

To: Judicial Conference committees on Codes of Conduct and Judicial Conduct and Disability  
From: Emma Janger on behalf of Pipeline Parity Project  
Date: November 13, 2018  
Re: Comment on Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability Proceedings

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The following comment regarding the proposed changes to the to the Code of Conduct for U.S. Judges (Code) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules) is respectfully submitted by the members of Pipeline Parity Project (PPP). PPP is a group of Harvard Law students working with students, faculty, and alumni at our institution and others to end harassment and discrimination in the legal profession. As future lawyers and clerks, we believe that we have both a responsibility and a unique perspective to contribute to the conversation about promoting in the judiciary.

Harassment is pervasive in American workplaces and the judiciary is not immune. In December 2017, a group of former clerks came forward to confirm the open secret that Ninth Circuit Judge Alex Kozinski subjected employees to sex-based harassment and other forms of abuse for years.<sup>1</sup> Although Kozinski's harassment was widely known — and sometimes even occurred in public, in front of multiple eyewitnesses — no one intervened. As future clerks, we comment the Judicial Conference's commitment to reform and share the goal of ensuring that all who work within the judiciary are treated with dignity and have equal opportunity to succeed. We believe that the proposed rules mark an important step forward and are heartened that the proposed rules embrace many needed changes.

Nevertheless, we urge you to make additional changes to address barriers that judicial employees, particularly clerks, will face in reporting and resolving misconduct within the judiciary. Sexual harassment is highly under-reported across the nation. According to a meta-analysis of studies on sexual harassment, less than a quarter of people who have been harassed at work file formal sexual harassment complaints with their employer, often because they fear retaliation, indifference, or organizational inaction.<sup>2</sup> But even in this context, the judiciary stands out: of 1,300 misconduct claims filed under the JC&D rules in 2016, not a single one was filed

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<sup>1</sup> Matt Zapotesky, *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=.c0d92507a342](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=.c0d92507a342).

<sup>2</sup> Lilila M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in *Review THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR*, 469, 484 (Julian Barling & Cary L. Cooper, eds., 2008), <https://lsa.umich.edu/psych/lilia-cortina-lab/Cortina&Berdahl.2008.pdf>.

by law clerks.<sup>3</sup> We believe that the Judiciary’s zero percent highlights the inadequacies of the judiciary’s limited system for reporting complaints, judicial clerks acute fear of retaliation should they come forward, the lack of informal resolution options, and a lack of public trust that complaints of discrimination will be handled fairly and effectively. We respectfully urge you to consider the following comments and proposed additional changes, which we believe would encourage reporting, help accommodate judicial employees who are discriminated against, and foster a more equitable workplace for all.

### **Definitions of Harassment**

We strongly support several proposed revisions to the Rules for Judicial-Conduct and Judicial-Disability Proceedings, including the inclusion of sexual harassment under Rule 4(a)(2) and a broad prohibition on discrimination under Rule 4(a)(3).<sup>4</sup> However, we believe the rules can be improved. First, we are concerned that Rule 4(a)(2) limitation on sexual harassment may inadvertently give the impression that only harassment of a sexual nature is prohibited, rather than harassment based on sex, sexual orientation, or gender identity.<sup>5</sup> Second, the proposed changes included too few examples of the forms that prohibited conduct can take. The rules and their commentary can be improved by including examples of prohibited behaviors as well as prohibited forms of retaliation, so that employees can fully exercise their rights.

Harassment can take many forms. The proposed rule 4(a)(3) is a welcome addition in that it recognizes that judicial employees can be victims of discrimination based on a non-exhaustive list of grounds.<sup>6</sup> However, Rule 4(a)(2) risks creating the impression the policy prohibits only that harassment a sexual nature, “much of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content.”<sup>7</sup> Therefore, we urge the committee to replace references to “sexual harassment” to “gender-based” harassment,” which better indicates that harassment based on a victim’s gender or sex is prohibited regardless of whether it is motivated by sexual desire. Alternatively, the definition of discrimination under rule 4(a)(3) should be expanded to clarify that harassment

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<sup>3</sup> FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 19 (2018),

[http://www.uscourts.gov/sites/default/files/workplace\\_conduct\\_working\\_group\\_final\\_report\\_0.pdf](http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf).

<sup>4</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability at 13 (Sept. 13, 2018)

[http://www.uscourts.gov/sites/default/files/jcd\\_rules\\_redline\\_-\\_proposed\\_changes\\_-\\_9.13.18\\_0.pdf](http://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf) (draft).

<sup>5</sup> *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (recognizing that discrimination based on sex is unlawful sex discrimination); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, No. 15-1720, WL 1230393 (7th Cir. Apr. 4, 2017) (en banc) (holding that a prohibition on sex discrimination incorporates a prohibition on sexual orientation discrimination).

<sup>6</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability, *supra* note 4, at 13, 15.

<sup>7</sup> Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686–87 (1998); *see also Proposed Changes To Code Of Conduct For U.S. Judges And Judicial Conduct And Disability Rules, Hearing before the Judicial Conference of the United States*, at 1 (Oct. 30, 2018) (Testimony of Alyssa Peterson, Yale Law Sch.).

based on any of the listed characteristics (or similar characteristics not listed) is a form of discrimination covered by Rule 4(a)(3).

We also commend the proposed changes for recognizing in the commentary to Rule 4 that any person can be a victim of sexual harassment “regardless of their sex and of the sex of the judge engaging in the misconduct.”<sup>8</sup> The commentary to Rule 4 is especially helpful to the extent it clarifies that the list of grounds for discrimination in Rule 4(a)(3) is not intended to be exhaustive.<sup>9</sup> However, the following paragraphs could be improved by including examples of prohibited conduct, so that judicial employees better understand their rights. Harassment can go beyond unwanted sexual advances or physical contact, and include offensive name-calling, ridicule, intimidation, and viewing offensive material in the workplace.<sup>10</sup>

Similarly, the prohibition on retaliation in Rule 4(a)(4) is a commendable addition to the Rules for Judicial Conduct. However, Rule 4(a)(4) could be improved by including examples of what conduct constitutes retaliation. Retaliation can take many forms beyond discharge of an employee for filing a complaint, including increased scrutiny of the employee and making the employee’s work more difficult by changing the employee’s schedule.<sup>11</sup> Furthermore, the rule only prohibits retaliation against those who participate in the formal “complaint process, or for reporting or disclosing judicial misconduct.”<sup>12</sup> While this definition could arguably be read to include retaliation for informal reporting (for example to another judge or judicial employee), it could also be read to limit the protection only to retaliation for filing a formal complaint. However, “protected activity” to assert one’s rights to a harassment-free workplace can take more forms than filing a formal complaint.<sup>13</sup> For example, the EEOC guidelines protect workers from retaliation because they resisted otherwise discriminatory advances, spoke with a supervisor or manager informally, or intervened on behalf of another person experiencing harassment.<sup>14</sup> Rule 4(a)(4) or its commentary should be expanded to make clear that judicial employees are protected from retaliation whenever they engage in a similarly “protected activity,” not only when they participate in the formal complaint process.

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<sup>8</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability, *supra* note 4, at 15.

<sup>9</sup> *Id.*

<sup>10</sup> *Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited Nov. 12, 2018); *see also Sexual Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](https://www.eeoc.gov/laws/types/sexual_harassment.cfm) (last visited Nov. 12, 2018) (including in the definition of sexual harassment “offensive remarks about a person’s sex”). In addition, the UN defines harassment as including “unwelcome sexually determined behaviour [sic] as physical contact and advances, sexually coloured [sic] remarks, showing pornography and sexual demand, whether by words or actions.” *See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, Eleventh Session (1992)*.

<sup>11</sup> *Retaliation*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/retaliation.cfm> (last visited Nov. 12, 2018).

<sup>12</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability, *supra* note 4, at 13.

<sup>13</sup> *Retaliation*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/retaliation.cfm> (last visited Nov. 12, 2018).

<sup>14</sup> *Id.*

## Complainants' Procedural Rights and Fair Investigation Procedures

To encourage reporting and promote public trust in the judiciary, it is imperative that the judiciary establish a prompt, thorough, fair, and consistent procedures for investigating complaints and guarantee clear, robust procedural rights for both complainants and judicial employees accused of harassment. To this end, we support several proposed changes JC&D Rules. We further urge you adopt several more changes to ensure greater parity in the procedural rights provided to a complainant and to a judge accused of discrimination and address some notable gaps in the proposed changes.

### A. Encouraging Aspects of Proposed Changes

We strongly support several proposed modifications to the JC&D Rules, including language added to specify that judicial employees include unpaid staff, such as interns and externs and to clarify that rules surrounding confidentiality do not prevent judicial employees from reporting or disclosing misconduct.<sup>15</sup> We also agree that it is appropriate that judges conducting the process have an affirmative duty to gather information, especially in a context where a complainant may be reluctant to name prohibited conduct or witnesses may be reluctant to come forward for fear of retaliation.<sup>16</sup>

### B. Additional Changes to Promote Fair Investigations and a Trusted Process

In general, we urge the Judicial Conference to explicitly guarantee greater parity in the procedural rights afforded to a complainant and to a judge. Specifically, we urge the Conference to guarantee that where a judicial employee makes a complaint against a judge of discrimination, both the complainant and the judge should have *reasonable and equal* opportunity to submit evidence to an investigating special committee, compel witnesses, and to receive copies of the any documents submitted to the special committee. The proposed changes rightly afford key procedural rights to a subject judge — but fail to provide many of those essential rights to complainants. For example, we believe the JC&D rules should be amended to provide greater parity in the following areas:

- Opportunity to Present Evidence: Rule 15(c) provides subject judges with the right to present evidence, compel the attendance of witnesses, and compel the production of documents.<sup>17</sup> However, Rule 16(b) only provides complainants the opportunity to briefly

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<sup>15</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability, *supra* note 4, at 6, 18.

<sup>16</sup> Cf. Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts>.

<sup>17</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability, *supra* note 4, at 39.

explain their knowledge of relevant evidence to the committee in writing.<sup>18</sup> Instead, complainants should have the right to call witnesses and compel the production of documents. It is especially important that complainants have the ability to call witnesses because witnesses may otherwise decline to come forward and present corroborating evidence for fear of retaliation. Thus, without guaranteeing complainants the right to call witnesses, the Judicial Conference risks adopting a system which will systematically omit key evidence that would substantiate complaints of misconduct. Similarly, Rule 16(c) would leave a complainant's ability to attend hearings and present arguments to the discretion of the special committee.<sup>19</sup> Instead, like subject judges, complainants should also be guaranteed the opportunity to offer oral argument.<sup>20</sup> Guaranteeing these rights, rather than leaving them to the discretion of the special committee, would help ensure fair, effective investigations and limit the risk that procedures are (or are perceived to be) inconsistently applied.

- Opportunity to Respond: Rule 11(f) requires a chief judge to invite the subject judge to respond to a complaint during a limited inquiry to determine whether a complaint should be dismissed, concluded, or referred to a special committee.<sup>21</sup> We believe this is essential, but urge the Judicial Conference to further specify that a complainant should have the opportunity to respond if a chief judge decides not to appoint a special committee in part or whole because of the subject judge's response. If the complaint is referred to a special committee, and the subject judge's response is sent to the committee, the complainant should likewise have an opportunity to review and respond. We believe that affording the complainant the opportunity to respond will facilitate accurate, fair investigations while preventing the perception that a complaint was closed without giving the complainant meaningful opportunity to present evidence.
- Access to Key Documents: Rule 15(e) affords judges the right to receive copies of the special committee report, hearing transcript, or any documents introduced, and of any written arguments submitted by the complainant, but Rule 16 does not provide parallel rights to complainants.<sup>22</sup> A complainant could thus file an initial complaint and be kept totally ignorant of the investigation and outcome of said complaint, which would make a timely appeal all but impossible. Moreover, denying complainants access to this information risks fostering the perception that the complaint process is opaque, biased towards subject judges, and not worth reporting to.

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<sup>18</sup> *Id.* at 40.

<sup>19</sup> *Id.*

<sup>20</sup> *See id.* at 39.

<sup>21</sup> *Id.* at 27.

<sup>22</sup> *Id.* at 39–41.

- Attorney’s Fees: Rule 20(e) provides that subject judges can in some circumstances be reimbursed for attorney’s fees and other expenses from complaint proceedings. There is no such provision reimbursing complainants for expenses incurred for reporting harassment.<sup>23</sup> Given the enormous barriers to reporting discrimination, the current zero percent reporting rate among judicial clerks, and the committees’ interest in encouraging these reports, the JC&D Rules should to provide attorneys fees for judicial employees who bring complaints in appropriate circumstances. This would alleviate the additional, financial barrier to reporting posed by attorney’s fees.

In some cases, the JC&D Rules should also provide for the procedural rights of witnesses. For example, Rule 15(f) specifies that a subject judge has a right to counsel, but under Rule 14(c), the special committee has the discretion to decide whether other witnesses may have counsel present.<sup>24</sup> Witnesses should be guaranteed the right to counsel.

We also urge the committee to amend the rules to provide a complainant with adequate time to file for judicial council review of a Rule 11 determination. Rule 18(b) gives a complainant only 42 days from the date of a chief judge’s order to file for judicial council review.<sup>25</sup> We agree that it is important to provide finality to the process — but given the emotionally fraught nature of reporting and participating in investigations of harassment, fear of further retaliation, and complainants’ limited access to the process, we believe a 42 day time-limit is insufficient and recommend expanding it to at least 180 days.

Finally, we urge the committee to consider creating an avenue to appeal a chief judge’s decision not to identify a complaint under Rule 5 or to otherwise allow judicial employees to alert an appropriate judicial body if any given chief judge has a pattern or practice of declining to recognize complaints contrary to evidence. Given the close relationship between chief judges and their colleagues, judicial employees may fear that chief judges will decline to recognize credible complaints, without oversight. The JC&D Rules should be amended to create an avenue, such as a national reporting channel housed in the newly created Office of Judicial Integrity, through which judicial employees to raise concerns about a chief judge’s pattern and practice of denying credible complaints.

### **Clarify the Availability of Informal Resolutions**

We propose that the Rules of Conduct allow for more forms of informal resolution. In general, people who experience sexual misconduct are considerably more likely to informally

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<sup>23</sup> *Id.* at 48.

<sup>24</sup> *Id.* at 38, 48.

<sup>25</sup> *Id.* at 42.

than to formally disclose the misconduct.<sup>26</sup> Clerks are especially unlikely to formally report misconduct due to fear of retaliation and the inherent power imbalance between a judge and a judicial clerk. We believe that providing specific informal resolutions will provide much-needed support to clerks who are unwilling to formally report discrimination, while also providing important guidelines for the adjudicators. We believe there should be more tailored options for informal resolutions specifically listed and described within the Code and JC&D Rules in order to give more guidance to potential complainants and the judges in charge of resolving misconduct complaints.

#### A. Suggested Changes to Process for Obtaining Informal Resolutions

*Timing of Resolutions:* The commentary to Rule 4 anticipates that some allegations of misconduct will result in informal procedures “because they appear likely to yield to effective, prompt resolution,” and that the chief judge will “initiate such steps as promptly as is reasonable under the circumstances.”<sup>27</sup> While the proposed Code of Conduct and JC&D Rules correctly recognize the value of informal resolutions in providing effective and prompt resolution, more guidance should be given to the meaning of as “promptly as is reasonable” so that clerks can be assured that their concerns will be resolved in a timely manner within the very short term of their employment. The rules should provide more guidance on the timeline of implementing informal corrective action, for example by suggesting that some interim measures should be available as soon as an individual makes a credible complaint.

*Role of Complainant in Requesting Informal Resolution* – Under Rule 11(d) the chief judge can conclude the complaint proceeding if she finds an informal resolution or voluntary action on the part of the subject judge satisfactory.<sup>28</sup> Both possibilities undervalue the role of the complainant in the process — instead, Rule 11(d) should be amended to require a consideration of whether a complainant finds the informal or voluntary resolution an appropriate remedy to the complaint. The chief judge is given too much discretion to define the satisfactoriness of a resolution. We are concerned that these procedures for concluding a complaint will enable the chief judge to conclude complaint with very informal corrective action that does not address needs of the clerk.

#### B. Suggested Informal Resolutions:

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<sup>26</sup> See, e.g., Chiara Sabina & Lavina Y. Ho, *Campus and College Victim Responses to Sexual Assault and Dating Violence: Disclosure, Service Utilization, and Service Provision*, 15 TRAUMA VIOLENCE ABUSE, 201, 203 (2014) (reporting findings of a systemic review of literature on college students’ reporting of sexual assault and finding that victims are far more likely to informally disclose than to formally report to police or others).

<sup>27</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability, *supra* note 4, at 16.

<sup>28</sup> *Id.* at 25, 27.

We urge the Judicial Conference to clarify what forms of informal resolution are available. Without outlining such resolutions, the chief judge retains sole discretion over the process, potentially creating inconsistency of available remedies across circuits. <sup>29</sup> This commentary should also clarify the timing of receiving informal resolutions and what steps a complainant would need to take to receive such measures. Providing this timeline will assure clerks that the process can remedy their claims in a timely manner, addressing concerns that slow resolution of complaints deters reporting

*Mental Health Support:* Access to mental health support should be made available to clerks as they consider reporting and as they go through the JC&D process. Experiencing sexual harassment has been tied to psychological effects ranging from a Major Depressive Disorder or PTSD to negative mood, disordered eating, and abuse of prescription drugs and alcohol. <sup>30</sup> We recommend providing confidential access or referral to mental health care and counseling covered by insurance or other means of financial support. Providing mental health services for clerks experiencing misconduct can be critical as they consider reporting, are reporting, or while they wait for the JC&D process to conclude. Additionally, as the EEOC has noted, the damaging effects of harassment are not limited to those harassed. There is growing evidence that those who observe such conduct can also suffer mental or physical harm. <sup>31</sup> While such observers may not report the behavior they have witnessed, they could be helped by mental health resources as well.

*Interim Measures:* We believe that in addition to longer-lasting resolution, interim measures should be available to complainants where they have made a credible (rather than probable) claim. <sup>32</sup> These interim measures would be short-term adjustments, such as working from home or from a different office, where possible, in order to ameliorate the situation. A system involving interim measures would mirror how universities, including law schools, handle Title IX complaints while the student and school decide how to proceed with or investigate a complaint. <sup>33</sup>

*Voluntary Transfers:* We urge the judiciary to establish voluntary transfer options. The Working Group Report suggested that the Judiciary “incorporate informal employee protection programs[,] includ[ing] 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

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<sup>29</sup> FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP. *supra* note 3, at 16 (noting the need for uniformity across circuits).

<sup>30</sup> EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC, 20 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf).

<sup>31</sup> *Id.* at 21.

<sup>32</sup> Rule 5(a) currently allows (unspecified) informal resolutions, if the Chief Judge finds probable cause.

<sup>33</sup> HARVARD UNIV., FREQUENTLY ASKED QUESTIONS CONCERNING HARVARD UNIVERSITY SEXUAL AND GENDER-BASED HARASSMENT POLICY AND PROCEDURES FOR HANDLING COMPLAINTS INVOLVING STUDENTS (2018), [http://titleix.harvard.edu/files/title-ix/files/sexual\\_harassment\\_policy\\_procedures\\_faqs.pdf?m=1461105743](http://titleix.harvard.edu/files/title-ix/files/sexual_harassment_policy_procedures_faqs.pdf?m=1461105743).

or supervisor makes it untenable for the employee to continue to work for that judge or supervisor.”<sup>34</sup> Given the proximity with which law clerks and judges work together, there may be some situations where the only option to alleviate the immediate harm of the work environment is through a voluntary transfer to a different clerkship or similar alternative work arrangements.

A voluntary transfer program would enable a clerk to remove themselves from a demeaning or harmful workplace, without losing employment, wages, the learning and career benefits of a clerkship. This system would not only improve those situations where voluntary transfers were taken, but the possibility of such relief would further reduce the barriers to reporting that many clerks face. We recognize that a voluntary transfer could take some time to effectuate and thus would recommend that it be paired with other forms of interim measures (above). We also note here that creating a successful transfer program would be another reason to share information with law schools. We recognize that these programs be developed in close co-ordination with law schools, whose faculty and career services staff can support alumni who seek to leave the judiciary altogether and secure alternative employment arrangements.

*Restrictions on Contact:* Judicial employees may be harassed by judicial officers or employees besides their judge: for example, the *Washington Post* revealed last year that former Judge Kozinski also harassed the clerks of other 9th Circuit judges.<sup>35</sup> In these cases a wider variety of remedies is available. We recommend that when a judicial employee is harassed by an individual outside a judge’s own chamber, one available information resolution be a restriction on contact between the victim and the individual who committed the discriminatory conduct, providing the victim the necessary relief to allow them to work free of harassment.<sup>36</sup>

### **Accountability Mechanisms**

As drafted, the revised rules and regulations do not provide adequate mechanisms for holding members of the judiciary accountable. It is important that accountability mechanisms are in place so that clerks, other judicial employees, and other stakeholders know that reports of judicial misconduct will receive prompt and appropriate responses.<sup>37</sup> The judiciary must have mechanisms to promote transparency so that clerks can make safe and informed decisions when accepting a clerkship interview or offer.

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<sup>34</sup> FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 3, at 38–39.

<sup>35</sup> Zapotosky, *supra* note 1.

<sup>36</sup> Restrictions on contact are quite common in the school setting because they enable both parties to continue working with minimal interference. *See, e.g.*, HARVARD UNIV., *supra* note 34 at 10.

<sup>37</sup> *See, e.g.*, KEY FINDINGS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2017), [https://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_research-translation\\_key-findings-select-task-force-study-harassment-in-the-workplace.pdf](https://www.nsvrc.org/sites/default/files/publications_nsvrc_research-translation_key-findings-select-task-force-study-harassment-in-the-workplace.pdf) (explaining that “the extent of non-reporting [of workplace sexual harassment] is striking” and tying high levels of non-reporting to fears of “organizational indifference or trivialization”).

In many circumstances, judicial accountability mechanisms raise concerns regarding judicial independence. While we respect the gravity of these concerns, they are beyond the scope of this comment. The hiring and treatment of clerks is an administrative function not entitled to absolute immunity.<sup>38</sup> The Supreme Court has recognized that the same privilege which protects adjudicatory decisions does not insulate members of the judiciary from suit by employees, for example.<sup>39</sup> Increasing accountability and transparency regarding the treatment of judicial clerks will not threaten judicial independence.

#### A. Proposals to Improve Accountability Under the JC&D Rules

Overall, we are primarily concerned about limiting review of complaints to members of the judiciary. Rule 5 limits the power of inquiry to the chief judge, raising concerns about conflicts of interest. The judiciary fosters close relationships among its members that may prevent the appropriate review of a misconduct allegation.

We suggest two alternatives to the review structure. The first is the creation of an independent, national body to receive and review complaints, such as an auditor general or ombudsman. The independent committee may either receive the initial complaint and carry out the initial inquiry into judicial misconduct or annually review the decisions of the special committee to determine whether allegations of misconduct received fair treatment. Independent review can help adjust for imbalances in power between parties, such as that between a judge and her clerks. We recommend that this take the form of a national reporting channel, possibly housed in the newly created Office of Judicial Integrity.<sup>40</sup>

As discussed in other sections of this comment, broad review mechanisms would also improve accountability in the complaint process. The JCUS must consider avenues for improving transparency such as providing annual reports to law schools, completing anonymous exit interviews with judicial clerks, and instituting a climate survey as described in this comment. Such broad reforms will help transform the culture surrounding reports of judicial misconduct.

#### B. Specific Revisions to the Rules

We further urge the committee to clarify several proposed rules to improve accountability. In Rule 5, the committee should define “reasonable grounds” to guide chief judges in properly carrying out these inquiries.<sup>41</sup> “Appropriate corrective action” must also be defined as it affects Rules 11(d) and (e), possibly by providing examples of appropriate

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<sup>38</sup> See *Forrester v. White*, 484 U.S. 219, 229–30 (1988).

<sup>39</sup> *Id.*

<sup>40</sup> See *infra* at 11-12.

<sup>41</sup> FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 3, at 19.

interventions.<sup>42</sup> Certain linguistic changes would also improve accountability and clarity under the revised rules. For example, the language in Rule 13(a) should frame the Special Committee’s affirmative duty to address misconduct in mandatory terms.<sup>43</sup> By clarifying the special committee’s obligations, it will be easier to determine whether the committee has fulfilled its duties under the new rules. Additionally, the commentary to Rule 23(b)(8) should clarify that a special circumstance can include allegations of sexual misconduct.<sup>44</sup> We also suggests striking the line “or when those materials constitute purely internal communications,” or amending it to exclude substantiated complaints of discrimination.<sup>45</sup> Communications between a judge and clerk often qualify as “purely internal” but still should be disclosed in cases of sexual misconduct. Opportunities for disclosure will hold individual judges, chief judges, and special committees accountable for their actions while allowing law schools and potential clerks to make more informed decisions.

In summary, the revised rules do not substantially assure accountability among members of the judiciary. The rules will serve this purpose better if they better support transparency, neutral review, and an improved balance of power. Without these accountability mechanisms, the JCUS risks failing its clerks and ingraining a culture of harassment and sexual misconduct.

### **Establishing a National Reporting Avenue**

We believe that judicial clerks’ zero percent reporting rate is driven by two key flaws: first, the lack of informal reporting procedures; and second, the absence of reporting avenues separated from chief judges, who form close working and personal relationships with judges who would be the subject of such complaints. To encourage reporting, we strongly encourage the committees to create an alternative centralized, national reporting avenue for all judicial employees, possibly housed in the newly created Office of Judicial Integrity.

A national reporting avenue would lower barriers to reporting harassment by alleviating actual and perceived conflicts of interest involved in reporting to a chief judge. While many judicial employees may feel comfortable reporting discriminatory conduct to a chief judge, many others may be uncomfortable doing so because they may work in close proximity to the chief judge (putting potential complainants at a heightened risk of retaliation) or because chief judges may have close ties to a potential subject judge. The office could be modeled after the Ninth Circuit’s newly created office for a Director of Workplace Relations, who will oversee

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<sup>42</sup> *Id.* at 26–27.

<sup>43</sup> *Id.* at 35. For example, “In investigating the alleged misconduct or disability, the special committee must take steps to determine the full scope of the potential misconduct or disability, including whether a pattern of misconduct or a broader disability exists.” *Id.*

<sup>44</sup> See FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 3, at 56.

<sup>45</sup> *Id.* at 58.

workplace issues, facilitate anti-discrimination training, and receive complaints.<sup>46</sup> Similar offices in each circuit could work in concert with a national reporting office, sharing information between branches to ensure consistent responses to harassment. Moreover, judicial employees may be more comfortable seeking advice and assistance regarding informal resolutions, accommodations, or reporting channels from a national office with a degree of separation from the circuit in which they work and the judge who would potentially be the subject of a complaint.

A national reporting avenue could also foster consistent responses to reports of discrimination, alleviating concerns that responses to sexual harassment will improperly vary from circuit to circuit. A centralized office could also create a standardized system to receive informal reports from a wide range of stakeholders, including judicial employees who experience discrimination, witnesses, and law schools. Because of the immense risk of retaliation, law clerks, like all employees, are more likely to informally report harassment or seek accommodations than to file a formal complaint. An independent, national office can track and aggregate informal reports, allowing the office to identify potential patterns and practices of discrimination in a given circuit or chamber and, where appropriate, to either identify a complaint or to informally intervene. For these reasons, we strongly urge the judiciary to revise Rules 7 and 11 to create such a reporting channel.

### **Conduct a Climate Survey:**

In order to effectively address patterns of harassment and violence within the judiciary, the Judicial Conference should launch a climate survey--asking current and former law clerks to anonymously provide information about their experiences with harassment while working for the federal judiciary.

Climate surveys are a widely recognized best practice for organizations seeking to address harassment and violence.<sup>47</sup> Climate surveys allow organizations to gather information about the extent and nature of harassment within a particular institution. Because harassment and violence do not look the same in every institution, climate surveys are essential to understanding the unique needs of an institution and to crafting a tailored response.

Effective climate surveys include questions assessing whether an employee has experienced or witnessed harassment; broadly, the form of such harassment; the role of the perpetrator vis a vis the victim; the employee's knowledge of reporting mechanisms, resources, and definitions of harassment; the cost and impact of harassment on victims; community attitudes towards harassment; and perceptions of the institution's ability to address harassment.

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<sup>46</sup> *Id.* at 37.

<sup>47</sup> EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE, *supra* note 34 at 69.

Climate surveys ensure that information gathering is systematic, transparent, and comprehensive, rather than reliant solely on informal methods such as individual outreach or haphazard anecdotes. Systematizing information gathering helps to minimize the effect of biases among those investigating and increases public confidence in the process. Because climate surveys are anonymous and non-identifying, those surveyed can honestly respond without fear of retaliation, providing more candid and thorough information on the scope and nature of the problem.

This Working Group has already acknowledged that harassment and misconduct within the judiciary is “not limited to a few isolated instances.”<sup>48</sup> Though some informal, non-systematic information gathering has already been done, without a full and accurate picture of the prevalence and nature of sexual harassment, the judiciary will be unable to effectively combat it. The U.S. Equal Employment Opportunity Commission (EEOC) estimates that approximately 75 percent of workplace harassment incidents go unreported;<sup>49</sup> this figure may well be even higher within the judiciary, because the power and prominence of judges, norms of confidentiality, and the judiciary’s historically opaque reporting process.<sup>50</sup> Because formal reports do not provide a complete picture of harassment and discrimination, the EEOC recommends that employers use anonymous climate surveys as a tool measuring the prevalence of harassment and other discriminatory behaviors and gathering other key data on attitudes and perceptions.<sup>51</sup>

In implementing a climate survey, the judiciary would be in line with many large institutions, including others within the federal government. Climate surveys have been widely implemented by educational institutions, including many of the same universities providing the greatest number of federal judicial clerks such as Yale, Harvard, and peer institutions.<sup>52</sup> Within the military, an institution that has been plagued by sexual harassment, assault, and underreporting, climate surveys are administered routinely.<sup>53</sup> Many of the same problems of secrecy, power, and the importance of reputation that are pervasive within universities and the military are also prevalent in the federal judiciary. Climate surveys work to counteract these

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<sup>48</sup> See FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 3, at 56.

<sup>49</sup> EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE, *supra* note 34 at 9.

<sup>50</sup> Debra Cassens Weiss, *Revision to federal law clerk handbook addresses sex harassment complaints*, ABA JOURNAL, (Dec. 19, 2017, 11:56 AM), [http://www.abajournal.com/news/article/revision\\_to\\_federal\\_law\\_clerk\\_handbook\\_addresses\\_sex\\_harassment\\_complaints](http://www.abajournal.com/news/article/revision_to_federal_law_clerk_handbook_addresses_sex_harassment_complaints).

<sup>51</sup> EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE, *supra* note 34 at 43.

<sup>52</sup> See OFFICE OF THE PROVOST, YALE REPORT ON THE AAU CAMPUS CLIMATE SURVEY (2015), <https://provost.yale.edu/title-ix/yale-report-aau-campus-climate-survey>.

<sup>53</sup> See ASS’N OF AM. UNIVS., AAU CLIMATE SURVEY ON ASSAULT AND SEXUAL MISCONDUCT (2015), <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>; *see, e.g.*, U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL AND SOC. SCIS., MILITARY COMMAND CLIMATE SURVEY, [http://www.belvoir.army.mil/climate\\_survey/military\\_survey.asp](http://www.belvoir.army.mil/climate_survey/military_survey.asp).

dynamics by signaling that combatting harassment and assault is a priority among leadership and by ensuring participants' anonymity.

To achieve these benefits, however, a climate survey of current and former law clerks must be carefully constructed and implemented. The judiciary should commission an independent, expert provider to develop a standardized survey instrument designed to collect accurate, complete data about harassment and other workplace conditions. The climate survey should have verified participant access and comply with best practices identified by social science for measuring harassment and discrimination. Alumni should have the option of identifying the circuit within which the harassing conduct occurred, which would help the judiciary identify potential patterns of discrimination and provide targeted intervention where needed. The survey should collect information on workplace equity and culture along both objective and subjective lines: for example, in addition to asking a respondent if they had felt harassed during a clerkship, the survey should ask if they were shown pornography.

The survey should include both standardized questions that allow empirical analysis and broad open-response questions. For example, in addition to a "yes or no" questions as to whether a judge or co-worker ever commented inappropriately on an employee's clothing or sexual history, an effective survey would include questions asking respondents to rate, on a 1-10 scale, how comfortable a clerk would feel reporting harassment to the judiciary's internal investigation process, and open response questions where respondents can comment on the workplace culture more broadly and provide specific examples of inappropriate or inequitable behavior.

In order to measure whether work and opportunities were distributed equitably, the survey should ask clerks to report their average working hours, describe the type of work assigned (i.e., bench memos, opinion drafts, administrative tasks, etc.), and describe their professional relationship with the judge as a mentor as well. Finally, the survey should not be limited to harassment or discrimination committed by judges: it should also gather information about potential harassment committed by co-clerks and other judicial employees.

At this early stage of the efforts to address harassment and violence within the federal judiciary, a climate survey is a crucial step. A climate survey is an essential information-gathering tool, providing data on the extent and nature of harassment. Without specific knowledge of how, when, and where harassment is taking place within the federal judiciary, solutions will be improperly tailored to the problem and, ultimately, ineffective.

We thank the Committees for their work on this critical issue and for the opportunity to present our recommendations.