From: Drobac, Jennifer A
To: AO Code and Conduct Rules
Subject: Drobac Letter in lieu of application to testify
Date: Wednesday, October 24, 2018 2:09:33 PM
Attachments: DrobacLetter10-24-2018.pdf

To The Members of the U.S. Judicial Conference Committees on Code of Conduct and Judicial Conduct and Disability:
Please accept this attached letter in lieu of an application to testify and as a written statement to the Committees. I note that "[a]ll requests to testify were due by **October 18, 2018**. All written statements accompanying a request to testify must be submitted by emailing CodeandConductRules@ao.uscourts.gov by **October 25, 2018**."
Because I am not requesting to testify, I trust that the Committees will accept this written statement in advance of the deadline for written statements and well in advance of the November 13, 2018 for comments.
Thank you, Jennifer

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Members of the U.S. Judicial Conference Committees on Code of Conduct and Judicial Conduct and Disability
Via Email

October 24, 2018

Re: Proposed Revisions to the Rules for Judicial-Conduct and Judicial-Disability Proceedings

To the Members of the U.S. Judicial Conference Committees on Code of Conduct and Judicial Conduct and Disability:

I write to urge adoption of the proposed revisions to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (The JC&D Rules), particularly those concerning sexual misconduct, harassment, and discrimination. This letter addresses the general need for the proposed revisions and issues of specific concern, as well as my qualifications for commenting on this matter.

I have a well-established expertise in the area of sexual harassment law. Having reviewed the proposed rules and ethical standards, I endorse these updates because I have seen too many industries, institutions, and their staffs suffer from a lack of proper guidance. I have also observed the avoidable effects of struthian inaction and too often deliberate indifference. I hold two diplomas from Stanford University and two more from Stanford Law School. I completed my doctoral degree at Stanford Law School with a focus on sexual harassment law in 2000. Before I moved to the Midwest to teach full-time at Indiana University's Robert H. McKinney School of Law, I had practiced employment discrimination law and prosecuted sexual harassment cases in Santa Cruz, California for almost ten years following the Hill/Thomas confirmation hearings. After my arrival in Indiana, I accepted the invitation to help revise the Indiana Rules of Professional Conduct for lawyers via the Ethics 2000 Amendments. Also at that time, I began teaching Sexual Harassment Law at McKinney Law from the manuscript for my textbook, which was published as SEXUAL HARASSMENT LAW: HISTORY, CASES, AND THEORY (Carolina Academic Press, 2005). I am currently drafting a new addition of that textbook for future Sexual Harassment Law and Feminist Studies classes. Since the public revelations of the Harvey Weinstein accusations, I have served as a source for comment and analysis on sexual harassment matters involving private and publically-traded businesses, and all levels of government, including the judiciary. I have participated in more than 100 media interviews since the advent of #MeToo. In addition to my community service, I have published numerous law review and other articles on this topic during the last fifteen years.

Chief Justice John Roberts highlighted in his 2017 *Year-End Report on the Federal Judiciary* that the Judicial Branch cannot assume that it is immune from the problems of sexual harassment. As a former judicial clerk myself, I have the highest regard for the

judiciary. However, the December 2017 complaints against Judge Kozinski, and numerous other concerns and complaints, highlight the need for official guidance and clear avenues of redress for robust response. A CNN special report from January 2018 that examined "5,000 judicial orders arising from misconduct complaints over the past decade, found that courthouse employees and others with potentially valid complaints against judges rarely use the judiciary's misconduct system, or get no relief when they do."[1] At the very least, federal and state judiciaries face a crisis of perception. The perception is that they harbor and protect life-appointed judges, as well as judicial branch personnel who are obdurately unresponsive, and on occasion, even a few corrupt sexual predators. At the worst, judicial bodies ratify and condone sex-based misconduct and predation through their negligence and deliberate inaction. In this post-#MeToo era, the judiciary is being called upon to provide strong leadership for interpersonal safety, gender equity, professionalism, justice and due process, and simple courtesy. The proposed revisions to the JC&D Rules comprise a promising response to these problems.

The Judiciary's current initiative was no doubt prompted in part by complaints lodged against Judge Kozinski during the rise of the #MeToo movement. This aspect of its response, in my view, has been commendably prompt, thorough, and insightful. In response to a directive from the Director of the Administrative Office of the United States Courts, the Federal Judiciary Workplace Conduct Working Group (Working Group) investigated the issue of misconduct within the judicial branch and drafted a report that details many proposed changes and modifications. In conducting its review, The Working Group examined a 2016 Equal Employment Opportunity Commission (EEOC) study concerning harassment and misconduct. In addition, The Working Group "focused on those distinguishing factors in evaluating the Judiciary's current workplace standards, its procedures for addressing inappropriate behavior, and its educational and training programs. . . . . The Report sets out 24 specific recommendations to the Judicial Conference of the United States and its relevant committees for further action."[2]

I have reviewed the full report of The Working Group (The Report), as well as the proposed revisions to Code of Conduct for United States Judges, the JC&D Rules, and the new Model Employment Dispute Resolution (EDR) Plan. I urge the Conference to approve The Report and the relevant proposed changes in The JC&D Rules. Every citizen of our country should feel confident that life-tenured judicial officers are held to the highest

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[1] Joan Biskupic, *Senate Judiciary Committee takes up #MeToo in the courts*, CNN POLITICS, June 13, 2018, https://www.cnn.com/2018/06/13/politics/senate-judiciary-metoo-hearing/index.html (discussing Joan Biskupic, *CNN Investigation: Sexual misconduct by judges kept under wraps*, CNN POLITICS, Jan. 26, 2018, https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html).

[2] *Executive Summary of the Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States June 1, 2018* (The Executive Summary) i-ii, http://www.uscourts.gov/sites/default/files/executive_summary_of_federal_judiciary_workplace_conduct_working_group_0.pdf.

standards of interpersonal conduct, especially in their dealings with their judicial clerks, staff, and even each other. Additionally, targets of misconduct need a fairly managed, sensitive, and accessible pathway to raise grievances and secure remedies. The proposed Rules and commentary provide a much needed and effective process for the accomplishment of these goals. (My *only* concern is that The JC&D Rules do not apply directly to the United States Supreme Court.) Given that I heartily advocate for the adoption of all proposed changes in the JC&D Rules, I will not duplicate comments and observations made by others that discuss each revision. Instead, I specifically address below what might be arguments *against* proposed changes and why those arguments are *not* persuasive.

First, The Working Group identified that leadership on the eradication of workplace misconduct and harassment must begin with judges throughout the judiciary.[3] A public perception arguably exists that federal judges are not inclined to address the need for discipline towards or among their colleagues. Any general argument that The Working Group's proposed changes are flawed or do not go far enough should *not* be reason to reject these initial steps to bring judicial rules in line with professional guidance for other institutions and industries.[4] To the contrary, swift adoption of these proposed revisions will send a clear message to judicial employees and the public that the federal judiciary intends to implement effective oversight and hold any perpetrators, including federal judges, accountable for any substantiated misconduct. Initiatives already taken by the Ninth and Seventh Circuit Courts of Appeals send such a message.[5]

Second, Article I of the JC&D Rules has been criticized for not clarifying the scope of protections and not more fully defining prohibited conduct. Article II Rule 4, addressed below, specifically explores prohibited misconduct. However, Rule 3 makes clear, "Traditional standing requirements do not apply. Individuals or organizations may file a

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[3] *Report of the Federal Judiciary Workplace Conduct Working Groupto the Judicial Conference of the United States June 1, 2018* (The Report) at 8, http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

[4] *See generally* The Honorable Judge Nancy Gertner (Ret.), *Sexual Harassment and the Bench*, STANFORD LAW REVIEW ONLINE, June 2018, https://www.stanfordlawreview.org/online/sexual-harassment-and-the-bench/. I agree with Judge Gertner that the proposed changes may not go far enough and may not ultimately address all of the definitional and other issues that current judicial misconduct prohibitions pose. That said, I still endorse the proposed changes as an important, promising next step. If judicial self-regulation does not keep up with the rising consciousness regarding the breadth and depth of sexual misconduct by savvy operators, the federal judiciary will experience more #MeToo events. I am not ordinarily known for my patience but I would rather see reasonable, even if arguably inadequate, first steps than no change because of unproductive and unnecessary wrangling over the efficacy of every proposed change.

[5] *See The Report* at n.21.

complaint even if they have not been directly injured or aggrieved."[6] This language significantly broadens the category of those who may identify and complain about abusive behavior, a pool that includes organizations and federal judges themselves.

Third, some reviewers may suggest that Rule 4 is incomplete or deficient because it fails to provide specific examples of sexual harassment and hostile workplace behavior. I urge the Conference to approve the JC&D Rules because they allow for flexibility in the interpretation of the rules and for an evolving consciousness of what may constitute discriminatory behavior. Clearly, the tone of voice and demeanor can impact the meaning of a particular statement. Depending on how a judge says, "Jennifer, your performance was really good today, and I'd like to see more from you," he may be paying a compliment and offering encouragement or he may be suggesting an improper sexual liaison by use of a sleazy innuendo. Strict definitions and explicit examples cannot convey every possible scenario or describe all types of misconduct. This Rule and its Commentary establish a firm commitment to workplace safety, equality, and decorum.

For further example, Rule 4 now contains not only prohibitions on sexual harassment and assault, but also bans the creation of "a hostile work environment" and "discrimination" on the basis of a wider variety of characteristics than were formerly protected. The Commentary on Rule 4 clarifies, "The enumerated grounds for discrimination and harassment contained in Rule 4(a)(3) are not intended to be exhaustive."[7] Additionally, Rule 4(a)(4) proscribes retaliation. The Commentary explains that Rule 4(a)(4) applies to anyone who participates in the complaint process, not just the complainant. Additional comments emphasize "the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, and retaliation."[8] Perhaps most important, Commentary to Rule 4(a)(6) highlights, "All judges have a duty to bring to the attention of the relevant chief district judge and chief circuit judge information reasonably likely to constitute judicial misconduct or disability." The Commentary continues, "Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable evidence 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."[9]

No set of Rules or any written Code of Conduct can address all forms of discriminatory misconduct. Certainly, the real efficacy of these rules will become apparent in their application. Without these revisions in the JC&D Rules, however, those who oppose workplace discrimination and harassment face an even greater challenge to the

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[6] *The Rules for Judicial-Conduct and Judicial-Disability Proceedings* (The JC&D Rules) at 8, Sept. 13, 2018, http://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf.
[7] *The JC&D Rules* at 15.
[8] *Id*.
[9] *The JC&D Rules* at 16.

achievement of cultural change and the assurance of workplace safety, equality, and decorum in the judiciary.

A final modification in the JC&D Rules that I urge the Judicial Conference to endorse is the acknowledgement set out in the Commentary to Rule 4:

> In practice, however, not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action. In such cases, allegations may initially be addressed to the chief district judge or the chief circuit judge to determine whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.[10]

The acknowledgement that not every problem requires a full-blown investigation and formal remediation is critical. "The Working Group found that the JC&D [the Judicial Conduct and Disability] Act and EDR Plans are effective *when their provisions are invoked*."[11] By acknowledging the utility of informal corrective action, The Working Group created the possibility that more complaints, even the most serious ones, will find expression because of the broader options for remediation.

When complainants know that they can request informal remediation measures, they are sometimes more comfortable in reporting abuse of all kinds. The adage "Sunlight is the best disinfectant" remains true. The achievement of transparency and cultural change requires flexibility and finesse. Certainly, flexibility in the process could lead to cover-ups

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[10] *Id.*

[11] *The Report* at 10-11 (italics in the original). One reason why clerks and other targets may not have complained about judicial misconduct in the past may have been because of complicated and burdensome complaint procedures, as well as fears of retaliation.

For example, The Working Group received suggestions that the complainants should have additional time under the EDR Plans for filing complaints, among other recommendations. The time for filing a complaint under the Model EDR Plan dated September 2018 has now been extended from 30 days to 180 days from the date of the alleged violation or when the complainant became aware of the violation. Some critics may argue that this period is still too short. While I might agree with that argument, I recommend endorsement of the proposed change because it makes the Model EDR Plan time limit more consistent with the statute of limitations under Title VII of the 1964 Civil Rights Act. *See* 42 U.S.C. §2000e *et seq.*; U.S. Equal Employment Opportunity Commission, *Time Limits For Filing a Charge*, Oct. 21, 2018, https://www.eeoc.gov/employees/timeliness.cfm (specifying an extension of the 180 day limit to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis). Reporting periods for judicial employees now match the minimums for other public and private sector employees (unless a state or local law extends the time to 300 days). At a point in the future, these 180-day complaint deadlines might be reconsidered. The Model EDR's five-fold increase of time for judicial employees is a long overdue improvement.

and further abuse. However, until such abuse results (and then it, too, should be remedied), we should not be constrained in our responses to judicial workplace sexual harassment and discriminatory misconduct.

I regret that a family commitment prevents my testifying in person before the Committees on October 30, 2018. I hope that this letter addressing some important points that I would have covered suffices to express my overall endorsement of the proposed changes. If other issues arise on which you think my views might enlighten, advance the debate, or otherwise help the Committee(s), I stand ready to respond as you may request.

With highest regard,

Professor Dr. Jennifer A. Drobac
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