below, after meetings with your staff in 2015, the Judicial Branch ensured that all 94 districts and all 13 of its circuits now include whistleblower protection in their Employment Dispute Resolution (EDR) Plans that prohibit any retaliatory action against employees who report violations of laws or regulations, waste, or gross mismanagement. These improvements, along with existing practices and procedures, are among the many reasons – in addition to our Constitutional concerns – why we believe an Inspector General (IG) over the Judicial Branch and yet additional whistleblower litigation options are not only unnecessary, but would themselves constitute an unwarranted and unjustifiable expense of public funds.

As set forth in detail in my separate letter to you of January 12, 2018, the Judicial Branch devotes tremendous resources and effort each year to provide for external, independent auditing of its finances and to provide mechanisms for exposing fraud, waste, or abuse. Given that the extensive internal controls are already in place in the Judicial Branch, any other approach would not improve oversight and would only create

substantial additional public expense. In short, we have the same goals as you do and we already have in place effective and cost efficient methods of achieving those goals.

I. THE ADMINISTRATIVE OFFICE PERFORMS CORE FUNCTIONS OF AN INSPECTOR GENERAL WITH INDEPENDENT OVERSIGHT.

Some historical perspective of financial oversight mechanisms within the Judicial Branch may be helpful. Prior to the Administrative Office's (AO) creation, the Department of Justice handled administrative matters and legislative issues before Congress on behalf of the Judicial Branch. As the federal Judiciary grew, the inherent conflicts of interests between the branches in administering the courts became more evident and problematic. When Congress created the AO in 1939, it provided the framework for independent management oversight of the Judicial Branch. Since the creation of the AO, the administrative management and legislative interface for the Judicial Branch has been handled within the Judicial Branch, in coordination with the Judicial Conference of the United States and its committees of judges. In December 1984, Chief Justice Warren E. Burger and AO Director William E. Foley designated what had been the "Office of Management Review" in the AO as the "Office of Inspector General." In October 1985, the office was again renamed to the Office of Audit and Review. The oversight functions of that office have largely remained in place ever since and are now performed by the AO's Office of Audit, Office of the Deputy Director and other offices within the AO.

The Director of the AO has the statutory responsibility under 28 U.S.C. § 604(a)(8) to disburse appropriations and other funds for the maintenance and operations of Judiciary organizations, as well as the responsibility under 28 U.S.C. § 604(a)(11) to audit accounts and vouchers of the courts. As Director of the AO, I have assigned the responsibility for administering the Judiciary's audit program to the AO's Office of Audit. Additionally, the Audits and Administrative Office Accountability (AAOA) Committee of the Judicial Conference of the United States provides independent oversight of the AO's Office of Audit and the Judiciary's auditing.

Specifically, the Office of Audit is organized as an independent internal audit office as defined under the Government Accountability Office's Generally Accepted Government Auditing Standards (GAGAS). The AO's Office of Audit conducts financial-related performance audits and contracts with independent external audit firms to perform financial statement audits and other attest engagements that require a level of independence, as defined in professional auditing standards, which must be provided by independent certified public accounting (CPA) firms. Audits are conducted in accordance with GAGAS and Generally Accepted Auditing Standards.

The Judiciary's audit programs reflect its wide-ranging responsibilities for the handling of appropriated and non-appropriated funds at the national and local levels. The Judiciary produces a series of financial reports and statements reflecting these responsibilities, and it audits them on a regular basis. In many cases, expenditure transactions will be examined at multiple levels. For example, an expenditure may be reviewed at the national level in an appropriations audit and at the local level in a cyclical court audit where the actual disbursement was initiated.

My letter of January 12, 2018, provides not only details of specific types of audits performed, but also details of our program reviews, special investigations, fraud, waste, or abuse procedures and our fair employment practices, procedures and protections. As also stated in that letter, after conversations with your staff, we have made improvements in publicizing those procedures on our website, at uscourts.gov. There is no need to create another IG over the already existing functions performed at the AO with independent outside auditors and, as explained below, by the Judicial Conference committees.

II. THE JUDICIARY HAS IMPLEMENTED WIDESPREAD WHISTLEBLOWER PROTECTION FOR ITS EMPLOYEES.

In 2012, the Judicial Conference of the United States adopted changes to its Model Employment Dispute Resolution Plan to include specific protections against whistleblower retaliation. Every judicial district and judicial circuit has now adopted whistleblower protections, and similar whistleblower protections are also in place for employees of the AO and Federal Judicial Center (FJC). These provisions allow for employees who allege whistleblower retaliation to obtain review and employment remedies (such as reinstatement and back pay) through an administrative process within the Judicial Branch, generally culminating in review by the chief judge of the court in which the retaliation is alleged to have occurred, with review of that ruling by the Circuit Judicial Council. These protections are parallel to those provided to Executive Branch employees, whose sole remedy is also administrative (through the Merit Systems Protection Board (MSPB) and then the appellate courts). Thus, court employees who believe they have been retaliated against for whistleblowing may seek redress under the EDR Plans through a process that entitles court employees to a hearing before an Article III judicial officer.

In addition to providing a forum for relief for employees alleging retaliatory action, the establishment of this formal process also allows us to better assess the scale of perceived whistleblower retaliation in our branch. As we expected, that scale is small: since the model whistleblower protection plan was promulgated in 2013, only two whistleblower complaints have been asserted under EDR and in neither case was there a finding that retaliatory action was taken against a whistleblower.

Therefore, we are concerned that the IG bill contains a provision which would create a private civil cause of action for Judicial Branch personnel who assert that they suffered employment retaliation as a result of having been a “whistleblower” (whistleblower litigation option)¹. This proposal would be unprecedented. It is not consistent with the treatment of whistleblowers in either of the other branches of government, and it may disrupt Judicial Branch operations. A separate, simultaneous path of litigation could lead to conflicting, wasteful, and duplicative proceedings.

A. THE PROPOSAL IS UNNECESSARY: THERE ARE EXISTING EDR WHISTLEBLOWER PROTECTIONS.

When you first introduced this provision years ago, many court employees lacked whistleblower protection equivalent to that provided in the Executive Branch through the Merit Systems Protection Board. A statutory whistleblower provision is now duplicative, and thus unnecessary, because Judicial Branch employees already have whistleblower protection with all of the due process and procedural protections available in a civil action, including the right to have their claim heard by an Article III judicial officer. Substantively, the Judicial Branch modeled its EDR whistleblower protection provision directly on the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8) (WPA) covering Executive Branch employees.² The EDR provision prohibits retaliation against

¹ The proposed language in a succession of prior legislation, reads:

Whistleblower protection. –

(1) IN GENERAL.-

No officer, employee, agent, contractor, or subcontractor of the judicial branch may discharge, demote, threaten, suspend, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any possible violation of Federal law or regulation, or misconduct, by a judge, justice, or any other employee in the judicial branch, which may assist in the investigation of the possible violation or misconduct.

(2) CIVIL ACTION. -

An employee injured by a violation of paragraph (1) may seek appropriate relief in a civil action.

Similar language is proposed in S. 2195, the Judicial Transparency and Ethics Enhancement Act and its iterations in prior Congresses.

² The Judicial branch EDR provision reads:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or threaten to take an adverse employment action with respect an employee (excluding applicants for employment) because of any disclosure of information to (A) the appropriate federal law enforcement authority, or (B) a supervisory or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts, by the latter employee, which that employee reasonably and in good faith believes evidences a violation of any law, rule or regulation, or other conduct that constitutes gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety, provided that such disclosure of information (1) is not specifically prohibited by law, (2) does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in Guide to Judiciary Policy, Vol. 20, Ch. 8), and (3) does not reveal information that would endanger the security of any federal judicial officer.

an employee who reports violations of law, gross mismanagement or waste of funds, or health and safety violations. It does require that the employee appropriately report the misconduct to an appropriate authority: law enforcement, the Administrative Office, a judicial officer, or a supervisor. The EDR provision does not protect an employee who wrongfully discloses judicial deliberations, case-sensitive information, or sealed material. This is a crucial omission in the proposed whistleblower litigation option.

Procedurally, the EDR claims process is modeled directly on the Congressional Accountability Act. An aggrieved employee is entitled to conduct discovery, to have a transcribed hearing before an Article III judicial officer, and to seek appellate review by the Article III judicial officers of the Circuit's Judicial Council. Employees may seek to disqualify the presiding judicial officer if they have any concerns about a potential conflict of interest. To ensure impartiality and that potential misconduct is investigated, any EDR allegation against a judicial officer must be handled by the circuit Judicial Council. Providing a statutory right to bring a civil action simply replicates these rights and protections already afforded Judicial Branch employees – without any obvious benefit to either party.

Our objections to the whistleblower litigation option are focused on this duplication as well as the need to protect the independence of the Judicial Branch. The language in the provision covering Judicial Branch employees fails to provide the Judicial Branch with the following protections necessary to its essential functions (though these same protections are afforded to the Executive Branch in the WPA).

B. THE PROPOSAL FAILS TO REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The whistleblower litigation option fails to require Judicial Branch employees first to exhaust their EDR administrative remedies, though all federal courts have EDR whistleblower protection and claim procedures. The Judicial Branch is a co-equal branch of government and is entitled to mutual recognition and congressional respect of its internal administration and employment procedures. The Executive Branch has been afforded such respect: In contrast to the whistleblower litigation option, the WPA covering the Executive Branch requires employees to exhaust administrative procedures by first bringing whistleblowing claims to the Office of Special Counsel. 5 U.S.C. § 1214(a)(3). Principles of comity require that the Judicial Branch be entitled to the same respect.

C. THE PROPOSAL FAILS TO REQUIRE GOOD FAITH OR REASONABLE BELIEF.

The whistleblower litigation option lacks any requirement that the employee act in good faith or possess a reasonable belief they are reporting illegality or misconduct. The WPA requires that the whistleblower “reasonably believes” his or her disclosure evidences a violation of law or misconduct. 5 U.S.C. § 2302(b)(8)(A). Indeed, we are aware of no federal whistleblower protection provision that does not include a requirement that the employee have a good faith or reasonable belief they are disclosing a violation of law or misconduct. Yet the whistleblower litigation option for the Judicial Branch contains no similar protection for the Judicial Branch.

In sum, we oppose the proposed statutory whistleblower litigation option because it is unnecessarily superfluous to the existing Judicial Branch EDR whistleblower protection, it fails to require exhaustion of administration remedies, and it does not require the employee to have any good faith or reasonable belief the disclosure evidences wrong-doing.

III. CIRCUIT COUNCILS AND JUDICIAL CONFERENCE COMMITTEES CAREFULLY ADMINISTER LEGAL PROCESS WITH STATUTORY GUIDELINES FOR ADDRESSING JUDGES’ MISCONDUCT.

With regard to the oversight of judicial conduct matters, the Judicial Conference’s Judicial Conduct and Disability Committee operates under a statutory structure created in the Judicial Conduct and Disability Act of 1980. The structure functions efficiently and effectively as witnessed in recent incidents involving allegations of judicial misconduct. The structure provides for an investigatory process that protects privacy interests while the alleged wrong-doing is investigated. It also provides for several stages of review by up to four separate bodies of judges, which protects against the possibility of any politically motivated charges or outcomes.

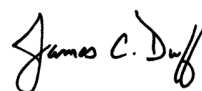
Under the Judicial Conduct and Disability Act, any person may file a misconduct complaint with the Chief Judge of a circuit, who in turn may appoint an investigatory committee of judges to examine the allegations and make a recommendation for independent consideration by the Circuit’s Judicial Council. In matters involving an investigation, the complainant may then seek review by the Judicial Conference’s Judicial Conduct and Disability Committee, which may then refer the matter to the entire Judicial Conference for a determination of whether the matter needs to be referred to the Congress for consideration of impeachment. The Chief Justice of the United States can resolve any potential conflicts by transferring complaints to different circuits. There are numerous examples of how complaints under the Judicial Conduct and Disability Act are addressed thoroughly and expeditiously.

The imposition of an Inspector General's investigatory powers and procedures overlapping the Judicial Branch's already functioning process is unnecessary and would only add procedural and constitutional attacks in collateral litigation by investigated judicial officers.

* * * *

We would be pleased to talk with you, your staff, and the Committee to answer any questions you may have or to clarify further these policies and practices within the Judicial Branch. We have found that increased dialogue with your staff about these issues has been productive and helpful. We all have the same interests in providing the best, most efficient services to the American people and, in doing so, protecting both the employees of the Judicial Branch and the independence of the Judicial Branch.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive style with a large initial "J" and a distinct "Duff" ending.

James C. Duff
Director

cc: Honorable Dianne Feinstein
Honorable Timothy M. Tymkovich

116 Nw. U. L. Rev. Online 275

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November 2, 2021

Essay

Hon. M. Margaret McKeown ^{al}

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THE JUDICIARY STEPS UP TO THE WORKPLACE CHALLENGE

ABSTRACT—As the #MeToo movement swept the country, the federal judiciary faced its reckoning in light of allegations against several judges. In short order, with the backing of Chief Justice Roberts, workplace issues took center stage. This Essay highlights workplace risks relevant to the judiciary, then details the significant changes adopted by the federal judiciary to foster a healthy, harassment-free, and productive work environment. Major undertakings include the establishment of a national Office of Judicial Integrity; circuit-wide Directors of Workplace Relations; multiple avenues to report misconduct, including anonymous reporting; revamped employment dispute policies; revised ethics, reporting, and discipline rules; and targeted workshops and trainings. While realizing the full potential of these reforms will require continued focus and deliberate attention across our workplace of 30,000 employees nationwide, the federal judiciary—with the backing of Chief Justice Roberts—remains committed to a workplace that treats everyone with respect and dignity.

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***276 INTRODUCTION**

In October 2017, more than a decade after activist and sexual violence survivor Tarana Burke began using the phrase “me too,” the hashtag “#MeToo” went viral on Twitter.¹ Revelations of sexual harassment, violence, bullying, and other misconduct flooded social media and the press as survivors shared stories and support.²

As the #MeToo movement gained momentum, stories of harassment and assault surfaced across industries, implicating some of the most powerful ^{*277} individuals in sectors as varied as entertainment,³ banking,⁴ fashion,⁵ food,⁶ and technology.⁷ Hollywood became front and center with accusations against influential film producer Harvey Weinstein.⁸ Once allegations of misconduct became ubiquitous, these industries and others were forced to grapple with pervasive sexual misconduct.

The federal judiciary was not immune. In December 2017, the United States Court of Appeals for the Ninth Circuit learned of multiple allegations of sexual misconduct against then-Judge Alex Kozinski.⁹ He resigned ten days later.¹⁰

As an independent branch of the United States government, the judiciary is tasked with making decisions and taking actions that affect everyone in the country. The judiciary's effectiveness is dependent on its highly accomplished judges and the respect and regard citizens have for the institution. With approximately 2,300 judges, the federal judiciary includes the United States Supreme Court, circuit courts of appeals, district courts, bankruptcy courts, other specialized courts, and federal defenders, and it *278 operates clerks' offices, libraries, pretrial services, probation departments, and administrative units.¹¹ With over 30,000 employees nationwide in workplaces of different sizes,¹² the judiciary is committed to a workplace that treats everyone with respect, recognizes everyone's dignity, and fosters inclusivity. As an institution, the judiciary has the responsibility to address workplace misconduct and recognizes that a sea change in approach is in order.

In response to the allegations against Kozinski, the federal judiciary recognized the need to do more to prevent and combat harassment, and it took action. Even before Kozinski's swift resignation following the allegations, Ninth Circuit Chief Judge Sidney R. Thomas appointed the Ad Hoc Committee on Workplace Environment (Ninth Circuit Committee), which was charged with conducting a comprehensive review of workplace practices and policies in the Ninth Circuit and making recommendations for improvement.¹³ Other circuits followed suit.¹⁴ And in his 2017 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts of the United States Supreme Court tasked the Director of the Administrative Office of the U.S. Courts (the AO) with forming a working group to undertake "a careful evaluation of whether [the federal judiciary's] standards of conduct and its procedures for investigating and correcting inappropriate behavior [were] *279 adequate to ensure an exemplary workplace for every judge and every court employee."¹⁵ The following month, in January 2018, the federal courts established the Federal Judiciary Workplace Conduct Working Group (National Working Group), a national counterpart to the Ninth Circuit Committee.¹⁶

Now, more than three years later, there have been substantial changes in workplace policies and visible improvements in the workplace environment. Ethics and discipline rules have been significantly revised, the national Office of Judicial Integrity and circuit Directors of Workplace Relations were established, and employees now have new avenues to seek confidential advice and guidance with multiple formal, informal, and anonymous reporting options and a judiciary that is more prepared to take prompt, fair action. This Essay catalogues many of these procedural and process improvements while recognizing that transforming workplace conduct is not instantaneous or simply a matter of revising policies. Most importantly, with the backing of Chief Justice Roberts, the issue has taken center stage in the judiciary, which is mindful that fostering an exemplary workplace is an ongoing process and that the judiciary must be vigilant about addressing continuing and novel challenges.

This Essay begins with a description of the EEOC's research on sexual harassment, which provides a foundation to explore the risk factors that are present in an institution such as the judiciary. The most salient factor is the power disparity that exists between judges and their clerks and staff, coupled with an often-isolated workplace. By leveraging that research, plus surveys and outreach to relevant stakeholders including current and former law clerks, court employees, and law schools, the past three years have resulted in major institutional changes. Though allegations of sexual harassment catalyzed the initial action, the changes extend more broadly to include *proactive* improvements to the workplace climate. And although the initial allegations stemmed from law clerks, the judiciary's response embraced the voices of the entire 30,000-plus employee workforce.

This Essay then surveys the key structural changes in workplace policies, procedures, and practices, ranging from the appointment of a national Judicial Integrity Officer and circuit Directors of Workplace Relations to revision of confidentiality policies, the ethics and disciplinary *280 codes, and employment dispute resolution policies. These changes seek to address the calls to interrogate the institutional structures that led to this moment, such as those made by Professor Leah Litman and Deeva Shah in their Essay, *On Sexual Harassment in the Judiciary*.¹⁷

Finally, while this Essay reflects on the strides the judiciary has made over the past three years, it also recognizes that there is no such thing as “victory.” The policies and practices, the people who implement them, and the leaders who insist upon them must constantly assess performance, listen to constructive feedback on our efforts,¹⁸ and address new and remaining challenges.¹⁹

This Essay does not attempt to distance the federal judiciary from the harassment events that have been publicly debated or from the genuine risk factors present. Rather, it endeavors to highlight in considerable detail the ways in which the judiciary has systematically evaluated, identified, and responded to workplace misconduct, including sexual harassment and bullying.

I. LINKING THE NATURE OF HARASSMENT IN EMPLOYMENT GENERALLY WITH EMPLOYMENT IN THE JUDICIARY

A. EEOC Report on Risk Factors for Harassment in the Workplace

Five years ago, in the face of rising claims of sexual harassment nationwide and before the Kozinski allegations surfaced, the Co-Chairs of the EEOC’s Select Task Force on the Study of Harassment in the Workplace (the Select Task Force) published a report documenting the persistence of workplace harassment and offering potential solutions (EEOC Report).²⁰ This report was the culmination of eighteen months spent examining the complex issues associated with harassment in the workplace.²¹ During that time, the Select Task Force examined tens of thousands of charges and complaints received by the EEOC; reviewed research; and convened experts *281 from law, sociology, psychology, employment, and more to better understand workplace harassment and how to prevent it.²²

It is well understood that harassment harms its targets and, when mishandled or overly cumbersome, reporting can cause additional harm, as these individuals may experience psychological distress from the reporting process itself and from the fear and reality of adverse job repercussions.²³ It is therefore important to emphasize *prevention* and to develop systems that will minimize these harms.

The Select Task Force thus endeavored to identify risk factors--“elements in a workplace that might put a workplace more at risk for harassment”--in order to “give employers a roadmap for taking proactive measures to reduce harassment in their workplaces.”²⁴

The EEOC Report catalogued a nonexhaustive, nonexclusive list of organizational conditions that are risk factors, including: “homogenous workforces,” “workplaces where some workers do not conform to workplace norms,” “cultural and language differences in the workplace,” “coarsened social discourse outside the workplace,” “workforces with many young workers,” “workplaces with ‘high value’ employees,” “workplaces with significant power disparities,” “workplaces that rely on customer service or client satisfaction,” “workplaces where work is monotonous or consists of low-intensity tasks,” “isolated workspaces,” “workplace cultures that tolerate or encourage alcohol consumption,” and “decentralized workplaces.”²⁵ The EEOC Report explains that most workplaces will contain some of these factors, and the presence of risk factors alone does not guarantee that harassment is occurring in that workplace.²⁶ But the presence of risk factors--especially multiple risk factors--does suggest that a workplace “may be fertile ground for harassment.”²⁷

B. Understanding the Risk Factors for the Judiciary

The nature of the federal judiciary informs how these risk factors map onto the judicial environment. Judicial independence is a foundational tenet of the judiciary as the third branch of government.²⁸ Judicial decision-making *282 is, and must be, independent of the executive and legislative branches and from political or other outside influences.²⁹ This independence is essential to ensure that judicial decisions remain legitimate, impartial, and transparent.³⁰

Stemming from the need to protect and ensure judicial independence, the federal judiciary has several unique features. First, under the Constitution, federal judges have lifetime tenure, or more accurately, “hold their Offices during good Behaviour.”³¹ The life tenure of federal judges is intended to insulate them from shifting political winds and outside pressures in reaching their decisions and to further support their independence.³²

Second, federal courts operate under a regionalized governance structure developed to support the core tenet of judicial independence and maintain a certain level of autonomy within the courts at the district and circuit levels.³³ While the Judicial Conference of the United States makes national policy for the federal courts, district courts and circuit courts manage their own employees, and individual judges have significant autonomy in how they organize and manage their personal staff and interact with other court employees.³⁴ In addition, the judiciary is distributed across a wide variety of geographic regions serving vastly different communities across the country.

Although the unique features of the federal judiciary provide important benefits, they also create several risk factors for harassment as described by the EEOC and others.³⁵ While life tenure guards the integrity of the judiciary, it nonetheless contributes to a power disparity between judges and employees—particularly law clerks and others who work in the judges' chambers. Research conducted in university settings has shown that “[h]ierarchical work environments ... where there is a large power differential between organizational levels and an expectation [] not to question those higher up, tend to have higher rates of sexual harassment than *283 organizations that have less power differential between the organizational levels.”³⁶ Sexual harassment is more pervasive in these environments because high-status employees may be more likely to exploit lower status employees, who may not understand the complaint mechanisms or may fear retaliation in response to reporting.³⁷

This research informs potential areas of concern within the federal judiciary. Though the individual workplace environments of the 30,000 judiciary employees have widely diverse characteristics, judicial chambers (which employ about one-fifth of these individuals)³⁸ are a focal point for power disparity. Federal judges oversee their chambers, often with one judicial assistant and several law clerks. Law clerks, many at the beginning of their legal careers and typically in one- or two-year positions, depend on judges for future job opportunities, recommendations, and networking connections.³⁹ Other chambers employees, like judicial assistants, often work for a single judge during their career and are thus dependent on that judge for their livelihood and for recommendations for future job opportunities. Judges thus have expansive power over their chambers and the employees who work there.

In addition to having a potential power disparity between their employees, some judicial chambers can be relatively isolated workplaces. This is a byproduct of a geographically dispersed judiciary and judges' autonomy in managing their chambers.⁴⁰ As the EEOC noted, harassment is more likely to occur in situations where employees may be physically isolated from their colleagues or where coworkers are less likely to report harassment.⁴¹

Understanding the unique facets of the judiciary and how they relate to the EEOC Report risk factors was, and remains, central in the work of the National Working Group and the Ninth Circuit Committee tasked with improving the workplace. These risk factors served as a road map for the judiciary's efforts, discussed next, to implement reforms designed to respond to harassment in the workplace.

***284 II. REFORM IN THE FEDERAL JUDICIARY**

A. Benchmarking the Need for Reform

Though some academics and former employees have expressed concern that the legal profession has not examined and reformed the structures that have allowed for harassment in the past,⁴² the first step in the judiciary's process was a top-to-bottom review of its employment structure and policies.⁴³ Responding to Chief Justice Roberts's push to address workplace conduct, the judiciary's priority was “to examine the sufficiency of the safeguards

currently in place within the Judiciary to protect all court employees from inappropriate conduct in the workplace” and to recommend any necessary changes and reforms.⁴⁴ As a complement to this review, beginning in early 2018 and still ongoing, the judiciary conducted extensive outreach and consultation with judges, employees (including court unit executives, managers, and supervisors), advisory committees within the judicial branch, law clerks, interns, externs, and volunteers to obtain valuable feedback from an employee perspective.⁴⁵ This outreach included expansive efforts to reach current and former law clerks and employees through focus groups, surveys, and anonymous email reporting.⁴⁶ Additionally, the judiciary solicited reviews from other stakeholders and interested constituencies including law schools, the EEOC, Law Clerks for Workplace Accountability, and employment experts from outside of the judiciary.⁴⁷

The results of these research and outreach efforts reflected some common themes. While the vast majority of employees were satisfied with their workplaces and did not report pervasive inappropriate conduct, three key areas emerged as opportunities for improvement:

- *285 • Multiple options for discussing and reporting workplace concerns;
- Coverage and clarity of workplace policies and procedures; and
- Training on workplace conduct issues.⁴⁸

More specifically, some employees articulated their reluctance to report workplace concerns through then-available channels, the lack of information about policies or work expectations, the need for more specific training and education, and a desire for a more collegial and interactive workplace environment to counteract feelings of isolation.⁴⁹ Others indicated a need for establishing, improving, and communicating policies related to antibullying and sexual harassment and a need to change the overall judicial culture to one where judges took more responsibility to stop and prevent inappropriate behavior.⁵⁰ And other stakeholders raised the desire for informal and confidential avenues outside the local chain of command to address inappropriate conduct.⁵¹ In terms of training topics, antibullying, civility, leadership, and bystander intervention were commonly requested.⁵²

This extensive feedback plus additional research served as a blueprint for the judiciary's approach to changes and improvement in these areas. The National Working Group's 2018 Report to the Judicial Conference of the United States included recommendations that were based on the EEOC Report and other research, input from several circuits' workplace conduct working groups, and the feedback from employees, former law clerks, and interest groups.⁵³ Over the fifteen months following this report, the judiciary engaged in an intensive effort to revise policies and implement changes that would improve the workplace by generating confidence in a confidential and fair system to prevent, reduce, and address inevitable workplace issues. The National Working Group issued a 2019 Status Report that summarized the progress and extensive revisions that the judiciary implemented, and the key reforms are outlined in detail below.⁵⁴ Each structural change, policy amendment, and revision was, of necessity, approved by the appropriate *286 governing body, and that process, too, led to wide acceptance and adoption of the reforms.

B. Judiciary Workplace Reforms

Judiciary policies regarding workplace conduct live in three places: the Model Employment Dispute Resolution Plan (Model EDR Plan) (procedures for reporting and resolving complaints related to all employees, including

judges),⁵⁵ the ethics codes for the judiciary (the Code of Conduct for United States Judges and the separate Code of Conduct for Judicial Employees), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules) (rules governing misconduct complaints against judges).⁵⁶ The different policies are meant to function both independently as well as interdependently, as they complement each other. In response to the findings and recommendations of the National Working Group and the circuit committees, each of these three policy areas has been overhauled. In March 2019, the Judicial Conference of the United States approved revisions to the ethics codes and the JC&D Rules.⁵⁷ Individual courts began revising their EDR plans soon after the reports of sexual harassment, and the revised Model EDR Plan was approved in September 2019.⁵⁸

1. Revamped Confidentiality Policy

Considering the sensitive and confidential nature of information entrusted to the judiciary, it is a given that employees are bound by various confidentiality obligations. Through law clerk and employee feedback, the National Working Group and circuit committees learned, however, that there was confusion and ambiguity about whether those obligations impeded the reporting of harassment.⁵⁹ The National Working Group stressed that the “confidentiality obligations [of judiciary employees] must be clear so both judges and judicial employees understand these obligations never prevent *287 any employee—including a law clerk—from revealing abuse or misconduct by any person.”⁶⁰ Not surprisingly, research demonstrates that “[d]eveloping and disseminating clear anti-harassment policies is crucial”⁶¹ because lack of clarity in these policies can stymie reporting.⁶²

To dispel any ambiguity, policies were immediately revised to make clear that, although information received in the course of judicial business remains confidential, reports of workplace harassment and misconduct are not subject to confidentiality restrictions.⁶³ The Code of Conduct for Judicial Employees was revised to clarify that the “general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.”⁶⁴ The law clerk handbook was similarly revised, the JC&D complaint process was amended to include a new provision, and related commentary emphasizing that nothing in the confidentiality provisions in the JC&D Rules or the Code of Conduct for Judicial Employees prevents a judicial employee from reporting or disclosing misconduct or disability.⁶⁵

2. Creation of the Office of Judicial Integrity and Directors of Workplace Relations

The most frequent recommendation from current and former employees “was for a clearly identifiable and independent person of high stature to whom they could report misconduct and discuss other workplace concerns.”⁶⁶ Key to this position, employees noted, was that it be outside of the supervisory chain of command.⁶⁷ And yet, employees did not favor reporting to an entity or person outside the judiciary. Two of the most significant changes in response to these comments were the AO’s establishment of the Office of Judicial Integrity, and the Ninth Circuit Committee’s appointment of the first Director of Workplace Relations.⁶⁸ *288 Other circuits soon adopted this approach, and now there is a director (or analogous role) for every circuit.⁶⁹

The national Office of Judicial Integrity, headed by the national Judicial Integrity Officer, serves as an independent resource outside of the courts’ traditional chain of command.⁷⁰ It provides confidential help, information, referral, and guidance in complaint options to address workplace harassment, abusive conduct, or other misconduct. This office also monitors recurring workplace issues to identify trends and conduct systemic reviews.

Modeled in part after an organizational ombudsman, each Director of Workplace Relations is an independent circuit-wide position that acts as a confidential resource within the circuit. They confidentially talk through issues with employees (including clerks, supervisors, managers, court unit executives, and judges), provide information about policies and procedures, set out options for early-stage resolution and the complaint process, offer guidance, receive reports of workplace issues, and monitor the workplace environment for trends and patterns.⁷¹

Directors serve all court units within a circuit--court of appeals, district and bankruptcy courts, probation and pretrial offices, and federal public defender offices. They do not report directly to any chief judges or judges, nor do they report to other court unit supervisory personnel such as the clerk of court, chief probation or pretrial officer, or chief federal public defender. Instead, directors report to the Circuit Executive yet maintain considerable autonomy.⁷²

The Directors of Workplace Relations and the Judicial Integrity Officer bring relevant and wide-ranging experience to their roles with backgrounds as former federal circuit court law clerks, Title IX officers, mediators, and *289 EEOC attorneys.⁷³ One of the benefits of this diverse collective experience is that it provides the judiciary with an internal group of experts who can see the workplace from a bird's eye view and who are well-positioned to collaboratively assess trends and feedback for additional improvements to the judiciary's policies, processes, and structures for addressing workplace issues. The Judicial Integrity Officer and directors from across the nation serve on the national Directors of Workplace Relations Advisory Group and meet frequently to discuss emerging issues, share information, and develop best practices. They draw on direct and indirect feedback to continue improving: it is an iterative process of making changes, assessing their effectiveness, adjusting as necessary, and disseminating information to national, circuit, and local court unit leadership as appropriate.

The creation of these new positions not only addresses one of the top employee requests, but it also serves to mitigate at least two other risk factors identified by the EEOC--decentralization and isolation. Because these individuals are available to employees in all court units, they function as centralized and uniform resources for employees to learn about their rights and options without fear that their local leadership will be informed of their confidential conversations.⁷⁴ And, importantly, the directors look beyond individual employees and workplaces to identify institutional trends.

3. Multiple Avenues for Advice, Reporting, and Resolution

Another key change was the development of multiple avenues to report, discuss, and resolve workplace concerns. The EEOC recommends that an anti-harassment policy include a “clearly described complaint process that provides multiple, accessible avenues of complaint.”⁷⁵ This recommendation is supported by research that demonstrates the efficacy of providing both *290 formal and informal dispute resolution options in combatting workplace harassment.⁷⁶ “Increasing informal, confidential options within the complaint-response system is important ... to create more supportive environments for those who have experienced sexual harassment.”⁷⁷ Employees feel more confident pursuing grievances when informal advice and multiple communication channels are available to them.⁷⁸ In accordance with these recommendations and the supporting research, the judiciary undertook significant reforms to its complaint processes in 2019.

Prior to the 2019 reforms, a clerk or other employee seeking to report a judge's misconduct primarily had two formal options: to file a complaint via an EDR Coordinator or file a formal JC&D complaint with the clerk's office or the Chief Circuit Judge.⁷⁹ EDR Coordinators are locally designated employees within each court unit who, in addition to their full-time jobs, provide guidance and administrative support for individuals and employing offices participating in the judiciary's internal employment dispute resolution process.⁸⁰

While nothing prevented a law clerk or other employee from reporting to another judge or supervisor, some employees did not see that as a realistic option.⁸¹ Outside of chambers, other judicial employees who wanted to report misconduct of judges or other employees had the options of reporting directly to a supervisor or manager, to human resources, or to EDR Coordinators.

Having only formal options hindered reporting. Employee feedback reflected a reluctance to report workplace concerns out of fear of retaliation from superiors and harm to their future career prospects.⁸² Employees further expressed concerns about “whether details of their complaint would be kept private, reported misconduct would

be adequately investigated, and *291 reporting would lead to a satisfactory resolution.”⁸³ Employees likewise expressed a desire for a confidential reporting avenue outside of the direct chain of command.⁸⁴

The changes were tailored to all of these concerns. Now employees can *explicitly* pursue multiple options: confidential informal advice, assisted resolution, and formal complaint.⁸⁵ To further assure that employees understand the reporting routes available, materials were developed to communicate the procedures. One such example is the following chart, created internally--a graphic outline of these options:

***292 FIGURE 1: OPTIONS FOR WORKPLACE ADVICE AND COMPLAINTS IN THE FEDERAL JUDICIARY.**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

“Informal Advice” is an option that allows an employee to receive confidential advice and guidance from a *local* EDR Coordinator, a *circuit* Director of Workplace Relations, or the *national* Judicial Integrity Officer.⁸⁶ This confidential guidance may include providing information on the employee's rights, providing perspective on the conduct, discussing ways to respond to the conduct, and providing an outline of potential options for resolution.⁸⁷ A primary purpose of informal advice is to confidentially provide employees with relevant information so they can make informed decisions about how to proceed with their concerns. As explained by the *293 EEOC, engaging in a reporting process can cause psychological distress.⁸⁸ The aim of the informal advice channel is to reduce the psychological distress of reporting. Accordingly, the conversations remain confidential unless the employee seeks or requests further action.⁸⁹ In this way, employees pursuing the “Informal Advice” option generally control the level of confidentiality that attaches to their conversations.⁹⁰

The “Assisted Resolution” avenue available under the EDR is an interactive and flexible process that may include discussions with the source of the conduct, preliminary investigations including interviewing the witness, and resolution by agreement.⁹¹ Consistent with the EEOC Report, this option gives employees an informal method to resolve a workplace matter, typically at an early stage.

Finally, filing a formal complaint remains an option as well. The conduct of a judge or an employee may be the subject of an EDR complaint, while a complaint under the JC&D process is limited to complaints against judges.⁹² Through formal resolution, a complainant may pursue remedies such as back pay, reinstatement, promotion, records modification, granting of family and medical leave, any reasonable accommodations, and any other appropriate remedy to address the wrongful conduct.⁹³

The Office of Judicial Integrity and Directors of Workplace Relations are key channels in the multiple avenues of reporting and receiving confidential guidance now available to judiciary employees. In addition to these newly created roles, the judiciary has also retained and revamped the EDR Coordinator role as a point of contact for employees who wish to report and resolve workplace concerns at a local level.⁹⁴

Early evidence indicates that the creation of multiple and confidential informal avenues for reporting has been successful in removing barriers to *294 reporting. Multiple Directors of Workplace Relations have reported that they spend more of their time on confidential informal advice than anything else--albeit on a range of workplace issues, not only harassment.⁹⁵ Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were not comfortable coming forward. The interventions have included informal actions to stop the inappropriate behavior, targeted trainings, policy revisions, mediations and facilitated conversations, and investigations.⁹⁶ These informal, confidential, and flexible options mitigate some of the impacts of the power disparities inherent in the judiciary.

These reporting avenues are not mutually exclusive and can be pursued simultaneously. And pursuing these options does not preclude the filing of a formal complaint. The net result is that structural barriers are removed,

confidentiality is protected to the greatest extent possible, and it is anticipated that employees will gain confidence in the system.

4. Major Revision of Harassment-Related Policies

a. Promoting Civility and Prohibiting Abusive Conduct

The Codes of Conduct and JC&D Rules now make clear that all judiciary employees, including judges, have an affirmative duty to promote civility both in the courtroom and throughout the courthouse. The Code of Conduct for judges emphasizes that its canons regarding civility--requiring that judges be patient, dignified, respectful, and courteous--extend not just to those coming before the court but also to all court personnel including chambers employees.⁹⁷ In a similar vein, the JC&D Rules now expressly protect judicial employees from “demonstrably egregious and hostile” treatment.⁹⁸

The codes of conduct for both judges and judiciary employees now expressly cover sexual harassment, discrimination, abusive behavior, and retaliation for reporting or disclosing judicial misconduct. A new section in the JC&D Rules, entitled “Abusive or Harassing Behavior,” provides that cognizable misconduct includes “engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault” as well as *295 creating a hostile work environment.⁹⁹ These changes expand the workplace-conduct obligations for federal judges and employees.

The judiciary's policies have long protected against “discrimination and harassment based on race, color, national origin, sex, gender, pregnancy, religion, and age (40 years and over),” but they were expanded in 2019 to include gender identity and sexual orientation within the definition of “protected categor[ies].”¹⁰⁰ As a consequence of employee feedback and consistent with the reality of today's workplace, the Model EDR Plan also added “[a]busive conduct” as a form of wrongful conduct, defined as “a pattern of demonstrably egregious and hostile conduct not based on a [p]rotected [c]ategory that unreasonably interferes with an [e]mployee's work and creates an abusive working environment.”¹⁰¹ Judiciary employees are thus now protected not only from discriminatory harassment but also from any form of harassment that unreasonably interferes with the work environment, regardless of motivation. Indeed, the revised Model EDR Plan includes a clear policy statement setting forth “wrongful conduct” prohibited in the workplace, including discrimination; “sexual, racial, and other discriminatory harassment;” abusive conduct; retaliation; and violations of specific employment laws.¹⁰² This expansion of wrongful conduct was significant in that the judiciary not only recognized harassment but also the closely related misconduct of abusive behavior.

b. Retaliation Protection and Bystander Reporting Obligation

The concern about “closed-door” interactions and a victim's reluctance to report misconduct is understandable, so the Working Group recommended that the JC&D Committee “provide additional guidance ... on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation” and “reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct.”¹⁰³ In response, the Judicial Conference expanded the JC&D Rules to define judicial misconduct “to include retaliation for reporting or disclosing judicial misconduct or disability.”¹⁰⁴ It “also added a new provision that includes a judge's failure to bring ‘reliable information reasonably likely to constitute judicial misconduct’ to the attention of the relevant chief district judge or chief circuit *296 judge within the definition of cognizable misconduct.”¹⁰⁵ Because sexual harassment and abusive behavior fall within such misconduct, judges now have an affirmative obligation in specific circumstances to come forward. This change is significant as the information ultimately must be shared with chief circuit judges who, apart from an individual complainant, have the authority to initiate a complaint against a judge.¹⁰⁶

Before recent changes, judges were advised to “take appropriate action” against misconduct.¹⁰⁷ The Code of Conduct for judges was amended to put teeth into this standard. As the commentary to the amended Code provision states:

Public confidence in the integrity and impartiality of the Judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence.¹⁰⁸

That commentary also clarifies that these provisions are read in conjunction with the JC&D Rules on misconduct.¹⁰⁹ The Code of Conduct for employees was correspondingly revised, emphasizing employees' “duty to promote appropriate workplace conduct, prohibit workplace harassment, take appropriate action to report and disclose misconduct, and prohibit retaliation for reporting or disclosing misconduct.”¹¹⁰ These changes coupled with increased training and widespread dissemination of related information have resulted in judges, law clerks, and employees coming forward to report inappropriate comments and conduct. Virtually all of these have been resolved through informal means, further investigation, mediation, and/or remedial action.

c. Complete Overhaul of Model EDR Plan

Before recent amendments, a reading of the existing Model EDR Plan revealed that it was dense, required exhaustion of mediation before filing a complaint, and was more procedurally complicated.¹¹¹ A wholesale revision to the plan resulted in a streamlined, easy-to-understand document that *297 encourages the reporting of workplace misconduct and provides multiple, more flexible options for resolving claims. As discussed above, the revised Model EDR Plan encourages reports of wrongful conduct by making clear that confidentiality requirements do not prohibit reporting workplace misconduct.¹¹² Revisions made to the Model EDR Plan increased the time to file a formal EDR complaint from 30 to 180 days from the alleged wrongful conduct or the time an employee becomes aware of such wrongful conduct and extended “EDR coverage to all paid and unpaid interns and externs.”¹¹³

The revised Model EDR Plan provides that the appropriate chief judge be notified of claims against a judge and that the chief judge oversees a request for assisted resolution or a formal complaint process that includes allegations against a judge or court unit executive.¹¹⁴

Importantly, the revised Model EDR Plan offers a process that is impartial and free of conflicts of interest.¹¹⁵ It provides that those managing or presiding over an EDR process must recuse if they participated, witnessed, or were otherwise involved in the conduct giving rise to the claim.¹¹⁶ It also requires recusal if the matter creates an actual or perceived conflict of interest.¹¹⁷ Where appropriate, it allows for a judge from a different court to be brought in to preside over a complaint.¹¹⁸ And, it further prohibits judges and unit executives from serving as EDR Coordinators.¹¹⁹

To ensure its efficacy, in January 2020, the Office of Judicial Integrity and EDR Working Group issued an internal EDR interpretive guide and handbook for all employees, managers, and judges, so that EDR claims can be processed in a uniform, conflict-free manner nationwide.¹²⁰

d. Revisions to the JC&D Rules

In addition to the revisions discussed above, the JC&D Rules were further revised to eliminate barriers to reporting and increase accountability *298 for judges, including clarification that confidentiality requirements do not limit disclosure of misconduct.

The National Working Group emphasized the judiciary's “institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition.”¹²¹ By law, Congress has provided that a judge who no longer holds a judicial commission is not subject to disciplinary proceedings under the Judicial Conduct and Disability Act.¹²² But that does not mean that the judiciary is stymied from a “look back” to learn from a misconduct complaint. To this end, the judicial conduct rules now highlight the authority of both the Judicial Conference and the relevant judicial council to evaluate the underlying circumstances that contributed to the misconduct, thus promoting appropriate review of what precautionary or curative steps need be undertaken to prevent its recurrence.¹²³ In addition, the judiciary may make referrals to law enforcement and licensing authorities even after a judge resigns.¹²⁴

Finally, the amendments were designed to increase transparency. For example, certain disclosures are allowed for details of a complaint that are already in the public realm (thus minimizing the need for confidentiality during the complaint proceedings), such as when key facts about the matter, such as a judge's identity, have been publicly released.¹²⁵

***299 e. Congressional Outreach**

Over the last several years, the judiciary has communicated often with various congressional offices and committees regarding its continuing work on workplace environments. This ongoing dialogue has included judiciary representatives providing testimony and documentation for congressional hearings,¹²⁶ providing written answers to questions for the record,¹²⁷ keeping Congress apprised of the judiciary's substantial efforts through its 2018 and 2019 reports, and responding to specific inquiries.¹²⁸ These responses capture the policy and procedural changes described in this Essay. In addition, the judiciary has acknowledged areas for improvement and reviewed how reported incidents are investigated and resolved.¹²⁹

III. TRAINING AND EDUCATION

Survey responses and other feedback revealed that, prior to 2018, many employees were unaware of policies prohibiting misconduct, their rights under those policies, or to whom they could turn with workplace misconduct concerns. In addition, some judges, managers, and supervisors were unsure of their obligations and responsibilities if they observed or otherwise became aware of misconduct.¹³⁰ In response, the judiciary has greatly expanded its training and educational opportunities consistent with the EEOC Report's recommendation that training is “an essential component of an anti-harassment effort.”¹³¹

The revised Model EDR Plan now requires annual EDR training to be provided for all employees, including judges and law clerks.¹³² That training *300 includes “bystander intervention,” which encourages those who recognize or witness misconduct to take action.¹³³ This may include reporting through the multiple channels available for assistance.¹³⁴ Judges, in particular, are advised that they are *required* to take appropriate action if they learn of wrongful conduct by any judicial employee, and they are *required* to report a fellow judge's misconduct to the chief judge.¹³⁵

The Office of Judicial Integrity has developed a uniform national training and certification curriculum for EDR Coordinators. All EDR Coordinators in the judiciary must now be trained and certified on the information and skills necessary to fulfill their function. This training is in addition to the annual training required for all employees.¹³⁶

The Federal Judicial Center regularly organizes educational programs for judges, court unit executives, managers and supervisors, and judiciary staff.¹³⁷ It has conducted trainings and programs on respect in the workplace,

civility, and implicit bias, and provided trainings and resources on other workplace topics.¹³⁸ Expanded training, such as on bystander intervention and the development of “soft skills” for managers and supervisors, is anticipated to supplement the traditional discrimination and harassment training programs already conducted. This expanded training will focus on broader themes and topics that promote a civil, respectful, and collaborative work environment.¹³⁹

Because of their unique roles and often short tenure, the Ninth Circuit has developed special initiatives targeting law clerks--expanded law clerk orientation agendas that include sessions on discrimination and harassment policies and employee dispute procedures, and sample chambers checklists on workplace expectations. Both endeavors encourage more transparency and communication about appropriate expectations of law clerks.¹⁴⁰ Training *301 for new judges begins at seminars following their confirmation hearings.¹⁴¹ And specialized workplace conduct training is offered for chief judges and others in supervisory roles focusing on their unique responsibilities as court leaders with respect to workplace conduct.¹⁴² A number of training and educational opportunities are offered online and through meetings, symposia, conferences, informal sessions with employees, reading clubs, and newsletters.¹⁴³ The Judicial Integrity Officer, chief judges, and Directors of Workplace Relations are seeing the impact of increased communications and training through additional inquiries and reports. Indeed, multiple employees have stated that these trainings alerted them to the inappropriate nature of certain behaviors and to the resources available to address them. And Directors of Workplace Relations have reported seeing an increase in the number of misconduct reports after holding trainings.¹⁴⁴

Increased education about the workplace makes employees aware of their rights, makes judges aware of their obligations and responsibilities, reinforces behavioral expectations, and sends a clear message that these issues matter and are taken seriously. Increased training also reduces the negative impacts of isolated workplaces. When employees, including clerks, are informed--early, clearly, and repeatedly--of their rights and options *and* of the expectations and obligations placed on judges, the judiciary's commitment to a fair and transparent workplace is reinforced.

IV. LOOKING TO THE FUTURE

A. Internal Efforts

The judiciary is steadfast in its commitment to enduring improvements. The Office of Judicial Integrity and the network of Directors of Workplace *302 Relations and EDR Coordinators continue to track and respond to workplace conduct trends, serve as resources for court employees, collaborate on best practices, and increase awareness of the judiciary's flexible reporting processes. Indeed, direct feedback on these resources has resulted in suggested changes, as recounted in this Essay. The National Working Group continues to meet, review relevant policies and procedures, identify areas for improvement, and aggressively recommend changes to existing structures while working closely with various other judicial committees.

The judiciary also is expanding the ways it collects feedback from employees, from post-training surveys regarding employees' awareness of available resources to anonymous comment boxes and both court-wide and unit-focused climate surveys. Several circuits have previously conducted either climate surveys or law clerk exit surveys which have provided valuable feedback for the development of workplace initiatives.¹⁴⁵ As Professor Litman and Shah note, and the EEOC recommends, workplace surveys are a means to uncover potential problems, including harassment.¹⁴⁶ Climate surveys and other feedback mechanisms “can alert organizations to the extent of the problem and provide[] them with an opportunity for early intervention.”¹⁴⁷

At the national level, all judiciary employees can provide information anonymously to the Office of Judicial Integrity through its online reporting mechanism, which allows employees to relay concerns without any attributable or identifying information. The Ninth Circuit implemented a similar tool for conveying anonymous information.¹⁴⁸ While the ability to respond directly is limited with anonymous complaints, information is

aggregated and reviewed for patterns, trends, and other information that may provide insight on potential training needs or other interventions.

Several circuits have developed or are developing various types of law clerk and employee engagement groups, facilitating closer engagement and interaction between chambers and court units.¹⁴⁹ These opportunities provide useful assistance to employees and simultaneously serve as a source of feedback to Directors of Workplace Relations about current concerns and the unique needs of each group. For example, the Ninth Circuit launched the Law Clerk Resources Group, comprised of former law clerks, to help current law clerks navigate their clerkships and provide them the opportunity to *303 discuss questions and concerns about their chambers experience with peers.¹⁵⁰ Similarly, the D.C. Circuit created a Law Clerk Advisory Group.¹⁵¹ Expanding on these models, the First Circuit includes law clerks, probation and pretrial services employees, and Clerk's Office staff on its Workplace Conduct Committee.¹⁵²

B. Partnerships

The Office of Judicial Integrity and Directors of Workplace Relations also serve as conduits and liaisons for outside stakeholders, such as law schools, clerkship programs and associations, and other organizations that interact with the judiciary. Judiciary representatives are collaborating with organizations like the National Association of Law Placement and the Association of American Law Schools and are connecting with law school administrators.¹⁵³

Law school faculty and administrators have a unique window into their students' and graduates' experiences. They can be valuable partners to the judiciary in identifying and addressing workplace misconduct during or after clerkships or other assignments.¹⁵⁴ In August 2021, the Director of the Administrative Office reached out to nearly 200 law schools to update them on the judiciary's efforts and to seek their assistance in “identify[ing] and correct[ing] any workplace conduct that falls short of [the judiciary's] high standards.”¹⁵⁵ The letter urges law schools to contact the Office of Judicial Integrity or a Circuit Director of Workplace Relations if they “receive a report of or hear about potential workplace misconduct in the Federal *304 Judiciary.”¹⁵⁶ Confidentiality protections in place for this reporting should enhance follow-up by law schools and the judiciary.

CONCLUSION

Recent news reports highlight that no industry is immune from workplace harassment.¹⁵⁷ As the EEOC and others have recognized, the institutional structures of some workplaces may increase the likelihood of misconduct while at the same time decreasing the likelihood of its detection. Professor Litman and Shah point out that the federal judiciary possesses several risk factors for harassment, and the surfacing of allegations against federal judges underscores the pressing need to address these institutional structures.¹⁵⁸

In evaluating the work that needs to be done to combat workplace harassment, Professor Litman and Shah call on the legal profession, including the judiciary, to engage in a “sustained, public reflection about how our words, actions, attitudes, and institutional arrangements allow harassment to happen, and about the many different ways that we can prevent and address harassment.”¹⁵⁹ After more than three years of intensive efforts to change the workplace landscape with respect to harassment and bullying, this Essay reflects on the ways in which the federal judiciary has begun this difficult but necessary work and acknowledges that it will take ongoing vigilance and attentiveness. Leadership will continue reflection and reform with the goal to gain the workforce's trust and confidence in the fairness of the policies and their implementation.

As one of the EEOC Report's authors testified to Congress, “two essential components of a successful effort to shape workplace culture are leadership from the top and a focus on the unique needs of a particular *305 workplace.”¹⁶⁰ The leadership has come directly from Chief Justice Roberts, chief circuit and district judges, and workplace managers. As efforts to date demonstrate, the federal judiciary appreciates the gravity of the issue and is dedicated to continued reform and innovation tailored to the judicial structure and environment. That

effort should be given a fair chance to blossom and take root, while at the same time looking ahead to continued refinements and innovations. Although from 2020 to the present, the pandemic slowed certain court operations and modified in-person interactions, the judiciary's workplace reforms continued unabated. The focus remains on preventing workplace harassment and providing employees with necessary advice, guidance, and procedures to address harassment and other abusive workplace conduct. This commitment to ensuring an exemplary workplace begins with Chief Justice Roberts and extends to all 30,000 plus people employed by the federal court system who deserve a respectful workplace.¹⁶¹

Footnotes

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- ¹ See TARANA BURKE, UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT 6-10 (2021); see also *History & Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/DW6F-4L9J>]; Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It--10 Years Ago*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [<https://perma.cc/HG47-GXBA>].
- ² See Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html> [<https://perma.cc/RJ28-KVQN>].
- ³ See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/K4K4-L35Q>]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/6K24-V73T>].
- ⁴ See Bethany McLean, *"We All Wear All Black Every Day": Inside Wall Street's Complex, Shameful, and Often Confidential Battle with #MeToo*, VANITY FAIR (Feb. 27, 2018), <https://www.vanityfair.com/news/2018/02/inside-wall-street-complex-shameful-and-often-confidential-battle-with-metoo> [<https://perma.cc/YM8A-C5S4>].
- ⁵ See Emilia Petrarca, *Fashion's #MeToo Movement Is Loudest on Instagram: Models Are Sharing Devastating Stories of Abuse in DMs*, THE CUT (Apr. 5, 2018), <https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html> [<https://perma.cc/WQ9U-2VLU>].
- ⁶ See Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why Is the Restaurant Industry So Terrible for Women?*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html [<https://perma.cc/AAP2-4DN2>].
- ⁷ See Alyssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017, 2:30 PM), <https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271> [<https://perma.cc/KTS5-GAPC>].

- ⁸ See generally Kantor & Twohey, *supra* note 3 (documenting allegations against Weinstein by employees and members of the film industry).
- ⁹ See Matt Zapposky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.33f68db99ef1 [<https://perma.cc/S95P-PKSL>].
- ¹⁰ Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/XZ3S-3MNM>].
- ¹¹ This number was compiled from data provided on judicial statistics. See, e.g., *Judicial Business 2020*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judicial-business-2020> [<https://perma.cc/HK6G-MC7G>] (noting the number of Article III judges, bankruptcy judges, and magistrate judges); *Judges of the United States Court of International Trade*, U.S. CT. OF INT'L TRADE, <https://www.cit.uscourts.gov/judges-united-states-court-international-trade> [<https://perma.cc/UN38-CXQQ>] (noting the sixteen Court of International Trade judges); *Judges - Biographies*, U.S. CT. OF FED. CLAIMS, <https://uscfc.uscourts.gov/judicial-officers> [<https://perma.cc/Q3V3-KBWS>] (noting twenty-four judges on the Court of Federal Claims).
- ¹² See James C. Duff, *Annual Report 2018: Director's Message*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/annual-report-2018> [<https://perma.cc/B9TP-APA5>].
- ¹³ See Press Release, U.S. Cts. for the Ninth Cir., Ninth Circuit Committee to Review Workplace Environment Policies (Jan. 12, 2018), http://cdn.ca9.uscourts.gov/datastore/ce9/2018/01/14/R3_Ninth_Circuit_Workplace_Environment_Committee_Announcement.pdf [<https://perma.cc/FS46-BSMZ>].
- ¹⁴ This Essay focuses primarily on the Ninth Circuit and national responses. Since 2017, other circuits have formed their own groups and committees and implemented similar reforms designed to address workplace issues. See, e.g., Press Release, U.S. Cts. for the D.C. Cir., Chief Judges Announce Adoption of Workplace Conduct Policies (Nov. 28, 2018), https://www.dcd.uscourts.gov/sites/dcd/files/NewsRelease_WorkplaceConductPolicies11282018.pdf [<https://perma.cc/MLB7-WLXS>]; Press Release, Off. of the Cir. Exec., U.S. Cts. for the First Cir., First Circuit Court of Appeals Forms Workplace Conduct Committee, Appoints Christine Guthery Director of Workplace Relations (Mar. 5, 2019), <https://www.ca1.uscourts.gov/sites/ca1/files/Workplace%20Conduct%20Press%20Release%202.pdf> [<https://perma.cc/Q7UE-GZFZ>]. By 2021, all circuits had Directors of Workplace Relations or similar roles. See *Director of Workplace Relations Contacts by Circuit*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/workplace-conduct/director-workplace-relations-contacts-circuit> [<https://perma.cc/2TX5-XX83>].
- ¹⁵ JOHN G. ROBERTS, 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017) [hereinafter 2017 YEAR-END REPORT], <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> [<https://perma.cc/YL57-ELL5>].
- ¹⁶ See *Federal Judiciary Workplace Conduct Working Group Formed*, U.S. CTS. (Jan. 12, 2018), <https://www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed> [<https://perma.cc/P6GB-MFJ6>].
- ¹⁷ Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 601 (2020).
- ¹⁸ See, e.g., Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. F. 446, 453 (2021).
- ¹⁹ The COVID-19 pandemic intervened during the period following the adoption of the structural and policy changes. While most court proceedings went remote and employees worked from home, the courts took

the opportunity to solidify the structural changes adopted earlier and enhance training and education on workplace policies and procedures.

²⁰ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE ii (2016) [hereinafter EEOC REPORT], https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [<https://perma.cc/PTP6-WBEB>].

²¹ *Id.* at iv.

²² *See id.* at iv, 3, 6-8.

²³ *See id.* at 16-17.

²⁴ *Id.* at 25.

²⁵ *Id.* at 26-30 (capitalization altered).

²⁶ *See id.* at 25.

²⁷ *Id.*

²⁸ *See* JUD. CONF. OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 4 (1996) [hereinafter JUDICIAL CONFERENCE REPORT] (“The judiciary’s internal governance system is a necessary corollary to judicial independence.”).

²⁹ *See id.*

³⁰ *See id.*

³¹ [U.S. CONST. art. III, § 1.](#)

³² *See* JUDICIAL CONFERENCE REPORT, *supra* note 28, at 4.

³³ *See id.* (“The judiciary’s internal governance system is a necessary corollary to judicial independence.”).

³⁴ *See id.* (“From the beginning of the federal court system, the hallmarks of judicial branch governance have been local court management and individual judge autonomy, coupled with mechanisms for ensuring accountability”).

³⁵ *See, e.g.*, THE NAT’L ACADS. OF SCIS., ENG’G & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 65 (Paula A. Johnson, Sheila E. Widnall & Frazier F. Benya eds., 2018) [hereinafter NATIONAL ACADEMIES REPORT] (recognizing that hierarchical relationships and isolated environments create higher levels of risk for sexual harassment); *see also* Litman & Shah, *supra* note 17, at 616-20.

³⁶ NATIONAL ACADEMIES REPORT, *supra* note 35, at 48.

³⁷ *See* EEOC REPORT, *supra* note 20, at 28.

³⁸ This information is drawn from an internal judiciary human resources database.

³⁹ *See, e.g.*, Litman & Shah, *supra* note 17, at 616 (“A judge can both help a clerk find a job and tank a clerk’s prospects with just one call.”).

⁴⁰ *See* EEOC REPORT, *supra* note 20, at 29.

⁴¹ *See id.*

- ⁴² See Litman & Shah, *supra* note 17, at 601; Warren, *supra* note 18, at 453.
- ⁴³ See FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 3-5 (2018) [hereinafter WORKING GROUP REPORT], https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [https://perma.cc/JF28-2JYX].
- ⁴⁴ *Id.* at 1.
- ⁴⁵ See NINTH CIR. AD HOC COMM. ON WORKPLACE ENV'T, NINTH CIRCUIT AD HOC COMMITTEE ON WORKPLACE ENVIRONMENT REPORT 4, 6-7 (2019) [hereinafter NINTH CIRCUIT COMMITTEE REPORT], <https://cdn.ca9.uscourts.gov/assets/workplace/committee-report/Ninth-Circuit-Workplace-Environment-Committee-Report.pdf> [https://perma.cc/6AHF-PTLK]; see also WORKING GROUP REPORT, *supra* note 43, at 3-4, 6-7.
- ⁴⁶ NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 6-10.
- ⁴⁷ *Id.* at 6; WORKING GROUP REPORT, *supra* note 43, at 4. Law Clerks for Workplace Accountability is an organization comprised of “current and former law clerks” who “believe that significant changes are necessary to address the potential for harassment of employees who work in the federal court system.” @ClerksForChange, TWITTER (July 20, 2018, 12:01 PM), <https://twitter.com/ClerksForChange/status/1020171891003162624> [https://perma.cc/K8V3-SMD3].
- ⁴⁸ See WORKING GROUP REPORT, *supra* note 43, at 5-7; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7-8.
- ⁴⁹ See NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7-8.
- ⁵⁰ See *id.* at 9.
- ⁵¹ See WORKING GROUP REPORT, *supra* note 43, at 17; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7.
- ⁵² See NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 8 (reporting that survey respondents “recommended developing and implementing trainings on harassment, bullying, implicit bias, leadership, and management techniques”); WORKING GROUP REPORT, *supra* note 43, at 41-42.
- ⁵³ See WORKING GROUP REPORT, *supra* note 43, at 4-7.
- ⁵⁴ See FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1-4 (2019) [hereinafter 2019 STATUS REPORT], https://www.uscourts.gov/sites/default/files/working_group_status_report_to_jcus_september_2019.pdf [https://perma.cc/2WSC-G9A9].
- ⁵⁵ Although titled a *model* plan, the Model EDR Plan, with certain modifications, is the actual plan of the individual courts.
- ⁵⁶ The Judicial Conference of the United States promulgated the JC&D Rules under the Judicial Conduct and Disability Act, [28 U.S.C. § 358](#). RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROCS. r. 1 cmt. (JUD. CONF. OF THE U.S. 2019) [hereinafter JC&D RULES], https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf [https://perma.cc/5RD5-7JFV].
- ⁵⁷ *Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-conduct-judges-judicial-conduct-disability-rules> [https://perma.cc/2U34-KB7B].

- ⁵⁸ JUD. CONF. OF THE U.S., MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN 14 (2019) [hereinafter MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN], https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf [<https://perma.cc/D4D6-VW6Z>].
- ⁵⁹ See WORKING GROUP REPORT, *supra* note 43, at 15.
- ⁶⁰ 2019 STATUS REPORT, *supra* note 54, at 6.
- ⁶¹ NATIONAL ACADEMIES REPORT, *supra* note 35, at 143.
- ⁶² See EEOC REPORT, *supra* note 20, at 38.
- ⁶³ See WORKING GROUP REPORT, *supra* note 43, at 27.
- ⁶⁴ 2019 STATUS REPORT, *supra* note 54, at 6 (quoting CODE OF CONDUCT FOR JUD. EMPS. Canon 3D(3) (JUD. CONF. OF THE U.S. 2019)).
- ⁶⁵ See 2019 STATUS REPORT, *supra* note 54, at 2, 9 (citing JC&D RULES, *supra* note 56, at r. 23(c)); see also JC&D RULES, *supra* note 56, at r. 4 cmt., 6 cmt.
- ⁶⁶ NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 2.
- ⁶⁷ See *id.* at 7.
- ⁶⁸ See *id.* at 7, 14-15; WORKING GROUP REPORT, *supra* note 43, at 17-18, 36-38.
- ⁶⁹ The D.C. Circuit has two Workplace Relations Coordinators rather than one director, but the positions are considered analogous. See *Director of Workplace Relations Contacts by Circuit*, *supra* note 14 (providing contact information for the directors and including the D.C. Circuit's Workplace Relations Coordinators).
- ⁷⁰ See *Workplace Conduct in the Federal Judiciary*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary> [<https://perma.cc/LFT2-S8KT>].
- ⁷¹ See MARY ROWE, TIMOTHY HEDEEN & JENNIFER SCHNEIDER, INT'L OMBUDSMAN ASS'N, WHAT DO ORGANIZATIONAL OMBUDS DO? AND NOT DO? 1-5 (2020), <https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=7572> [<https://perma.cc/M3BT-42CV>]; see also Marsha L. Wagner, *The Organizational Ombudsman as Change Agent*, 16 NEGOT. J. 99, 103-05 (2000).
- ⁷² See, e.g., Press Release, U.S. Ct. of Appeals for the Sixth Cir., Sixth Circuit Announces Appointment of First Director of Workplace Relations (May 8, 2020), <https://www.ca6.uscourts.gov/sites/ca6/files/Announcement%20of%20Director%20of%20Workplace%20Relations.pdf> [<https://perma.cc/857X-8R6N>].
- ⁷³ See, e.g., Press Release, U.S. Ct. of Appeals for the First Cir., *supra* note 14 (appointing Christine Guthery as Director of Workplace Relations, who had been the Assistant Director of the First Circuit Gender, Race, and Ethnic Bias Task Force); Press Release, U.S. Ct. of Appeals for the Third Cir., Third Circuit Forms Workplace Conduct Committee and Announces Appointment of First Director of Workplace Relations (Sept. 10, 2019), https://www.ca3.uscourts.gov/sites/ca3/files/DWR_Announcement.pdf [<https://perma.cc/5CRV-T6GB>] (appointing Julie Todd as Director of Workplace Relations, who was an Administrative Judge for the EEOC); Press Release, U.S. Ct. of Appeals for the Sixth Cir., *supra* note 72 (appointing Kelly Roseberry as Director of Workplace Relations, who had served in the Wyoming government including as Interim Administrator for the Workforce Standards Division, the Deputy Administrator for Labor Standards, and the Executive Secretary for the Wyoming Medical Commission); Press Release, U.S. Cts. for the Ninth Cir., Ninth Circuit Announces Appointment of First Director of Workplace Relations (Nov. 13, 2018), http://cdn.ca9.uscourts.gov/datastore/general/2019/02/15/PR_11132018.pdf [<https://perma.cc/FL9D-GVDN>] (appointing Yohance Edwards as

Director of Workplace Relations, who was the associate director and deputy Title IX officer at the University of California, Berkeley).

⁷⁴ See EEOC REPORT, *supra* note 20, at 87-88.

⁷⁵ *Id.* at 38.

⁷⁶ NiCole T. Buchanan, Isis H. Settles, Angela T. Hall & Rachel C. O'Connor, *A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U. S. Military*, 70 J. SOC. ISSUES 687, 690 (2014); Paula McDonald, Sara Charlesworth & Tina Graham, *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment*, 53 ASIA PAC. J. HUM. RES. 41, 44, 48 (2015); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCH. 497, 503 (1991).

⁷⁷ NATIONAL ACADEMIES REPORT, *supra* note 35, at 141. Tarana Burke's personal story also serves to emphasize the importance of ensuring that informal support and resources are available for those who have experienced abuse. See BURKE, *supra* note 1, at 153-59, 214-17.

⁷⁸ McDonald et al., *supra* note 76, at 44.

⁷⁹ WORKING GROUP REPORT, *supra* note 43, at 9-10; 2019 STATUS REPORT, *supra* note 54, at 8, 13.

⁸⁰ WORKING GROUP REPORT, *supra* note 43, at app. 8; MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at app. 1.

⁸¹ WORKING GROUP REPORT, *supra* note 43, at 12-13.

⁸² NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 2019 STATUS REPORT, *supra* note 54, at 13-14.

⁸⁶ *Id.* at 14.

⁸⁷ MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at app. 5.

⁸⁸ EEOC REPORT, *supra* note 20, at 16-17; *cf.* BURKE, *supra* note 1, at 156-59, 218-24 (describing the psychological difficulties experienced by the author in articulating the abuse she had suffered).


⁸⁹ MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 4.

⁹⁰ The only time a conversation cannot be kept completely confidential is when the employee raises an issue that indicates reliable information of a threat to an individual's safety or security, or of a threat to the integrity of the judiciary. *Id.* Materials are provided to employees alerting them to the level of confidentiality they can expect according to their circumstances. See *id.* at 4, app. 2 at 3.

⁹¹ *Id.* at 5.

⁹² NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at app. 1 at 8 n.3 (citing [28 U.S.C. §§ 351-364](#)).

⁹³ MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 10-11. Back pay and associated benefits are available when the statutory criteria of the Back Pay Act are satisfied. Those criteria "include: (1) a finding of an unjustified or unwarranted personnel action; (2) by an appropriate authority; (3) which resulted in the withdrawal or reduction of all or part of the [e]mployee's pay, allowances, or differentials." See *id.* at 11 & n.2 (citing [5 U.S.C. § 5596\(b\)\(1\)](#)).

- [94](#) 2019 STATUS REPORT, *supra* note 54, at 15-16.
- [95](#) This observation is drawn from conversations between the author and circuit Directors of Workplace Relations and representatives of the Office of Judicial Integrity.
- [96](#) This observation is likewise drawn from conversations between the author and circuit Directors of Workplace Relations and representatives of the Office of Judicial Integrity.
- [97](#) 2019 STATUS REPORT, *supra* note 54, at 5 (citing CODE OF CONDUCT FOR U.S. JUDGES Canons 2A cmt., 3 intro., 3B(4), 3B(4) cmt. (JUD. CONF. OF THE U.S. 2019)).
- [98](#) JC&D RULES, *supra* note 56, at r. 4(a)(2)(B).
- [99](#) *Id.* at r. 4(a)(2).
- [100](#) 2019 STATUS REPORT, *supra* note 54, at 9, 13 (citing JC&D RULES, *supra* note 56, at r. 4(a)(2), 4(a)(3)).
- [101](#) MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 2-3 (emphasis omitted); *see also* NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 13.
- [102](#) MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 1-2.
- [103](#) WORKING GROUP REPORT, *supra* note 43, at 31.
- [104](#) 2019 STATUS REPORT, *supra* note 54, at 8 (citing JC&D RULES, *supra* note 56, at r. 4(a)(4)).
- [105](#) 2019 STATUS REPORT, *supra* note 54, at 8-9 (citing JC&D RULES, *supra* note 56, at r. 4(a)(6) & cmt., 23 cmt.).
- [106](#) Judicial Conduct and Disability Act,  [28 U.S.C. § 351\(b\)](#); JC&D RULES, *supra* note 56, at r. 5.
- [107](#) 2019 STATUS REPORT, *supra* note 54, at 5.
- [108](#) *Id.* at 6 (quoting CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 97, at Canons 3B(6) & cmt.).
- [109](#) CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 97, at Canon 3B(6) cmt.
- [110](#) 2019 STATUS REPORT, *supra* note 54, at 6-7 (citing CODE OF CONDUCT FOR JUD. EMPS., *supra* note 64, at Canons 3C, 3D).
- [111](#) WORKING GROUP REPORT, *supra* note 43, at 33, app. 8; 2019 STATUS REPORT, *supra* note 54, at 13-14.
- [112](#) 2019 STATUS REPORT, *supra* note 54, at 12.
- [113](#) *Id.* at 11.
- [114](#) This notification process ensures that reporting goes to an individual who is superior in rank to the person about whom the complaint is made. If the complaint relates to the chief judge, then the notice goes to a different judge. MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 7.
- [115](#) *Id.* at 4.
- [116](#) *Id.*
- [117](#) *Id.*
- [118](#) *Id.* at 7.

- [119](#) *Id.* at 12.
- [120](#) See generally EDR WORKING GRP. & OFF. OF JUD. INTEGRITY, EMPLOYMENT DISPUTE RESOLUTION INTERPRETIVE GUIDE & HANDBOOK: A GUIDE TO THE 2019 MODEL EDR PLAN (2020), https://www.tnwb.uscourts.gov/PDFs/conduct/EDR_HANDBOOK_2020.pdf [<https://perma.cc/SF4Y-9BBX>] (providing guidance on navigating the EDR).
- [121](#) WORKING GROUP REPORT, *supra* note 43, at 39.
- [122](#) See Judicial Conduct and Disability Act, [28 U.S.C. § 351\(d\)\(1\)](#); JC&D RULES, *supra* note 56, at r. 1(b); see also *In re Complaints Under the Jud. Conduct & Disability Act*, C.C.D. No. 19-02, at 10 (U.S. Jud. Conf. Mar. 3, 2020).
- [123](#) JC&D RULES, *supra* note 56, at r. 11 cmt. (noting that “the Judicial Conference and the judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint Such an assessment might include 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” (citations omitted)). Thus, for example, despite the resignation of then-Judge Carlos Murguia, the Committee on Judicial Conduct and Disability issued a written decision noting “the instructive value of providing guidance regarding the statutory standard for Congressional referral for consideration of impeachment.” *In re Complaints Under the Jud. Conduct & Disability Act*, C.C.D. No. 19-02, at 8. The Committee concluded that “the underlying misconduct” related to sexual misconduct and harassment was “serious enough to have warranted our deliberations over a referral to Congress for its consideration of impeachment.” *Id.* at 9. The Committee further observed that despite the former judge's resignation, “[c]oncluding a misconduct proceeding upon a judge's resignation serves important institutional and public interests, including prompting subject judges who have committed misconduct to resign their office.” *Id.* at 10.
- [124](#) JC&D RULES, *supra* note 56, at r. 23 cmt.
- [125](#) 2019 STATUS REPORT, *supra* note 54, at 10; JC&D RULES, *supra* note 56, at r. 23(b)(8) & cmt.; see, e.g., *id.* at r. 24.
- [126](#) See *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (responses to questions for the record of James C. Duff, Dir., Admin. Off. of the U.S. Cts.), <https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary> [<https://perma.cc/5WLB-56Y7>]; *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2791> [<https://perma.cc/FJ9U-EJUR>].
- [127](#) See *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary*, *supra* note 126.
- [128](#) See Letter from James C. Duff, Sec'y, Jud. Conf. of the U.S., to Jerrold Nadler, Chairman, Comm. on the Jud., Henry C. Johnson, Chairman, Comm. on the Jud., Mary Gay Scanlon, Vice Chair, Comm. on the Jud., and James Sensenbrenner, Jr., Rep., U.S. House of Representatives (Mar. 3, 2020), https://judiciary.house.gov/uploadedfiles/letter_from_the_judicial_branch_responding_to_hjc_inquiry_regarding_judiciary_workplace_misconduct.pdf [<https://perma.cc/5BHZ-3PPD>].
- [129](#) See WORKING GROUP REPORT, *supra* note 43, at 10-13; 2019 STATUS REPORT, *supra* note 54, at 1-4.
- [130](#) See WORKING GROUP REPORT, *supra* note 43, at 19-20, 25-28, 40-41.

- [131](#) EEOC REPORT, *supra* note 20, at 45.
- [132](#) MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 13.
- [133](#) WORKING GROUP REPORT, *supra* note 43, at 20, 42.
- [134](#) *See id.*
- [135](#) JC&D RULES, *supra* note 56, at r. 4(a)(6).
- [136](#) *See* EDR WORKING GRP. & OFF. OF JUD. INTEGRITY, *supra* note 120, at 35; MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 12.
- [137](#) *See Education Programs*, FED. JUD. CTR., <https://www.fjc.gov/education/education-programs> [<https://perma.cc/XRT6-TK8Y>]; WORKING GROUP REPORT, *supra* note 43, at 18-19.
- [138](#) *See Programs and Resources for All Court Employees*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-all-court-employees> [<https://perma.cc/E3Y4-22FL>]; 2019 STATUS REPORT, *supra* note 54, at 3.
- [139](#) *See* 2019 STATUS REPORT, *supra* note 54, at 19-21; *Programs & Resources for Executives*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-executives> [<https://perma.cc/PA2R-BHEU>].
- [140](#) NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 3.
- [141](#) *See Programs and Resources for Judges*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-judges> [<https://perma.cc/BNE2-AGBT>]; WORKING GROUP REPORT, *supra* note 43, at 41.
- [142](#) *See* 2019 STATUS REPORT, *supra* note 54, at 2; *Programs & Resources for Executives*, *supra* note 139.
- [143](#) For example, workplace issues are addressed in online and in-person training for law clerks, meetings of chief judges (both district and appellate courts), yearly educational meetings with district and bankruptcy court judges, the national symposium for court of appeals judges, targeted training for pretrial and probation units, and individual district meetings with lawyers and judges. Other examples include the Ninth Circuit's internal newsletter *9th to 5*, and law clerk training via the Interactive Orientation for Federal Law Clerks and Maintaining an Exemplary Workplace.
- [144](#) This positive relationship between training and reporting should be unsurprising and has been observed in other environments. *See* Jamie Mansell, Dani M. Moffit, Anne C. Russ & Justin N. Thorpe, *Sexual Harassment Training and Reporting in Athletic Training Students*, 12 ATHLETIC TRAINING EDUC. J. 3, 7 (2017) (“[A]thletic training students who never received any training were 6 times less likely to know what to do in harassing situations.”).
- [145](#) *See* 2019 STATUS REPORT, *supra* note 54, at 18; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 6-10, 16.
- [146](#) Litman & Shah, *supra* note 17, at 635; *see* EEOC REPORT, *supra* note 20, at 67.
- [147](#) Buchanan et al., *supra* note 76, at 697.
- [148](#) *See* NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 9-10.
- [149](#) *See infra* notes 150-152 and accompanying text.
- [150](#) Jessica Mach, *Stakeholders Credit 9th Circuit's Harassment Policy Changes, But Say More Needs to Be Done*, DAILY J. (Mar. 11, 2020), <https://www.dailyjournal.com/articles/356634-stakeholders-credit-9th-circuit-s-harassment-policy-changes-but-say-more-needs-to-be-done> [<https://perma.cc/6ZPU-MQKY>].

- [151](#) *Law Clerk Advisory Group*, U.S. CT. OF APPEALS D.C. CIR., <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Workplace+Conduct+-+Law+Clerk+Advisory+Group> [<https://perma.cc/4QYJ-EZSP>].
- [152](#) *See First Circuit Workplace Conduct Committee Appoints Three New Members*, U.S. CT. OF APPEALS FOR THE FIRST CIR. (July 17, 2019), <https://www.ca1.uscourts.gov/news/first-circuit-workplace-conduct-committee-appoints-three-new-members> [<https://perma.cc/2HAC-4SFN>].
- [153](#) For example, the judiciary has been in correspondence with these organizations and a representative participated in national meetings of both groups along with appearing at the American Academy of Appellate Lawyers. Judiciary representatives have also spoken at bar associations and civic groups. *See, e.g.*, NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 10, 17.
- [154](#) *See* NAT'L ASS'N OF L. PLACEMENT, COURTING CLERKSHIPS: THE NALP JUDICIAL CLERKSHIP STUDY § 3 (2000), <https://www.nalp.org/courtingclerkships?s=judicial%20clerkship%20study> [<https://perma.cc/XQK3-H75V>] (discussing findings regarding the role of law school faculty and administrators in judicial clerkship placement).
- [155](#) Letter from Roslynn R. Mauskopf, Dir., Admin. Off. of the U.S. Cts., to law school clerkship directors (Aug. 5, 2021) (on file with author).
- [156](#) *Id.*
- [157](#) *See, e.g.*, Jesse McKinley, *Cuomo Faces New Claims of Sexual Harassment from Current Aide*, N.Y. TIMES (Apr. 7, 2021), <https://www.nytimes.com/2021/03/19/nyregion/alyssa-mcgrath-cuomo-harassment.html> [<https://perma.cc/K5MX-W2Z9>] (detailing recent allegations of sexual harassment against former New York state Governor Andrew Cuomo).
- [158](#) Litman & Shah, *supra* note 17, at 620-25; *see also* Zapotosky, *supra* note 9 (detailing allegations of harassment against former judge Alex Kozinski); *see also, e.g.*, Mihir Zaveri, *Federal Judge in Kansas Resigns After Reprimand for Sexual Harassment*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/judge-carlos-murguia-sexual-harassment.html> [<https://perma.cc/395J-Q927>] (same against former judge Carlos Murguia); Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html> [<https://perma.cc/2H5Q-4V52>] (same against former judge Stephen Reinhardt). The events recounted against these judges occurred before the judiciary undertook the extensive workplace initiatives outlined in this Essay.
- [159](#) Litman & Shah, *supra* note 17, at 599.
- [160](#) *Protecting Federal Judiciary Employees from Sexual Harassment Discrimination and Other Workplace Misconduct*, *supra* note 126, at 2 (statement of Chai R. Feldblum, Partner & Dir. of Workplace Culture Consulting, Morgan, Lewis & Bockius LLP).
- [161](#) 2017 YEAR-END REPORT, *supra* note 15, at 11 (noting the federal judiciary's commitment to ensuring “an exemplary workplace for every judge and every court employee”).

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

August 25, 2021

Honorable Henry C. “Hank” Johnson, Jr.
Chair
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write concerning the Judiciary Accountability Act, H.R. 4827, introduced on July 29, 2021. At the outset, it is disappointing that a bill encompassing such a significant overhaul of the oversight, supervision, and management of the Judicial Branch of government was introduced without input from the Judicial Branch. Unfortunately, the bill fails to recognize the robust safeguards that have been in place within the Judiciary to protect Judiciary employees, including law clerks, from wrongful conduct in the workplace, including protections against discrimination, harassment, retaliation, and abusive conduct. Further, the bill interferes with the internal governance of the Third Branch; creates structures that compete with existing governing bodies and authorities within the Judiciary; and imposes intrusive requirements on Judicial Conference procedures. For these reasons, the Judicial Conference of the United States opposes the bill. The Judiciary will provide a more detailed response to the Committee after further study, and I request that you not take further action on the bill, pending our review.

The Judiciary has been and remains committed to an exemplary workplace for all Judicial Branch employees. In recent years, we have taken numerous steps to strengthen policies, procedures, and organizational structures to help foster a safe and respectful workplace. The attached Fact Sheet provides a brief overview of some of our current protections, but I will highlight some here.

Our Employment Dispute Resolution (EDR) system has long provided Judiciary employees enforceable protections against all the same conduct covered under Title VII, Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), as well as the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. Judicial Branch employees are also already provided with whistleblower

protection. Indeed, Judiciary employees now have expanded enforceable protections against “abusive conduct,” even when the misconduct is not discriminatory or based on protected categories.

Judiciary employees have multiple avenues to report workplace conduct concerns, including anonymously and to points of contact outside of their employing office. Confidentiality policies have been clarified to remove potential barriers and encourage reporting. The Codes of Conduct and Judicial Conduct and Disability Rules have been changed, among other things, to emphasize that judges and judiciary employees have a responsibility to take appropriate action upon learning of potential workplace misconduct, even if they are a bystander.

We have put in place scores of local EDR coordinators, Circuit Directors of Workplace Relations, and the national Office of Judicial Integrity, to assist employees with confidential reporting and address workplace conduct inquiries and complaints. We have enhanced and expanded training for all Judiciary employees, including judges and chambers staff, on the EDR process, employment laws, wrongful conduct, and unconscious bias, among other relevant topics for the workplace. We have actively engaged internal and external stakeholders, including judges, Judiciary employees, and law schools, among others, to hear and address issues of mutual concern.

Contrary to assertions that federal Judiciary employees are denied basic workplace rights and are provided no protection from workplace harassment, discrimination, and retaliation, the Judiciary has in place the protections and mechanisms to provide for an exemplary workplace, and to allow all employees to obtain confidential advice, report misconduct, and seek and receive remedial action. While we have accomplished much, we recognize there is additional work to do. We are committed to doing so and are presently engaged in that effort.

The Federal Judiciary Workplace Conduct Working Group was established in 2018 to examine the sufficiency of safeguards currently in place within the Judiciary to protect Judiciary employees from inappropriate conduct in the workplace. In its first six months it conducted extensive investigation and research, and published a 45-page report that contained numerous findings and 24 recommendations to the Judicial Conference of the United States for enhancing protections, improving working conditions, and refining procedures. That Group continues to meet to assess those safeguards and recommend further improvements.

It is critical that our current practices and improved policies be included and accurately reflected in any consideration of the Judiciary Accountability Act. Moreover, any mechanism addressing workplace conduct must recognize the Judiciary as a separate and co-equal branch of the United States government under the Constitution and allow

Honorable Henry C. "Hank" Johnson, Jr.

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the Branch, through the decentralized administration of the federal courts, to govern itself. The Judicial Branch must retain autonomy over internal administration, including matters of employee and workplace management, as is the case in the other two branches.

I look forward to communicating further with you on this critical topic.

Sincerely,

A handwritten signature in black ink that reads "Roslynn R. Mauskopf". The signature is written in a cursive, flowing style.

Roslynn R. Mauskopf
Secretary

Enclosure

cc: Honorable Jerrold Nadler
Honorable Jim Jordan
Honorable Darrell Issa
Honorable Jackie Speier
Honorable Norma J. Torres
Honorable Nancy Mace