

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

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 court employees from inappropriate conduct in the workplace. The goal of this undertaking is to “ensure an exemplary workplace for every judge and every court employee.” On January 12, 2018, the Director announced formation of the Federal Judiciary Workplace Conduct Working Group (Working Group), consisting of eight experienced judges and court administrators from diverse units within the Judiciary. The Working Group consulted with Administrative Office staff to collect information and formulate recommendations, meeting collectively on four occasions and collaborating continuously through telephonic and electronic means.

The Working Group proceeded from the premise that the Judiciary shares many common features with other public and private workplaces. Accordingly, studies conducted in those environments—most notably, a Select Task Force of the U.S. Equal Employment Opportunity Commission Study of Harassment in the Workplace in 2016 (EEOC Study)—provide pertinent guidance. But the Working Group also recognized that the judicial workplace is different in significant respects that can affect—both positively and negatively—the potential for inappropriate conduct. The Working Group accordingly embraced the guidance contained in the EEOC Study, but additionally 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. In the course of its review, the Working Group received input from current and former law clerks, court employees, Judicial Branch advisory councils, and individual circuits. It received that input through face-to-face meetings, anonymous and attributable comments from an electronic mailbox, and court surveys.

This Report sets out the findings and the recommendations of the Working Group. Some of the recommendations require action by the Judicial Conference of the United States, which is the national policy-making body for the federal courts. Other recommendations can be instituted by the Administrative Office, which administers judicial policies, or the Federal Judicial Center (FJC), which conducts judicial education. The Report sets out 24 specific recommendations to the Judicial Conference of the United States and its relevant committees for further action. Those recommendations are in addition to numerous actions that have already been initiated by the Administrative Office or the FJC.

I. *Findings*

The Judiciary employs 30,000 individuals in a broad range of occupations, ranging from life-tenured judges to temporary interns. The Working Group sought to assess the quality of the workplace environment across that broad spectrum. Based on the input from the electronic mailbox, the advisory groups, individual interviews, and court surveys, the Working Group believes that inappropriate conduct, although not pervasive within the Judiciary, is not limited to a few isolated instances. Of the inappropriate behavior that does occur, incivility, disrespect, or crude behavior are more common than sexual harassment.

The Working Group assessed the strengths and weaknesses of the Judiciary's current workplace practices through five considerations that the EEOC Study identified as key elements

in preventing inappropriate conduct: leadership; accountability; policies; procedures; and training. In summary, the Working Group found:

- The Judiciary has demonstrated committed leadership in addressing inappropriate conduct, but that leadership is not uniform throughout all court units and supervisory levels. The Judiciary should encourage leadership on workplace conduct and civility throughout the branch through educational programs, performance reviews, and other mechanisms for motivating positive change.
- The Judiciary has also shown a commitment to accountability in its formal processes for receiving and resolving complaints. There is room for improvement in terms of both accessibility and transparency, but the most significant challenge to accountability lies in the understandable reluctance of victims, especially law clerks and other temporary employees, to report misconduct. The Judiciary should reduce barriers to reporting and provide alternative avenues for seeking advice, counseling, and assistance for all employees. Judges have a special responsibility to promote appropriate behavior and report instances of misconduct by others, including other judges.
- The Judiciary has long had in place policies, expressed through codes of judicial and employee conduct, to maintain high standards of behavior while preserving the independence and integrity of the Judicial Branch. Those policies, however, were not developed with the aim of addressing the particular issues of workplace harassment or incivility. The codes should more clearly communicate the rights and responsibilities of employees, including the scope of confidentiality and the availability of remedial procedures.

- The Judiciary has two formal mechanisms for reporting misconduct—the Judicial Conduct and Disability Act (JC&D Act), which sets out statutory procedures for complaints against judges, and the Employment Dispute Resolution Plans (EDR Plans), which are judicially created mechanisms in each of the circuits for making claims against judges and other judicial employees. They are effective when invoked, but they should not be the exclusive avenue for employee recourse. Employees should have other options, apart from filing a formal complaint, for guidance, counseling, assistance, and relief. Those options, calibrated to the nature of the conduct, should exist at the local, regional, and national levels.
- The FJC, as well as the Administrative Office and individual courts, have a broad range of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility. These vigorous training programs can be improved through refinements placing more focus on workplace civility, integrating civility principles into other training programs, emphasizing proactive measures to prevent bad conduct, and encouraging “bystanders” who witness misconduct to take action through channels for reporting and response. Educational programs should be continuously evaluated to determine their effectiveness.

II. *Recommendations*

Based on its findings, the Working Group offers recommendations in three discrete areas for achieving the goal of an exemplary workplace. 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 register complaints. Third, the Judiciary should supplement its educational and training programs to raise awareness of conduct issues, prevent discrimination and harassment, and promote civility throughout the Judicial Branch.

A. Codes of Conduct and Guidance Documents

The Judicial Conference has adopted codes of conduct for judges and judicial employees that indicate, either expressly or by clear implication, that judges and judicial employees have a duty to refrain from and prevent harassment and other inappropriate workplace conduct. Those codes—and public confidence in the Judiciary—would be strengthened if the Judicial Conference 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 Working Group recommends that the Committee on Codes of Conduct formulate more precise language in the Code of Conduct for United States Judges to make clear that:

- A judge has an affirmative duty to promote civility, not only in the courtroom, but throughout the courthouse. The admonitions that judges show patience, dignity, respect, and courtesy to litigants, jurors, witnesses, lawyers, and the public also apply to judicial employees.
- A judge should neither engage in nor tolerate inappropriate workplace conduct, including comments or statements that could reasonably be interpreted as harassment, abusive behavior, or retaliation for reporting misconduct.
- A judge has a responsibility to curtail inappropriate conduct by others, including other judges. The judicial virtues of mutual respect, independence, and collegiality should not

prevent a judge from intervening when necessary to protect an employee (including a fellow judge's chambers employee) from inappropriate conduct.

The Working Group recommends that the Committee also revise the Code of Conduct for Judicial Employees to formulate more precise language to make clear that:

- Judicial employees, including supervisors, have a duty to promote workplace civility, avoid harassment, and take action when they observe misconduct by others.
- Confidentiality obligations do not prevent any employee—including law clerks—from revealing abuse or reporting misconduct by any person.
- Retaliation against a person who reports misconduct is itself serious misconduct.

The Judiciary has a wide range of guidance documents, policy statements, and instructions issued by the Administrative Office, individual courts, and other Judiciary entities that all need to 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. 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. Many of those efforts are already underway.

B. Procedures for Identifying and Correcting Misconduct

The Judiciary enforces its standards of conduct through two procedural mechanisms. Judges are subject to discipline through the statutory procedures set out in the JC&D Act, which the Judicial Conference has implemented through its Rules for Judicial Conduct and Judicial Disability Proceedings (the Conduct Rules). In addition, both judges and employees are subject

to EDR Plans already in place in each regional circuit. The Working Group suggests some changes to each of those procedures.

In the case of the JC&D Act, the Working Group recommends that the Judicial Conference’s Committee on Judicial Conduct and Disability revise the Conduct Rules or associated commentary to make clear 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. Complainants should clearly 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.
- Workplace harassment is within the definition of misconduct. The Committee on Judicial Conduct and Disability should adopt language and examples in its procedural rules that are congruent with any changes that the Committee on Codes of Conduct makes to the Code of Conduct for United States Judges.
- Confidentiality obligations should never be an obstacle to reporting judicial misconduct or disability. Complainants should understand that the obligations of confidentiality that judicial employees must observe in the conduct of judicial business do not shield a judge from a complaint under the JC&D Act.
- A judge has an obligation to report or disclose misconduct and to safeguard complainants from retaliation. The Committee on Codes of Conduct should state these principles in the Code of Conduct for United States Judges, but they warrant repetition in the Conduct Rules.

In addition, the Working Group recommends that the Judiciary as a whole consider possible mechanisms for improving the transparency of the JC&D Act process. Public confidence in the JC&D Act will benefit by efforts, already agreed upon by the Administrative Office, to identify harassment complaints in its statistical reports. Individual circuits also should investigate making decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.

In the case of EDR Plans, the Working Group recommends that the Judicial Conference's Committee on Judicial Resources consider revisions to the Judiciary's Model EDR Plan, which provides the template for the EDR Plans in each of the federal Judiciary's regional circuits. The Working Group recommends the Committee consider revisions to accomplish several discrete goals:

- The Model EDR Plan should be rendered more “user-friendly” through simplified language and more succinct direction on the steps to be followed in the dispute resolution process.
- The Model EDR Plan should ensure a uniform scope of coverage throughout the Judiciary. Some circuits have excluded certain classes of individuals from access to their EDR Plans. The Committee should consider mandatory coverage for all persons working in the court system, including interns, externs, and chambers employees.
- The Model EDR Plan's reference to sex discrimination should be examined to ensure it is consistent with established legal definitions and to make clear that harassment, without regard to motivation, is wrongful conduct.
- The Model EDR Plan should make clear 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.

- The Model EDR Plan's time limit for initiating a claim should be extended from 30 days to 180 days from the date of the alleged violation or when the complainant became aware of the violation. That time limit will better accommodate the time employees may reasonably need to ascertain and assess their options under the EDR Plan.
- The Committee should consider steps to improve the training and qualifications of EDR Coordinators, who play a critical role in providing information and training to employees regarding their rights under the EDR Plan and assist employees in accessing the claims 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. Accordingly, the Working 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 should range from a discussion of options to address their concerns, to intervention on their behalf with appropriate court personnel and related support.

- At the national level, the Working Group recommends that the Administrative Office establish an internal Office of Judicial Integrity that would 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. The newly created office could be combined with existing offices that already exist to ensure the integrity of the Judiciary, including offices that provide and coordinate independent financial auditing and management analysis services to the courts to prevent and expose waste, fraud, and abuse.

- 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. 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.
- 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. Courts 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.

C. Education and Training Programs

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:

- 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 FJC has developed high quality educational programs, but they are not reaching all employees—in significant part, because the programs are not consistently offered throughout the Judicial Branch.
- The FJC should develop advanced training programs specifically aimed at developing a culture of workplace civility. The FJC is already 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. 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.
- 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 specific topics of special relevance to the judicial workplace. Where feasible, the FJC should tailor its advanced programs to specific groups. For example, programs for judges, court executives, and supervisors should emphasize leadership, accountability, and risk identification, while programs for court employees, including law clerks, should emphasize standards and procedures, and highlight where and how to get advice and help.

In 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 remains committed to assisting with that effort and offers its continued service in whatever capacity the Chief Justice and the Judicial Conference direct.