From:	Yan, Megan
To:	AO Code and Conduct Rules
Cc:	Gilles, Marguerite
Subject:	Public Comment
Date:	Tuesday, November 13, 2018 11:55:30 PM
Attachments:	Proposed Changes_Public Comment of Yale Law Student Working Group.pdf

To whom it may concern:

Please see attached for a comment submitted by a group of Yale Law students. A full list of the individuals submitting this comment is in Appendix A of the attached PDF. Our comment is with respect to both the Code and the JC&D Rules. Thank you.

Best,
Megan

Megan Yan
she / her / hers
J.D. Candidate, 2020
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[redacted]

Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules

Comment of Yale Law Student Working Group*

Submitted electronically, November 13, 2018, to the
Committee on Code of Conduct and Committee on Judicial-Conduct & Disability

* This comment is submitted by students in their individual capacities. A full list of students is provided in Appendix A.

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I. Executive Summary of Recommendations

On September 13, 2018, the Judicial Conference Committees on Code of Conduct and on Judicial Conduct and Disability released proposed changes to the Code of Conduct for U.S. Judges ("Code") and to the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("JC&D Rules") and requested public comment.[1] This comment is submitted on behalf of a working group of over fifty Yale Law School students[2] who organized to review the proposed changes. Seven students in the working group also testified before the Committees at the public hearing on October 30, 2018.

As law students, we believe we have a unique perspective and an important role in providing input on the rules that would govern us as potential future law clerks (indeed, some of us have already accepted clerkships). We recognize that aside from law clerks, the judicial branch has some 25,000 other employees who will also be governed by the Code and the JC&D Rules and who may have additional or differing needs. We write from our vantage point and in light of the particular challenges of encouraging misconduct reporting by law clerks – as recognized by the Report of the Federal Judiciary Workplace Conduct Working Group.[3] Those specific challenges come from the unusual features of clerkships, including their short-term nature and their importance as a first job in launching legal careers. This comment therefore addresses the proposed changes to the Code and JC&D Rules with those circumstances in mind. We also recognize that misconduct and harassment may fall unequally on women and groups marginalized on account of race, class, sexual orientation, and gender identity, and we offer suggestions to reflect the intersectional nature of the problem.

Above all, we appreciate the Committees' thoughtful work and efforts in proactively strengthening protections for judicial employees and, given our vantage point, for law clerks in the federal judicial workplace. This comment provides recommendations to further this goal. We address various areas of proposed change, including improving the reporting process; expanding the timeframe for reporting; clarifying the definitions of abusive or harassing conduct and retaliation; providing support for complainants throughout the reporting process; and expanding data collection and reporting of judicial misconduct to outside entities. Below is a summary of our recommendations:

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[1] *See* CODE OF CONDUCT FOR UNITED STATES JUDGES (Proposed Draft Sept. 13, 2018) [hereinafter "Code"], http://www.uscourts.gov/sites/default/files/code_of_conduct_for_u.s._judges_-_proposed_changes_-_9-13-2018.pdf; RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (Proposed Draft Sept. 13, 2018) [hereinafter "JC&D Rules"], http://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf.

[2] *See* Appendix A for a full list of students.

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

Improving the Reporting Process

- Clarify precedence of the JC&D Rules over the Model Employment Dispute Resolution Plan ("Model EDR Plan"), particularly regarding the statute of limitations, to make explicit that there is no limit on when a report can be filed
- Improve reporting confidentiality and documentation of reports of misconduct to enable data collection at the circuit and national levels
- Expand reporting channels beyond the chief judge of a given circuit
- Centralize data collection and reporting through the new Office of Judicial Integrity
- Institute a confidential climate survey to understand the current scope of judicial misconduct

Defining and Clarifying the Scope of Misconduct and Retaliation

- Clarify that cognizable misconduct includes *all* harassment based on sex, including pregnancy, sex/gender stereotyping, sexual orientation, and gender identity, regardless of whether the conduct is "sexual" in content or motivation
- Define cognizable misconduct to include *all* harassment based on other grounds prohibited by law, such as race, national origin, religion, disability, and age, as well as intersectional harassment based on more than one such ground because harassment is often not cabined to a single form
- Clarify the definition of "abusive or harassing behavior" to ensure coverage of other misconduct
- Add a range of examples to the commentary to clarify what constitutes "abusive or harassing behavior"
- Define retaliation and provide examples of retaliation

Providing Resources for Complainants Throughout the Reporting Process

- Ensure complainants have access to services to support health and well-being
- Provide law clerks with the ability to voluntarily transfer offices
- Provide informal career support, including letters of recommendation or other facilitation of the post-clerkship transition

Clarifying and Expanding Reporting of Misconduct to Outside Entities

- Provide specific examples of when judicial misconduct requires disclosure to outside entities
- Expand the list of outside entities that receive reports of judicial misconduct to include law schools in recognition of the unique relationship law schools have with the Judiciary in the context of clerkship placement

II. Improving the Reporting Process

A central finding of the Report of the Federal Judiciary Workplace Conduct Working Group ("Working Group Report") was that the Judiciary must "reduce barriers to reporting and provide alternative avenues for seeking advice, counseling, and assistance."[4] Data in the report indicated that, of the 1,303 misconduct complaints filed under Judicial-Conduct and Judicial-Disability procedures in FY2016, over 1,200 were filed by dissatisfied litigants and prisoners or persons who were incarcerated. "No misconduct claims were filed under these procedures by law clerks or judiciary employees that year."[5] The report noted that "there are significant 'power disparities' between judges and law clerks and other employees who work with them, which may deter a law clerk or employee from challenging or reporting objectionable conduct."[6] We support the Working Group Report's recognition of power disparities between judges and their employees and the need to reduce reporting barriers. No matter the strength of the procedural reform, if law clerks do not use these processes, the proposed changes will be ineffective. We therefore offer the following recommendations, focused on law clerks, to improve the reporting process for misconduct claims. These recommendations focus primarily on the Rules of Judicial-Conduct and Judicial-Disability ("JC&D Rules") and the Model Employment Dispute Resolution Plan ("Model EDR Plan"), all of which we understand to govern aspects of the reporting process.

A. Clarify Precedence of JC&D Rules over the Model EDR Plan, Particularly Regarding the Statute of Limitations for Reporting, to Make Explicit that There Is No Limit on When a Report Can Be Filed

Judicial employees can report misconduct within the Judiciary through the JC&D Rules process and the Model EDR Plan. However, these documents now appear to have different statutes of limitations. The proposed changes to the JC&D Rules leave unclear which process takes precedence and as such, it is unclear how much time employees have to report.

Chapter X, Section 3 of the Model EDR Plan suggests that the JC&D process would take precedence, stating that the adjudicating body may require that "all or part of the EDR claim must be abated until action is taken on the judicial misconduct complaint."[7] The current ambiguity leaves a conflict between the two systems regarding the statute of limitations. The Model EDR Plan posits a 180-day timeline within which an employee must request counseling, the mandatory

[4] *Id.* at 12.
[5] *Id.* at 10.
[6] *Id*. at 3.
[7] Judicial Conference of the United States, *Model Employment Dispute Resolution (EDR) Plan* ch. X, § 3 (Sept. 2018) [hereinafter "Model EDR Plan"], http://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2b-model-edr-plan.pdf.

first step in initiating a proceeding.[8] In contrast, the JC&D Rules place no limit on the time to report, thus creating confusion with respect to the statute of limitations that requires clarification.

We recommend resolving the ambiguity by amending the JC&D Rules to clarify that they take precedence over the Model EDR Plan in the context of misconduct claims against judges. We read the JC&D Rules to provide no statute of limitation on reporting, and we agree that this is the best possible way to encourage reporting from not only current but also former law clerks, who may feel more comfortable reporting after leaving chambers.

We therefore also recommend modifying the Model EDR Plan to explicitly adopt the JC&D Rules' timeline, both because it is the better choice to encourage reporting and because consistent timelines make plain an across-the-board commitment to doing so.[9]

Given the power disparities recognized by the Working Group Report and outlined above, the current Model EDR Plan's restrictive timeline of 180 days does not further the Committees' goals. We think it highly unrealistic to assume that law clerks will feel comfortable reporting during their clerkships. Each judge typically has a small number of clerks, who, if forced to file a complaint while still working for the judge, may fear identification and career ramifications.

Additionally, we recommend that the JC&D Rules and Model EDR Plan explicitly state that law clerks who have experienced misconduct have as much time as needed to report, particularly given the potential career consequences of reporting for clerks. We recognize that the Judiciary has many different types of employees, and that the public may also file complaints. As such, the changes we recommend to the reporting timeline may not be warranted with respect to all possible complainants. The Committees may wish to consider adopting a distinct section in the JC&D Rules and the Model EDR Plan to address the time to report for particular types of misconduct or complainants.[10]

B. Improve Reporting Confidentiality and Documentation

We recommend improving confidentiality standards throughout the reporting process, as the Working Group Report identified confidentiality as essential to effective anti-harassment policies.[11] As individuals who hope to become law clerks and indeed, as current students, we know how important confidentiality is given the impact that reporting publicly might have on

[8] *Id.* ch. X § 8.
[9] We recognize that the JC&D Rules also apply to complaints made by and against non-judge and non-law clerk individuals; the relevant considerations for reporting timelines may be different for them. Our recommendations here, however, are focused on misconduct by judges, especially during the unique and short-term nature of a clerkship.
[10] Model EDR Plan, *supra* note 7, at ch. I, § 3.
[11] Working Group Report, *supra* note 3, at 14.

relationships, health, and career prospects. Unless full confidentiality is provided, complainants may be discouraged from reporting, and the Judiciary will lose valuable information that would otherwise aid adequate investigation and elimination of misconduct.

The parameters of confidentiality are not adequately defined in the JC&D Rules and the Code of Conduct for U.S. Judges ("Code").[12] We are concerned about the possible power under JC&D Rules 23(b)(3) and 24(a)(5) for the chief judge or judicial council to order a complainant's name to be publicly disclosed without the complainant's consent.[13] A complainant's name should be eliminated from any documents made public resulting from or related to the confidential investigation. While we understand why the Committees may wish to avoid anonymous formal complaints, protecting complainants from public disclosure can and should be ensured during and after the process.

Further, we are concerned that, as currently drafted, there is no option for anonymous initial reporting.[14] We believe a separate confidential resource is needed: someone with whom current employees can discuss (with anonymity protected) the possibility of reporting before lodging an official complaint against a judge, an approach similar to the recommendation adopted by the Ninth Circuit Judicial Council.[15] We suggest that at least two routes be available: First, we recommend allowing such anonymous reporting to the newly proposed Office of Judicial Integrity. Second, we encourage each circuit to have an office or official who can provide this opportunity – having multiple venues will enable reporting that would otherwise not occur.

We also recommend changing the requirement under Rule 6(d) that complaints must include complainants' names and signatures to trigger formal review,[16] by opening the triggers for formal review to anonymous complaints where appropriate. For example, although certain

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[12] *See, e.g.*, "A judge, in deciding what action is appropriate, may take into account any request for confidentiality made by a person complaining of or reporting misconduct....A judge's promise of confidentiality may necessarily yield when there is information of misconduct that is serious or egregious and thus threatens the integrity and proper functioning of the Judiciary." Code, *supra* note 1, at Canon 3B(6). Similar language can be found in Rule 4(a)(6). JC&D Rules, *supra* note 1, at Rule 4(a)(6).

[13] "Disclosure in Decisions. Except as otherwise provided in Rule 24, written decisions of a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of a council or the Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public." JC&D Rules, *supra* note 1, at Rule 23 (b)(3). "[T]he name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge or the judicial council orders disclosure." JC&D Rules, *supra* note 1, at Rule 24(a)(5).

[14] "The complainant must provide a contact address and sign the complaint...If any of these requirements are not met, the submission will be accepted, but it will be reviewed under only Rule 5(b)." JC&D Rules, *supra* note 1, at Rule 6(d).

[15] Public Information Office, *Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations*, U.S. CTS. FOR NINTH CIR. (May 21, 2018), http://cdn.ca9.uscourts.gov/datastore/ce9/2018/05/21/R2_Judicial_Council_Workplace_Initiative.pdf.

[16] JC&D Rules, *supra* note 1, at Rule 6(d).

complaints might not be able to be investigated if made anonymously, reports of misconduct such as the viewing of sexual images on a workplace computer could be investigated without the name and signature of the complainant. This change will not only allow for more thorough review of these issues, but will also enable better documentation of misconduct patterns.

C. Expand Reporting Channels Beyond the Chief Judge

The Working Group Report recommended "multi-faceted" reporting procedures that provide "a range of methods, multiple points-of-contact, and geographic and organizational diversity."[17] The proposed changes to the Code and JC&D Rules do not yet, as we read them, meet this goal.

To comply with this requirement and ensure that clerks feel more comfortable reporting, we recommend that the JC&D Rules institute additional and more flexible avenues of reporting. Currently, Rule 25 establishes that the chief judge will handle all complaints of judicial misconduct, unless the chief judge is the accused or voluntarily recuses himself.[18] According to Rule 26, proceedings pertaining to a complaint can only be transferred to a judicial council in another circuit "in exceptional circumstances."[19] For various reasons (e.g., if the complainant has reason to believe that a chief judge and the accused are friends, or the chief judge may otherwise have particular views), a complainant may feel that coming forward is too uncomfortable or of little avail.

We suggest that the JC&D Rules be amended to include several new channels of reporting. First, the JC&D Rules might be changed to allow complainants the option to submit their complaints to a three-judge panel instead of the chief judge for initial review. The panel option establishes an alternative reporting channel that precludes the involvement of the chief judge, while the presence of three judges provides an effective check on any potential discretionary abuses.

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[17] Working Group Report, *supra* note 3, at 43.

[18] "(a) General Rule. Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If a complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint. (b) Subject Judge. A subject judge, including a chief judge, is disqualified from considering a complaint except to the extent that these Rules provide for participation by a subject judge." JC&D Rules, *supra* note 1, at Rule 25(a)-(b).

[19] "Transfer to Another Judicial Council: In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 12 or filed under Rule 6 to the judicial council of another circuit. . . . Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules." JC&D Rules, *supra* note 1, at Rule 26.

Second, we recommend that the JC&D Rules be amended to allow for complainants to submit their complaint for distribution of review by any judge, instead of only the chief judge, and provide a process for that judge to utilize once he or she receives such complaints.[20]

Third, Rule 26 could be amended to allow the transfer of a complaint to another circuit at the request of the complainant or the entity handling the proceedings, if either have reason to believe that the complaint will not be properly addressed in its original circuit.

Fourth, we recommend that the JC&D Rules be amended to allow complainants to report to the newly proposed Office of Judicial Integrity, or a comparable centralized office. There are several different and important functions related to reporting that the new office could perform:

- *The Office of Judicial Integrity could be an alternative place to submit formal reports.* It could function through a hub-and-spoke structure: placing non-judicial officers in each circuit for employees to comfortably report to, then transferring information back to the central office. Such a centralized model could also reduce barriers to reporting by establishing a standardized system to receive informal reports from a range of stakeholders.

- *The Office of Judicial Integrity could offer informal reporting.* Importantly, the Working Group Report acknowledges that the current formal reporting processes are not well-suited to address forms of workplace misconduct that, although falling short of assault, nevertheless may qualify as abusive or harassing conduct.[21] Because complainants, aiming to maintain working relationships, may minimize the severity of their experience, they may be discouraged from reporting what they perceive to be lower-level harassment out of concern that their claims are insufficiently serious. A centralized office, like the Office of Judicial Integrity, may help address this issue by developing a system to confidentially receive informal reports from judicial employees. This practice would enable the Office of Judicial Integrity to aggregate reports and identify patterns of misconduct. If the Office receives multiple reports against the same individual, it could confidentially notify complainants and ask if they would consider filing a formal complaint.

  A system similar to this process has been piloted and proven effective in addressing sexual abuse on college campuses: individuals were six times more likely to come forward and report under such a system.[22] This recommendation is in line with the Working Group

[20] "The circuit clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or, whether the chief judge is disqualified from considering a complaint, to the judge authorized to act as chief judge." JC&D Rules, *supra* note 1, at Rule 8.
[21] Working Group Report, *supra* note 3, at 36-37.
[22] *Year 3 of Combatting Sexual Assault, Empowering Survivors, and Advancing Justice*, CALLISTO 3 (2017-2018), https://www.projectcallisto.org/Callisto_Year_3_final.pdf.

Report's recommendation that the Office of Judicial Integrity "assist in resolving a matter when requested by an employee or otherwise warranted."[23]

With multiple channels to reporting available, complainants will be able to select the best way, and the way most comfortable for them, to address their complaint.

D. Centralize Data Collection and Reporting Through the Office of Judicial Integrity

We recommend expanding the role of the new Office of Judicial Integrity to be tasked not only with receiving reports, but also with centralizing reporting and data collection. Having two venues for data collection and review – at the circuit and at the national level – will enable data analyses to guide evidence-based policy revisions. Centralizing data collection responsibilities with the Office of Judicial Integrity would also better guarantee standardized treatment of complaints. We present three approaches that we believe are most promising:

1. *Rule 7(a) could be revised so all complaints would be filed and archived by the Office of Judicial Integrity.*[24] Currently, all complaints are filed with the clerks of the relevant circuit. While we believe that practice should continue, we recommend amending the JC&D Rules to include concurrent reporting to the Office of Judicial Integrity, so as to not miss the opportunity to track misconduct data and identify patterns nationwide.

2. *Rule 8(c)-(d) could be altered so complaints against non-covered persons could be filed with the Office of Judicial Integrity.* Currently, circuit clerks cannot accept complaints about non-covered persons, as illustrated in Rule 8(c) (complaints against a non-covered person) and Rule 8(d) (complaints against a judge and a non-covered person).[25]

3. *The Office of Judicial Integrity could produce a de-identified, annual public report on misconduct claims by circuit.* This would be akin to the six-month list regarding pending cases before District Courts.[26] Even if the data is deidentified, such a report would enhance public accountability for circuits that habitually see unreasonably low or high reporting numbers. Should confidentiality be at risk in listing claims by circuit (e.g. if the numbers

[23] Working Group Report, *supra* note 3, at 37.
[24] "Where to File. (1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office." JC&D Rules, *supra* note 1, at Rule 7(a).
[25] "Complaint Against Noncovered Person. If the circuit clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint under these Rules." JC&D Rules, *supra* note 1, at Rule 8(c).
[26] *Civil Justice Reform Act Report*, U.S. CTS., http://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report.

are so low that complainants or subject judges are readily knowable), the list may simply be an aggregated number of claims.

E. Institute a Confidential Climate Survey to Understand the Current Scope of Judicial Misconduct

In addition to rule revisions, we propose using the Office of Judicial Integrity to institute a climate survey. Such surveys have proved to be effective tools for tracking data, such as the Association of American Universities' campus climate surveys,[27] and would provide useful information about the prevalence and types of conduct employees are concerned about as well as employees' perceived barriers to reporting. As noted above, the Judiciary received no reports of harassment from law clerks in 2016 despite now-public reports of the existence of such misconduct. There are likely to be information gaps created by the current lack of reporting. A climate survey will help address the risk that the lack of accurate baseline data will undermine efforts to evaluate the effectiveness of the solutions that the Judicial Conference implements.

III. Defining and Clarifying the Scope of Misconduct and Retaliation

We commend the Committees for so prominently highlighting the issue of misconduct in the proposed changes and for acknowledging the seriousness of the challenges raised. Rule 4 and Canons 2, 3, and 4 of the Code are prime examples of the important steps the Committees have taken to elevate the issue of workplace harassment. We support these changes to better assist the federal courts in undertaking their judicial responsibilities to the public and in improving the experiences of staff, including law clerks.

In addition to these important changes, we have identified two major areas in which we believe modifications to definitions within the JC&D Rules and the Code will further the Committees' stated goals. First, with respect to the definitions of cognizable misconduct, we recommend that the Committees clarify harassment to reflect all forms of sex-based misconduct, rather than just sexualized harassment; state that cognizable misconduct includes all bases prohibited under existing law; clarify the definition of "abusive or harassing behavior"; and include a non-exhaustive list of examples of "abusive or harassing behavior." Second, we recommend providing a definition of retaliation. Clarifying these definitions will better enable individuals to file and respond to reports.

[27] *See AAU Announced 2019 Survey on Sexual Assault and Misconduct*, ASS'N AM. U. (June 18, 2018), https://www.aau.edu/newsroom/press-releases/aau-announces-2019-survey-sexual-assault-and-misconduct; *AAU Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N AM. U. (Sept. 3, 2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

We agree with the Working Group Report that judges should strive to promote a general tone and climate of civility, respect, and inclusion and recognize the Committees' amending of Canon 3(B)(4) to reflect such values.[28] We believe that such protection could be strengthened by revising and clarifying operative terms. As law students and potential future law clerks, we have identified specific behaviors and factors that are likely to make individuals employed in chambers uncomfortable in the workplace. We also realize that norms may change over time and, as a consequence, there is now a need to update judicial understandings to align with expectations of acceptable workplace behavior. The additions we suggest to the Code and JC&D Rules will make these documents clearer, more comprehensive, and, we believe, more effective.

A. Define Harassment to Reflect Sex-Based Misconduct and Encompass Intersectional Identities, and Include Examples of Prohibited Conduct

We believe the JC&D Rules and the Code would benefit from a definition of harassment that is more comprehensive. We strongly support the addition of the multi-part definition of "abusive or harassing behavior" in Rule 4(a)(2). We appreciate that Rule 4(a)(2) recognizes that "abusive or harassing behavior" constitutes misconduct, regardless of the gender of the victim or the perpetrator. We believe the JC&D Rules and the Code would benefit from a revised definition of cognizable misconduct that clarifies key dimensions, as follows:

1. Clarify Rule 4(a)(2)(A) such that cognizable misconduct includes *all* harassment based on sex, including pregnancy, sex/gender stereotyping, sexual orientation, and gender identity, regardless of whether the conduct is "sexual" in content or motivation.

We recognize that many complaints deal with explicitly sexual forms of harassment. Although such misconduct must be addressed, we are concerned that the Rule's well-intentioned focus on "sexual" conduct in subpart (A) may inadvertently lead judges to think Rule 4(a)(2) covers only conduct that is sexual in nature or is related to sexual desire.

Existing Title VII protections and the EEOC's guidelines understand and prohibit sexual harassment as a type of sex-based harassment.[29] We recommend the Committees follow such an understanding in the JC&D Rules, particularly given the pervasive nature of sex-based harassment beyond sexual harassment. Even explicitly "sexual" conduct is often accompanied and/or driven by non-sexual forms of sexism and hostility.[30] It is important that all forms of sex-based

[28] Working Group Report, *supra* note 3, at 8, 15; Code, *supra* note 1, at Canon 3(B)(4).
[29] *Sexual Harassment*, EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sexual_harassment.cfm. Additionally, research has consistently shown that non-sexual forms of sex-based discrimination and hostility are far more pervasive than explicitly sexual ones. Vicki Schultz, *Open Statement on Sexual Harassment by Employment Discrimination Scholars*, 71 STANFORD L. REV. ONLINE 17, 21 n. 10 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Schultz-2.pdf.
[30] Schultz, *supra* note 29, at 21 n. 11.

misconduct be considered together and not artificially disaggregated, and that all people subjected to sex-based harassment, including LGBTQ individuals, be protected.[31] Though subparts (B) and (C) of Rule 4(a)(2) cover other kinds of harassment that may be sex-based rather than sexual, a targeted change in subpart (A) could help the Committees further emphasize that the Rule prohibits all harassment based on sex.

2. Revise Rule 4(a)(2) to state that cognizable misconduct includes *all* harassment based on other grounds prohibited by law, such as race, national origin, religion, disability, and age, as well as intersectional harassment based on more than one such ground because harassment is often not cabined to a single form.

We want to underscore that while the focus of changes to Rule 4(a)(2) may be sex-based misconduct, discriminatory conduct predicated on other legally impermissible grounds should also be emphasized in the proposed definitions. We recognize that Rule 4(a)(3) prohibits "discrimination" based on these additional grounds. However, we are concerned that the prohibition on "discrimination" might be limited to tangible employment decisions, such as hiring, firing, or assignment decisions, and might not be applied to harassing behavior that could create a hostile work environment.

We recommend revising the rules to clarify that not only discrimination, but also harassment based on any of these grounds is cognizable misconduct, as is intersectional harassment based on more than one ground. Individuals with intersectional identities may experience harassment based on multiple grounds that are inextricably intertwined. For example, in some circumstances, it may not be possible to disaggregate race and sex when a woman of color is subject to harassment. Just as any and all sexual and non-sexual harassment should be considered together, so too should other intersecting and interlocking vectors of identity be considered in concert.[32]

3. Clarify the definition of "abusive or harassing behavior" under Rule 4(a)(2) to ensure coverage of other misconduct.

We believe an explicit clarification of the definition of "abusive or harassing behavior" is required to cover all behavior identified as problematic by the Working Group Report, including behavior such as ridicule or screaming. Below, we have identified examples of workplace conduct that we understand the Working Group Report wished to prohibit, and which we agree should be explicitly prohibited in the proposed Code and JC&D Rules.[33] As currently written, the definition

[31] *See, e.g., id.* at 25-28.
[32] *See, e.g., id.* at 28-32.
[33] *See* Working Group Report, *supra* note 3, at 23-25 (discussing civility canons).

of "abusive or harassing behavior" in the Code and JC&D Rules does not clearly prohibit all the behaviors in the below examples.

We encourage the Committees to hew more closely to the Equal Employment Opportunity Commission's (EEOC) definition, which defines harassment to include "offensive conduct . . . not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance."[34] Similarly, we note that the Washington Supreme Court's Harassment-Free Workplace Policy provides that prohibited behavior includes "verbal conduct such as threats, epithets, derogatory comments or slurs[;] visual conduct such as displaying or distributing derogatory posters, photography, cartoons, drawings or gestures, inappropriate mail, electronic mail (e-mail) or Internet sites[;] physical conduct such as assault, unwanted touching or blocking normal movement."[35]

These examples are particularly fitting given that it they encompass misconduct that is not necessarily solely sex-based or sexual in nature. We also recognize that defining "abusive or harassing" to encompass more general conduct may be viewed by some as a more expansive change, and note that the importance and viability of our other proposals do not turn on whether this suggestion is pursued.

4. Add a range of examples to the commentary on Rule (4)(a)(2) to clarify what constitutes "abusive or harassing behavior" prohibited by the Code and the JC&D Rules.

We recommend the Committees add language and examples to clarify what constitutes "abusive or harassing behavior" prohibited by the Code and the JC&D Rules. We are concerned the current drafts do not provide adequate detail about what conduct is proscribed; failure to do so may raise problems of fairness to accused judges while also failing to apprise employees of their rights. The commentary on Rule 4(a)(2) can resolve such concerns by including examples of cognizable conduct involving diverse forms and types of "abusive or harassing behavior." To develop such examples, we encourage the Committees to consult various sources, including the EEOC policy and the Washington Supreme Court policy outlined above. For example, the 2018 Open Statement on Sexual Harassment by Employment Discrimination Law Scholars includes numerous examples of harassing conduct, including "patronizing treatment, physical assaults, hostile or ridiculing behavior, social ostracism or exclusion, and work sabotage."[36]

[34] *See Harassment*, EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/harassment.cfm.
[35] Appendix B, *Harassment-Free Workplace*, WASH. SUP. CT. (April 2018).
[36] Schultz, *supra* note 29, at 20.

We strongly recommend that the Committees propose a similar list to provide clarity to judges, clerks, and other employees. The Committees should explicitly note that such a list is not exhaustive. We recommend incorporating the following examples:

Harassment (including on the basis of race, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability):

- Comments rooted in stereotyping;
- Comments demeaning people based on sexual orientation or gender identity;
- Unwanted sexual advances;
- Offering employment benefits in exchange for sexual favors;
- Making or threatening reprisals after a negative response to sexual advances;
- Unwanted visual conduct: making sexual gestures; displaying sexually suggestive objects, pictures, cartoons, posters, sexually explicit electronic messages (emails) or Internet sites;
- Unwanted verbal conduct: graphic commentary about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes or invitations.

Abusive Behavior (not necessarily dependent on or related to the employee's identity):

- Physically assaultive or threatening conduct;
- Derogatory slurs and remarks;
- Telling dirty jokes in the workplace;
- Generally hostile, abusive, or intimidating conduct.

Including such examples could help inform judges and judicial employees of the broad scope of "abusive or harassing behavior."

B. Define Retaliation and Provide Examples of Retaliation Within the Language of the Rules

We appreciate that retaliation is explicitly prohibited in the Code and JC&D Rules, and that the purpose of this prohibition is clear. However, we understand that retaliation can be difficult to define in the context of the judge-law clerk relationship. The term "retaliation" on its own is ambiguous and can be interpreted differently within the federal court system. Thus, we recommend adding a definition of retaliation, as well as several examples of different types of retaliation. We recommend adopting language like that contained in the Washington Supreme Court's Harassment-Free Workplace Policy:

> Retaliation is strictly prohibited against any person by another employee or the Court for using this complaint procedure, reporting harassment, threatening to report harassment, or for filing, testifying, assisting or participating in any manner in any investigation,

> proceeding or hearing conducted by a governmental enforcement agency. Prohibited retaliation includes, but is not limited to, termination, demotion, suspension, failure to hire or consider for hire, failure to give equal consideration in making employment decisions, failure to make employment recommendations impartially, adversely affecting working conditions or otherwise denying any employment benefits. Any employee who engages in retaliation will be subject to disciplinary action, up to and including termination.[37]

We would add to this definition that retaliatory acts can occur at any time following the report, regardless of employment status, and can occur in both professional and non-professional contexts.

Finally, in recognition of low reporting rates for harassment, we encourage expansion of the definition of retaliation to include actions taken against those who oppose misconduct and support complainants. Title VII provides a model for barring retaliation against individuals who participate in proceedings as well as those who oppose discriminatory practices. Creating an environment that encourages reporting requires protections not just for complainants, but also for their allies. The Committees could strengthen the proposed changes by adding an opposition clause and expanding the definition of retaliation to address these concerns.

IV. Providing Resources for Complainants Throughout the Reporting Process

We commend the Committees' proposed amendments for focusing so clearly on encouraging reporting and for recognizing the particular challenges faced by law clerks in this regard. However, we would emphasize that the complaint system cannot function properly unless the complainants themselves are offered clear guidance on the resources that they could receive *before, during, and after* the reporting process. Providing up-front clarity about available resources will encourage law clerks to make reports and ensure that those who choose to come forward receive adequate support.

We recognize the difficulties of framing available relief to judicial law clerks – where monetary relief is not possible,[38] and where the term of employment is short. Further, we acknowledge that these amended procedures may apply to all employees of the Judiciary, and that the resources available to complainants may vary based on their needs.

We focus our comments here on additional, realistic resources, tailored to what the Working Group Report has recognized as the unique experiences of law clerks. First, we suggest

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[37] *See* Appendix B. For other examples of retaliation policies, see *Facts About Retaliation*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/retaliation.cfm; and Wage and Hour Division, *Protection for Individuals Under the FMLA*, U.S. DEP'T LAB., https://www.dol.gov/whd/regs/compliance/whdfs77b.htm.

[38] Model EDR Plan, *supra* note 7, at ch. 10 § 12.

including access to services addressing complainants' health and well-being. Second, we urge the Committees to adopt and publicize a process to allow affected law clerks to transfer positions when necessary, while complaints are pending, not only when they are resolved. We believe this transfer option is crucial to encourage those in the insular environment of judicial chambers to come forward. Finally, we suggest providing career support, given the importance of a judge's recommendation in employees' future career and job prospects. Offering resources and support to those who make reports is essential to "promoting public confidence in the complaint process" and "reflect[ing] the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect."[39]

A. Provide Access to Services for Complainants' Health and Well-being

Based on research showing the prevalence of psychological harm caused by harassment, we recommend the Committees revise the Model EDR Plan and the JC&D Rules to explicitly note support services for individuals impacted by misconduct.[40] We encourage that the Committees accommodate complainants' needs, including through referral to counseling, covered by insurance or another means of financial support. We further urge the Committees to make such relief available before, and regardless of, the final outcome of any adjudication. Interim relief would provide critical resources to individuals who are hesitant to report. As the Working Group Report noted, "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."[41]

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[39] JC&D Rules, *supra* note 1, at Commentary to Rule 4.

[40] Research shows that workplace sexual harassment has damaging psychological effects. *See* Federal Judiciary Working Group Report, *supra* note 3, at 15. Experiencing harassment can lead to or heighten the risk of Major Depressive Disorder, posttraumatic stress disorder (PTSD), anxiety, and substance abuse. Prolonged exposure to harassment exacerbates these effects. Researchers have found that increasing victims' perceived control of their recovery and decreasing the likelihood of future harassment can lessen post-traumatic stress symptoms. *See* Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, EQUAL EMP. OPPORTUNITY COMMISSION (2016) [hereinafter "EEOC Taskforce Report"], https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; *see also* Lilia M. Cortina & Emily A. Leskinen, *Workplace Harassment Based on Sex: A Risk Factor for Women's Mental Health Problems*, *in* VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 139 (Claudia GarcÍa-Moreno & Anita Riecher-Rössler eds., 2013). The psychological impact of harassment can also contribute to impaired physical health, including, respiratory, cardiovascular, and musculoskeletal problems; sleep disorders; weight fluctuation; and other problems. Lilia M. Cortina & Jennifer L. Berdahl, S*exual Harassment in Organizations: A Decade of Research in Review*, *in* 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOr 469, 481 (J. Barling & C. L. Cooper eds., 2008); Jennifer L. Berdahl & Jana L. Raver, S*exual Harassment*, *in* 3 APA HANDBOOK OF INDUSTRIAL & ORGANIZATIONAL PSYCHOLOGY 641, 649 (Sheldon Zedeck ed., 2011). Research also suggests that mental health treatment, including cognitive processing therapy, can help to mitigate PTSD, anxiety, and other symptoms that may manifest in individuals who have experienced harassment. *See* Berdahl & Raver, *supra* note 40, at 649.

[41] Working Group Report, *supra* note 3, at 15.

It is also crucial to note the importance of providing support and resources for bystanders and other employees affected by the misconduct and EDR process in question. Psychology research has shown that "[e]mployees who observe or perceive mistreatment in their workplace can also suffer mental and physical harm."[42]

Providing resources to support individuals who are considering or involved in the filing of complaints would further the goal of enabling reporting, while also benefitting the Judiciary by increasing reports of the circumstances that adversely impact employee health and well-being.

B. Provide Voluntary Transfer Options

We echo the suggestion of the Working Group Report that the Judiciary "incorporate informal employee protection programs[,] . . . includ[ing] contingency plans and funding to provide for a transfer or alternative work arrangements for an employee, including a law clerk."[43] We do not see this emphasis on transfer explicitly reflected in the Code or the JC&D Rules. Offering transfer as an informal venue for immediate relief for law clerks would encourage reporting and maintain safe working environments.

We acknowledge the challenges inherent in offering transfer as a form of relief for law clerks who are employed on a short-term basis.[44] However, we believe that it is critical to provide access to transfer during the pendency of a complaint--rather than waiting until a formal or informal adjudication is complete. Given the uniquely close environment of the judicial chambers, staff such as law clerks may face heightened concerns about retaliation and confidentiality. And, for early career professionals, there is an additional barrier to reporting: many will refrain in order to avoid creating an unexplainable gap in their resumes.[45] A contingency plan that enables complainants to relocate to a different chambers or another comparable position would allow law clerks and others similarly affected to continue working while avoiding a hostile or retaliatory environment. Furthermore, such voluntary transfer options already exist and occur through longstanding widespread, informal practices that occur upon the death, disability, retirement, or elevation of judges.

We therefore suggest the Conference establish and publicize such a process for transfer that is open to law clerks and, as appropriate, other employees, experiencing misconduct. Ensuring

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[42] EEOC Taskforce Report, *supra* note 40, at 21; Kathi Minder-Rubino & Lilia Cortina, *Beyond Targets: Consequences of Vicarious Exposure to Misogyny at Work*, 92 J. APPLIED PSYCHOL. 1254, 1264 (2007).

[43] Working Group Report, *supra* note 3, at 39.

[44] Importantly, voluntary transfer options or other such employee protection programs are likely appropriate for non-short-term employees as well and can be highly meaningful in those working situations.

[45] *Memorandum from Concerned Harvard and Yale Law Students to the Judicial Conference of the United States*, at 7, LAW CLERKS FOR WORKPLACE ACCOUNTABILITY (Sept. 6, 2018), http://clerksforaccountability.org/docs/2018-08-09-students-law-schools-role-combating-harassment.pdf?v2.

that complainants are aware that this form of relief is available will make reporting easier for affected individuals.

C. Provide Informal Career Support

We also recommend the Committees propose a change providing that law clerks who have experienced misconduct have other methods of informal career support to put them in a position akin to where they would have been in in the absence of such misconduct. Given that law clerks often rely on their judges for recommendations and career advancement, this type of support is important to ensure that clerks do not fear the career ramifications of reporting. Providing for avenues through which a clerk may still receive a recommendation or otherwise be facilitated in transferring to work in a law firm, non-profit, government, or other legal job will provide necessary support for complainants. Again, our focus comes from our vantage point as potential future law clerks, but we recognize that many of these recommendations may be relevant to other employees as well.

V. Expanding Reporting of Judicial Misconduct to Outside Entities

We commend the new Rule 23(b)(8) for recognizing the need to redress the informality that currently defines the Judiciary's response to complaints of judicial misconduct. As the Breyer Committee concluded in 2006, "[i]nformal efforts to resolve problems remain . . . the principal means by which the judicial branch deals with difficult problems of judicial misconduct and disability."[46] In his study of discipline in the federal judiciary, law professor Charles Geyh offered several compelling reasons for the lack of formal orders issued by judicial councils, including that "[c]ouncil members do not like to order their colleagues about"[47] and that "[f]ormal orders are unlikely to succeed where informal methods of persuasion fail."[48]

The new Rule 23(b)(8) and its commentary contain an important innovation: they expand the people who may disclose information relating to a complaint, the instances that may merit such disclosure, and the range of entities that may receive this information. These changes may lead to disciplinary measures being imposed by outside entities, such as state bar associations, as well as information-sharing that enables judicial councils to institute formal proceedings. For this revision to reach its full potential, however, we recommend the following changes.

A. Provide Specific Examples of When Judicial Misconduct in the Form of Harassment or Discrimination Requires Disclosure to Outside Entities

[46] Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980*, at 99 (Sept. 2006), http://www.uscourts.gov/sites/default/files/breyercommreport_0.pdf.
[47] Charles Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 267 (1993).
[48] *Id*. at 268.

First, we recommend the Committees list more circumstances that require disclosure. "Appropriate circumstances" is too vague a term to provide guidance in this context. Currently, the commentary to Rule 23(b)(8) lists the following situations as appropriate: prosecution for perjury based on testimony given before a special committee, when a special committee discovers criminal conduct, and to allow disciplinary action by a bar association or other licensing body. These examples do not illustrate when and how judicial misconduct might rise to a level that warrants reporting to outside entities. The absence of nuanced, contextual examples likely makes it difficult for a chief judge to infer general principles about when complaints rise to a level at which they should be disclosed to state bar associations. Specifically elucidating further circumstances that may require disclosure will make it more likely that a chief judge or a judicial council will make use of this important new responsibility.

B. Expand the List of Outside Entities that Receive Reports of Judicial Misconduct to Include Law Schools

Finally, we recommend that the Committees additionally list circumstances requiring disclosure to law schools. So doing would recognize the uniquely close partnership between law schools and the Judiciary when it comes to the clerkship process. That partnership, we believe, creates an obligation to share information to ensure a safe working environment for all. We understand that there may be concern about sharing information in this context, but we believe that this proposal merits serious consideration and further study. For instance, a set of specific circumstances might be developed to identify when reporting to law schools may be triggered and to ensure clearly frivolous complaints are not passed on. We note also that the same desire for information-sharing was expressed in the letter to the Judicial Conference of the United States written by Concerned Harvard and Yale Law Students in September 2018.[49] We also believe, although less relevant to the changes the Committees are making, that the law schools themselves have a reciprocal obligation to alert the chief judge of the circuit or the new Office of Judicial Integrity when they are notified about complaints involving judges.

Another reason these changes merit strong consideration is that state bar associations, the main new group now identified under the Committees' proposal to receive disclosures, may not be well-equipped to make use of this information. As a threshold matter, there is debate as to whether federal judges are subject to the jurisdiction of state bar associations. The Supreme Court of Nevada has expressed doubt that they are,[50] while the Supreme Court of Mississippi has permitted sanctions against sitting federal judges.[51] Though the Department of Justice's Office of Professional Responsibility recommended referring a judge in the Ninth Circuit to his state bar

[49] *Memorandum*, *supra* note 45, at 2-5.
[50] State Bar of Nevada v. Claiborne, 756 P. 2d 464, 466 (Nev. 1988).
[51] Mississippi State Bar v. Nixon, 494 So. 2d 1388, 1390-91 (Miss. 1986).

association for professional misconduct, the Department of Justice did not do so, and the jurisdictional issues remain unsettled.[52]

Assuming that bar associations have the jurisdictional authority, they may still lack the resources or political will to respond to judicial misconduct. We could only find one reported example of a state bar association that sanctioned a sitting federal judge,[53] and another that sanctioned a former federal judge.[54] These sanctions were issued either during or after impeachment proceedings took place.

VII. Conclusion

To conclude, we wish to convey our appreciation for the steps taken by the Committees and the Judicial Conference toward making positive changes in the workplace. We believe the Committees' proposals, together with the enhancements we have offered, would go a long way toward restoring trust in the system for all involved, including prospective future law clerks.

We are excited about the Committees' proposed changes thus far and offer our recommendations to further the shared goal of a safe and productive work environment.

[52] Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES (Feb. 19, 2010), https://www.nytimes.com/2010/02/20/us/politics/20justice.html.
[53] *Nixon*, 494 So. 2d at 1390-91.
[54] *In re* Collins, 645 So. 2d 1131 (La. 1994).

Appendix

A	List of Yale Law Student Working Group Members
B	Washington Supreme Court, Harassment-Free Workplace

APPENDIX A

List of Yale Law Student Working Group Members

List of Yale Law Student Working Group Members

All working group members submit this comment in their individual capacities.

Adair Kleinpeter-Ross ‘21
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Andrew DeGuglielmo ‘21
Anna Wherry ‘21
Annie Himes ‘21
Ben Daus-Haberle ‘21
Bina Peltz ‘19
Caroline Lawrence ‘21
Caroline Wallace ‘21
Catherine McCarthy ‘19
Chaarushena Deb ‘21
Chandini Jha ‘21
Claire Blumenthal ‘21
Daisy Wolf ‘21
Dan Stein ‘21
Erin Drake ‘20
Geoffrey Block ‘21
Isa Qasim ‘20
Jeff Schroeder ‘21
Jenny Choi ‘21
Jon Petkun ‘19
Jordan Dannenberg ‘21
Josh Feinzig ‘21
Kate Levien ‘21
Kath Xu ‘20
Kshithij Shrinath ‘21
Lauren Blazing ‘21
Lisa Hansmann ‘21
Madeline Silva ‘20
Megan Mumford ‘20
Megan Yan ‘20
Meghan Brooks ‘19
Melanie Sava ‘20
Michael Avi-Yonah ‘21
Molly Petchenik ‘21
Neil Alacha ‘21
Petey Menz ‘20
Rachel Brown ‘20
Rebecca Steele ‘21
Ricky Zacharias ‘19
Rita Gilles ‘20
Sam Peltz ‘20
Sarah Levine ‘20
Serena Walker ‘21
Shiv Rawal ‘21
Simone Seiver ‘21
Stephanie Garlock ‘20
Sumaya Bouadi ‘21
Susan Wang ‘21
TJ Grayson ‘21
Veronica Guerrero ‘20
Xander Nabavi-Noori ‘21

APPENDIX B

Washington Supreme Court, Harassment-Free Workplace

SUPREME COURT POLICY

Subject: Harassment-Free Workplace

Scope: All Employees of the Washington Supreme Court (Chambers, Office of the Clerk, Office of the Commissioner, Office of the Reporter of Decisions and the Washington State Law Library)

Issue Date: April 2018

PURPOSE:

To provide a work environment based on respect and dignity for all employees and a workplace free of harassment.

POLICY:

The Washington Supreme Court is committed to providing a work environment free from harassment of any kind, including sexual harassment and harassment because of gender, pregnancy, race, color, national origin, ancestry, religion, creed, physical, mental or sensory disability (actual or perceived), use of a service animal, marital status, sexual orientation, gender identity or expression, veteran or military status, age, HIV or Hepatitis C status, or any other basis protected by federal or state law. All such harassment is prohibited. Retaliation is also prohibited. The Court will not tolerate retaliation against anyone who files or participates in a harassment or discrimination complaint.

This policy applies to all persons involved in the operations of the Court and prohibits harassment by any employee of the Court. Court employees are also protected from harassment from contractors, customers, volunteers, vendors, and anyone doing business with the Court and are to use these procedures to report such harassment.

All employees will receive training on awareness and prevention of harassment, including sexual harassment. Training will also be provided to supervisors on how to handle sexual harassment complaints.

SEXUAL HARASSMENT:

Federal law defines sexual harassment as unwelcome sexual advances, requests for sexual favors, or visual, verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is explicitly or implicitly made a term or condition of employment; or

2. Submission to or rejection of such conduct is used as a basis for employment or other court-related decisions affecting the individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive working environment.

Prohibited behavior includes, but is not limited to:

- Unwanted sexual advances.
- Offering employment benefits in exchange for sexual favors.
- Making or threatening reprisals after a negative response to sexual advances.
- Visual conduct: leering; making sexual gestures; displaying sexually suggestive objects, pictures, cartoons, posters, sexually explicit electronic messages (e-mails) or Internet sites.
- Verbal conduct: making or using derogatory comments regarding gender, epithets, slurs, sexual suggestions, comments, gossip, or jokes, or comments about an individual or an individual's body, appearance, or dress.
- Unwanted Verbal sexual advances or propositions.
- Verbal abuse of a sexual nature - graphic verbal commentary about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes or invitations.
- Physical conduct: unwanted touching, assault, impeding or blocking movements.

RACIAL AND OTHER TYPES OF HARASSMENT:

Harassment is prohibited on the basis of gender, pregnancy, race, color, national origin, ancestry, religion, creed, physical, mental or sensory disability (actual or perceived), use of a service animal, marital status, sexual orientation, gender identity or expression, veteran or military status, age, HIV or Hepatitis C status, or any other basis protected by federal or state law.

Prohibited behavior includes, but is not limited to:

- Verbal conduct such as threats, epithets, derogatory comments or slurs.
- Visual conduct such as displaying or distributing derogatory posters, photography, cartoons, drawings or gestures, inappropriate mail, electronic mail (e-mail) or Internet sites.
- Physical conduct such as assault, unwanted touching or blocking normal movement.

REPORTING HARASSMENT – INVESTIGATION:

Any individual subjected to what he/she believes is harassment as described in this policy can address the issue immediately and tell the harasser to stop his/her unwanted behavior, if comfortable doing so; and/or immediately report that behavior to a supervisor, Department Head, Justice, or the Administrative Office of

the Courts (AOC) Human Resources Office. If any further incident(s) of harassment occur, the incident should be immediately reported.

Any Court employee who becomes aware of harassing conduct engaged in and/or directed toward another Court employee should immediately report that information to a supervisor, Department Head, Justice, or the AOC Human Resources Office. Supervisors observing or having knowledge of incidents or practices which are harassment as defined in this policy shall take immediate steps to stop the harassment and prevent its recurrence, and promptly notify their immediate supervisor. Failure to do so will be grounds for corrective/disciplinary action, up to and including dismissal. Supervisors can be held responsible for any acts of sexual harassment or other harassment occurring in their organizations, even when such acts are initiated by non-employees, if the supervisor knows or should have known about the situation and fails to take immediate and appropriate remedial action.

Designated representatives of the Court (internal or externally sourced) will undertake a prompt, thorough and objective investigation of the allegation. Complaints may vary in kind and complexity. Investigative procedures depend on the nature and the extent of harassment and the context in which the alleged incidents occurred. Appropriate investigative procedures may include informal review or a formal investigation and will be conducted in a timely and sensitive matter. The Court may authorize an investigation by an outside party. Every effort will be made to conduct investigations in a timely and sensitive manner. All employees are expected to cooperate fully in all phases of the investigation process. When the investigation is completed, the Department Head and/or the Chief Justice will determine the action to be taken. All complainants and persons against whom harassment allegations are made shall be informed of the completion of the investigation and whether the allegations were substantiated.

If it is determined that prohibited activity has occurred, appropriate remedial action will be taken, up to and including termination. Appropriate action will also be taken to deter any future prohibited activity.

The confidentiality of any harassment allegations will be protected to the extent possible while conducting an investigation. An effective investigation cannot be conducted without revealing certain information to the alleged harasser and potential witnesses. However, information and records relating to harassment complaints will be shared on a "need to know" basis.

All employees have the right to file a complaint via the Washington State Human Rights Commission, or the Equal Employment Opportunity Commission.

RETALIATION:

Retaliation is strictly prohibited against any person by another employee or the Court for using this complaint procedure, reporting harassment, threatening to report harassment, or for filing, testifying, assisting or participating in any manner

in any investigation, proceeding or hearing conducted by a governmental enforcement agency. Prohibited retaliation includes, but is not limited to, termination, demotion, suspension, failure to hire or consider for hire, failure to give equal consideration in making employment decisions, failure to make employment recommendations impartially, adversely affecting working conditions or otherwise denying any employment benefits. Any employee who engages in retaliation will be subject to disciplinary action, up to and including termination.

CONSEQUENCES:

Any person who is found to have engaged in harassment or retaliation as described in this policy is subject to disciplinary action up to and including termination.

Employees are strongly urged to report all incidents of harassment, discrimination, retaliation, or other inappropriate behavior as soon as possible. In order to provide all employees with a respectful, professional and productive working environment, these issues must be reported promptly.