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.

APPENDIX 2

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.

APPENDIX 3

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.

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)

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.

<u>Meet on Common Ground: Speaking Up for Respect in the Workplace</u>

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

<u>Code of Conduct</u>

- 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 cntact 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

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)

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.

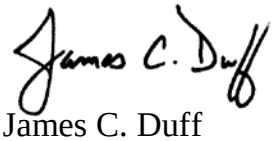
11. Lengthen the time allowed to file EDR complaints.

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.

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,



James C. Duff
Director

cc: Judiciary Workplace Conduct Working Group

APPENDIX 6

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) 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) 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.

APPENDIX 7

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 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).

APPENDIX 8

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 stages[1] of the EDR process, which includes:

- Informal Dispute Resolution
    - Counseling and/or
    - Mediation

- Formal Complaint

- Hearing and Decision
    - 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
    - Review of the presiding judicial officer's decision
    - 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 though the wrongful conduct process. Chief judges and unit executives are to assure that allegations of wrongful conduct are promptly investigated.

APPENDIX 9

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 ad-dresses 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 dis-crimination. 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 ex-plains 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.

APPENDIX 10

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 *AO Manual*	General Human Resources	The virtual town hall was held to address questions about the updated volume of the *AO Manual*. 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: *AO Manual* 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 *AO Manual*.
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 threated 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,

James C. Duff
Director

cc: Honorable Dianne Feinstein
Honorable Timothy M. Tymkovich