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To:	AO Code and Conduct Rules
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Subject:	Comments on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules
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Attachments:	LCWA Comments.pdf

Dear all,

Please find attached our comments on the proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules. We appreciate the opportunity to participate in this process, and we look forward to the next set of amendments to the Code and the Rules.

Best,
Kendall

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November 13, 2018

Committees on Codes of Conduct & Judicial Conduct and Disability
Judicial Conference of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544
CodeAndConductRules@ao.uscourts.gov

Re: Proposed Changes to the Code of Conduct and Judicial Conduct & Disability Rules

Dear All,

The members of Law Clerks for Workplace Accountability—an organization dedicated to ensuring that the federal judiciary provides a safe workplace environment for all employees—submits these comments on the Judicial Conference's proposed changes to the Code of Conduct for U.S. Judges ("Code") and to the Judicial Conduct & Disability Rules ("Rules"). We appreciate the opportunity to share our views on the proposed changes in this notice-and-comment process and in the October 30, 2018 hearing on the same topic.

I. Introduction

For all the women in our group, working for the federal judiciary was an incredible privilege. We grew as lawyers and as people, developed lasting relationships, and strove to do our best work. Many in our group did not experience harassment during our time with the judiciary, but—motivated by our respect for the institution and the experiences of colleagues and friends—we want to ensure that appropriate procedures and policies are in place to address harassment within the federal judicial system going forward. In December 2017, following several media reports of harassment by a federal judge, our organization sent a letter to prominent members of the federal judiciary, urging them to take certain steps to address workplace harassment. At the time the letter was sent, 695 individuals had signed it; it has now garnered more than 850 signatures. Around the same time, Chief Justice Roberts convened a Working Group on Workplace Conduct to address the issues of harassment and other inappropriate conduct in the judicial workplace.

Over the past ten months, the Working Group met to study these issues and prepare recommendations for the Judicial Conference of the United States. Members of Law Clerks for Workplace Accountability participated in three Working Group meetings in Washington, D.C. on an ad hoc basis.[1] On June 1, 2018, the Working Group published its Report (the "Report") to the Judicial Conference of the United States ("JCUS" or the "Judicial Conference"). One of our members, Jaime Santos, previewed our response to that Report when she, James Duff (Director of the Administrative Office of the U.S. Courts), and Jenny Yang (former Chair of the EEOC) testified before the Senate Committee on the Judiciary on June 13, 2018.[2] We submitted our formal written response to the Judicial Conference on July 20, 2018.[3]

On September 13, 2018, in response to the Working Group's Report, the Judicial Conference released its proposed changes to the Code and the Rules. On October 30, 2018, two of our members, Jaime Santos and Kendall Turner, testified before members of the Judicial Conference to offer our initial thoughts on the proposed amendments. These comments expand on that testimony.

In general, we are encouraged by how quickly the federal judiciary has acted to improve its policies and procedures for handling allegations of sexual harassment and other forms of misconduct. We especially appreciate that the judiciary has recognized that there are many barriers to reporting misconduct and that it has acted to remove or lower those barriers. That said, we believe several important recommendations have yet to be implemented or have been implemented in imperfect ways. Our comments begin by discussing the proposed changes to the Code. We then discuss the proposed changes to the Rules. Finally, we discuss the recommendations that we encouraged the judiciary to adopt that have not yet been recommended or implemented.

II. Comments to the Proposed Changes to the Code of Conduct for U.S. Judges

A. Encouraging Aspects of the Proposed Changes

There are several laudable aspects of the proposed changes to the Code. In particular, the Code now specifically recognizes that harassment and retaliation erode public confidence in the

[1] We also attended two meetings with Ninth Circuit Workplace Environment Committee, and one meeting with the D.C. Circuit Workplace Conduct Committee.

[2] U.S. Senate, Committee on the Judiciary, *Hearing: Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary*, https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary (June 13, 2018).

[3] Law Clerks for Workplace Accountability, Response to the Federal Judiciary Workplace Conduct Working Group's June 1, 2018, Report (July 20, 2018), http://clerksforaccountability.org/response-to-working-group-report?v2.

judiciary.[4] It also specifically provides that judges should not engage in behavior that is harassing, abusive, prejudiced, or biased;[5] instructs judges to hold court personnel who are subject to their control to the same standard;[6] explains that the duty to refrain from retaliation extends to former judiciary personnel;[7] and instructs judges to take appropriate corrective action when they have reliable evidence of likely misconduct.[8]

B. Suggestions for Improvement

There is, however, room for improvement in the proposed changes to the Code. The proposed Canon 3B(6), which now imposes a duty to act when judges learn of misconduct, has a few shortcomings. It states:

> A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code, that a judicial employee's conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct.[9]

The obligation to remedy misconduct is vague. The Rules appear to obligate judges to report all "information reasonably likely to constitute judicial misconduct or disability" to the chief judges of the relevant circuit and district.[10] The Code, by contrast, seems to suggest that judges who learn of misconduct may take action to address it without reporting it. Whatever judges' obligations to report or remedy misconduct, we think they should be clear and be uniform across the Rules and the Code.

Additionally, there appears to be no obligation in the Code or the Rules to report allegations of misconduct to the Administrative Office or the Judicial Conference. Such reporting is essential to identifying patterns of misconduct so that past instances can be remedied and future incidents can be prevented. Of course, any obligation to report information to the Administrative Office or the Judicial Conference will be meaningless if those entities do not have a way to receive, retain, protect, and analyze that information, and we encourage those entities to create such a reporting mechanism. It is essential to collect information about the frequency of misconduct so that the judiciary can better understand the scope of the problem and how best to remedy it. Moreover, collection and analysis of this information would send a strong signal that the judiciary takes reports of harassment seriously.

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[4] Draft Code of Conduct for U.S. Judges, Canon 2A, cmt. (Sept. 13, 2018), http://www.uscourts.gov/sites/default/files/code_of_conduct_for_u.s._judges_-_proposed_changes_-_9-13-2018.pdf.
[5] *Id.*, Canon 3.
[6] *Id.*, Canon 3(B)(4).
[7] *Id.*, Canon 3(B)(4), cmt.
[8] *Id.*, Canon 3(B)(6), cmt.
[9] *Id.*, Canon 3(B)(6).
[10] *Id.*

III. Comments to the Proposed Changes to the JC&D Rules

A. Encouraging Aspects of the Proposed Changes

There are many positive aspects of the proposed changes to the Judicial Conduct and Disability Rules, and we are encouraged that the Judicial Conference acted so quickly to make a meaningful difference.

1. The recommendations affirm that traditional rules about standing should not apply to the Judicial Conduct and Disability complaint process, and that the Conduct Rules and commentary should expressly state as much.[11] (We also note that the Judiciary's Model Employment Dispute Resolution (EDR) rules—which the Judicial Conference is currently revising—similarly should not apply traditional rules of standing.) Those who observe harassment are often better situated to address it than those who suffer harassment, and observers should be encouraged to do so. Freedom from traditional standing rules allows such observers to initiate a complaint process.

2. The suggested changes add a much more robust definition of "misconduct." In particular, the changes specify that "misconduct" includes "abusive or harassing behavior," such as "engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault" and "creating a hostile work environment for judicial employees" (among other things). The recommendations "recognize[] that anyone can be a victim of unwanted, offensive, or abusive sexual conduct, regardless of their sex and of the sex of the judge engaging in the misconduct." They also define misconduct to include "discrimination on the basis of race, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability." This list is "not intended to be exhaustive." Critically, the recommendations also make clear that "failing to call . . . attention" to misconduct is *itself* misconduct.[12] (There are, however, still some problems with this duty to report, as discussed below.)

3. Although the Rules have long made clear that "a judge's efforts to retaliate against any person for his or her involvement in the complaint process may constitute cognizable misconduct,"[13] the recommendations note that retaliation for "reporting or disclosing misconduct" is similarly unacceptable and constitutes cognizable misconduct.[14] The recommendations also expressly add

[11] *See* Draft Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 3, cmt. (Sept. 13, 2018) [hereinafter Draft Rules]. Traditionally, standing doctrine in federal court requires that a plaintiff herself be able to claim a redressable injury stemming from the alleged misconduct. While this requirement is necessary for Article III adjudication of a claim, the same requirement should not apply to proceedings under the Judicial Conduct & Disability Act.
[12] *Id.*, Rule 4 & cmt.
[13] Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 3, cmt.
[14] Draft Rules, Rule 4, cmt.

retaliation against judicial employees to the definition of cognizable misconduct, which already included retaliation against complainants and witnesses.[15]

4. The recommendations provide a definition of "judicial employee," and define it to include "judicial assistants, law clerks, and other court employees, including unpaid staff, such as interns, externs, and other volunteer employees."[16] This recommendation is critical to ensuring that *all* judiciary employees (whether paid or not) are protected from misconduct. After all, unpaid staff are often at the greatest power imbalance with respect to other court staff.

5. The recommendations expressly state that, while confidentiality is an important norm for the judiciary in general and the Judicial Conduct and Disability Act complaint process in particular, "confidentiality . . . does not prevent judicial employees from reporting or disclosing misconduct."[17] This clarification is a helpful step towards remedying a potential conflict with the rules of confidentiality that may have prevented past victims from reporting judicial misconduct.

6. Finally, the commentary to Rule 11 now expressly recognizes that, even where a complaint does not result in remedial action as to a judge,

> the Judicial Conference and the judicial councils have ample authority to assess potential institutional issues related to the complaint 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." *Id.* at § 332(d)(1). Such an assessment might include an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence.[18]

Although this commentary does not bestow on the judiciary any powers that it did not already have, it constitutes a critical recognition of the judiciary's ability to assess, remedy, and prevent misconduct even where remedial action against a particular judge has been deemed unwarranted. Such self-assessment and correction is essential to not only addressing past wrongs and forestalling future ones, but also to the public's faith in the continued integrity of the judicial branch. That said, this commentary could be made significantly more effective in ways discussed below.

[15] *Id.*, Rule 4(a)(5).
[16] *Id.*, Rule 3(f).
[17] *Id.*, Rule 6, cmt.
[18] *Id.*, Rule 11, cmt.

B. Suggestions for Improvement

Although there is much to commend in the Judicial Conference's changes to the Judicial Conduct and Disability Rules, there is (as always) room for improvement. Below we highlight some key areas for improvement.

1. As noted above, the Judicial Conference's recommended changes make clear that "failing to call . . . attention" to "information reasonably likely to constitute judicial misconduct or disability" is *itself* misconduct.[19] The way in which a judge is required to report misconduct is, however, flawed. The recommended Rule states:

> A judge who receives such information shall respect a request for confidentiality but shall disclose the information to the chief district judge and chief circuit judge, who shall also treat the information as confidential. Some information will be protected from disclosure by statute or rule. 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.[20]

This effort to impose a mandatory reporting obligation on judges addresses an admittedly difficult situation: On one hand, if judges have absolute, mandatory reporting obligations, judicial employees may be less likely to tell them about misconduct, and thus misconduct may go unchecked for a long period of time. On the other hand, if judges have no mandatory reporting obligations, misconduct can also go unredressed for years, as judges hearing allegations of misconduct have no obligation to act on them.

The Judicial Conference has accordingly tried to strike a compromise position between an absolute duty to report and no duty to report. But this compromise, unlike Goldilocks' third bowl of porridge, is not quite right.

a. To begin, there is tension between the first and final sentences of this Rule. The first sentence of the Rule appears to obligate judges *in all circumstances* to report misconduct to the chief district judge and chief circuit judge. But the last sentence suggests that a judge may promise confidentiality to those reporting misconduct, and that this promise will only yield in "serious or egregious" cases. In other words, this Rule could be read to obligate judges to report allegations of misconduct to the chief district judge and the chief circuit judge even where the judge has promised confidentiality; under this reading, the only reporting that would yield to the promise of confidentiality is reporting to anyone *other* than the two chief judges. Alternatively, this Rule could be read to free judges of any reporting obligations where they have promised confidentiality (unless the alleged misconduct is sufficiently serious or egregious).

[19] *Id.*, Rule 4(a)(6).
[20] Proposed Rules, art. II(a)(6).

The Rule needs to be written more clearly. We strongly favor changing it to make clear that judges must *always* report allegations of misconduct. If someone seeking to report misconduct asks the judge to keep the information confidential, the judge can explain his or her mandatory reporting obligations and note the existence of alternative resources that do not have equally demanding reporting obligations.

Although absolute mandatory reporting obligations may have some chilling effect on reporting, they provide useful clarity to all involved. A judge knows when he must report information, and a complaint knows when reports must be made. Moreover, because there are other entities on the court and national level that do *not* have mandatory reporting obligations for allegations of misconduct, the chilling effect for those who do not wish to speak to mandatory reporters should be minimal. Additionally, clear mandatory reporting obligations would bring courts in line with many other institutions (such as universities) that impose mandatory reporting obligations on faculty members, residential staff, and other personnel. Finally, mandatory reporting would help the courts track the frequency and nature of alleged misconduct.

b. Second, it is not clear when an allegation of misconduct is so "serious or egregious" that it "threatens the integrity and proper functioning of the judiciary." Although judges routinely apply such discretionary standards, this one leaves both judges and complainants in the dark. A complainant may elect to speak to a judge because she believes the misconduct she wishes to discuss is not so serious that the judge will have to report it. But the judge may disagree and report the information, leaving the complainant to wish she had never discussed the matter. Conversely, a complainant may talk to a judge precisely because he *does* have an obligation to report serious or egregious misconduct—and may be disappointed if the judge does not believe the conduct to be sufficiently serious as to warrant reporting. In practice, it seems likely judges would err on the side of reporting to avoid being found guilty of misconduct themselves. But the lines of judges' reporting obligations are not clearly drawn. And, again, we think everyone would benefit from clearer rules.

c. Relatedly, it is not clear whether judges, when approached by someone alleging cognizable misconduct, must disclose that they have mandatory reporting obligations. They should be required to do so. Only if the individual reporting alleged misconduct has full information about reporting processes can she make an informed decision about whether, when, how, and to whom to report misconduct.

d. Finally, it is not clear how a judge should handle allegations of misconduct if they are against the chief judge of a circuit or a district. One option would be to allow reporting to the chief judge of the circuit *or* of the district court. Another (or additional) option would be to allow reporting to the Administrative Office of U.S. Courts (or the newly-

created Office of Judicial Integrity within the Administrative Office). We favor both changing "and" to "or," and adding a requirement that misconduct be reported to the Administrative Office. In other words, a judge who is obligated to report misconduct must report to both (1) the Administrative Office, and (2) either the chief district judge *or* the chief circuit judge. Allowing the recipient of the complaint to choose between chief district judge and the chief circuit judge provides more flexibility, thereby facilitating better reporting, while also addressing the sticky situation in which a chief judge is the alleged harasser.

2. The Judicial Conduct and Disability Act governs complaints of judicial misconduct or disability, including both complaints "filed" by any person, and also complaints "identified" by a chief judge based on information available to him, even if no official complaint is "filed" by a complainant (known as "identified" complaints).[21] But the Rules purport to treat identified complaints differently under Rule 5 than they treat filed complaints under Rule 6.

For identified complaints, beginning the formal review process under Rule 11 is a last resort, to be used only where "there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible."[22] If the formal review process is not initiated, there does not appear to be any disclosure required about the potential misconduct identified, any requirement that the chief judge's decision be made public, or any requirement that the Judicial Council or the Judicial Conference receive any information about the potential misconduct. In short, the chief judge has an enormous amount of discretion in handling identified complaints that he or she does not have in handling filed complaints. This discretion can hide from public view and from the Judicial Conference even serious potential misconduct about which the chief is aware.

There does not appear to be any statutory basis for handling identified and field complaints so differently, and we have several concerns with the distinctions drawn by the Rules. Section 351 of Title 28 defines two different types of complaints: complaints filed "by any person" (defined in § 351(a)) and complaints identified by the chief judge (defined in § 351(b)). But nowhere does the statute provide that identified complaints should be investigated or resolved differently—much less *so* differently—from filed complaints. To the contrary, § 352(a) refers to the chief judge's review of "any complaint received under section 351(a) or identified under section 351(b)," and § 352(b) states clearly that after reviewing "a complaint under subsection (a)" (meaning a filed or reviewed complaint), the chief judge must address the complaint by written order or, under § 353, refer the complaint to a special committee.

Providing such broad discretion to chief judges to handle misconduct about which they become aware is not only inconsistent with the text of the Judicial Conduct and Disability Act, it also undermines public confidence and increases the likelihood that harassment or misconduct by a

[21] *See* 28 U.S.C. § 351(a), (b) (distinguishing between identified and filed complaints).
[22] *See* Draft Rules, Rule 5, cmt.

judge will be shielded from public disclosure. The enormous discretion afforded to a chief judge with respect to identified complaints creates a serious risk that misconduct may continue unabated, and that the Judicial Conference will remain unaware of serious allegations of misconduct. This discretion also could render toothless judges' new obligation to report to chief judges any potential misconduct of which they become aware. Indeed, the fact that referring an identified complaint for investigation and resolution under Rule 11 is seen as a last resort actually *encourages* this outcome.

3. The Conference chose to retain the pre-existing rules governing public disclosure of judicial misconduct allegations. We disagree with that decision. These rules significantly favor non-disclosure of even the most basic information about alleged misconduct by a judge, such as the identity of the judge who may have engaged in misconduct and the basic nature of the misconduct alleged or identified. Rule 24 provides that if a complaint is dismissed under Rule 11(c), dismissed under Rule 11(d) because of voluntary corrective action, dismissed because of "intervening events" (such as a judge's resignation), or dismissed at any time after a special committee is appointed, no public disclosure is required.[23] If the complaint is disposed of privately—by a private reprimand or censure—public disclosure is prohibited.[24] And no provision provides for the public disclosure of identified complaints that are not referred for a formal investigation by a special committee—which is a disfavored last resort for identified complaints. Furthermore, Rule 23 prohibits disclosure of any information about the consideration of a complaint by any judicial employee—with no apparent exception for a judicial employee who complained about (or was the victim of) judicial misconduct.[25]

This level of disclosure—or, more accurately, lack of disclosure—is not warranted and significantly undermines public faith and public confidence in the judiciary. It is understandable that the Judicial Conference would not want to reveal information about potential misconduct by judges: no member of the legal profession (or the public generally) would want public disclosure about alleged misdeeds. But as lawyers, we are subject to public disclosure of bar complaints—even frivolous bar complaints that are dismissed—in some states.[26] Moreover, while the ABA Model Rules for Lawyer Disciplinary Enforcement allow for private admonitions of attorneys, such private remedies are allowed only with the consent of the respondent and the approval of the chair of a hearing committee and "[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer."[27]

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[23] *See id.*, Rule 24(a)(1), (2).
[24] *Id.*, Rule 24(a)(3).
[25] *Id.*, Rule 23(b).
[26] *See* Center for Professional Responsibility, Survey on Lawyer Discipline Systems, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_II_2012_sold_results.pdf (Kansas and Oregon do not have non-public disciplinary measures).
[27] ABA, Model Rules for Lawyer Disciplinary Enforcement, Model Rule 10(A)(5), https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_10/.

Because judges are in an incredible position of power and authority in American society, they should be held to a higher standard of disclosure than most. Disclosing allegations would not undermine faith in the judiciary; it would increase public confidence in the judiciary's proper handling of misconduct allegations. We thus strongly encourage the Judicial Conference to revise its public disclosure rules. At the very least, the public should have access to aggregated data about the quantity and types of complaints (identified or filed) addressed each year in each circuit. We would also like to see the Judicial Conference make publicly available the following information for all complaints: the subject of misconduct complaint, the nature of the alleged misconduct, and the resolution of the identified or filed complaint.

4. As noted above, the commentary to Rule 11 provides that, even when a complaint does not result in remedial action against a judge, the judiciary has "ample authority to assess potential institutional issues related to the complaint," such as by conducting "an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence."[28] Although the recognition that the judiciary has this power is important, it is lacking in critical details. To begin, this commentary does not explain when such analysis is appropriate, who should conduct it, whether other individuals' knowledge of the misconduct should be investigated, or who should be in charge of propagating or implementing curative steps to prevent recurrence of the misconduct. Without articulating these specifics, the recognition that the judiciary has the power to analyze institutional issues that may contribute to misconduct is purely symbolic. (Although the Office of Judicial Integrity is still in its infancy, we note that it could potentially be an excellent entity to task with conducting investigations like the ones contemplated by the amendments to the Rules, if adequate staffing and training is provided.)

5. There are also some amendments that we encourage the Judicial Conference to consider in the future.

a. To begin, the current recommendations do not clarify when the chief judge of a circuit must be recused or disqualified from an investigation. For example, while a judge would (or should) disqualify himself or herself if a litigant was a close personal friend, the disqualification rules for misconduct complaints do not seem to address personal friendships at all. More generally, the Rules do not seem to provide any guidance as to how a complaint should be handled if allegations involve the chief, or if the chief's impartiality could reasonably be questioned due to familial or close personal relationships with the subject of a complaint. Because the Rules provide no guidelines for the chief's exercise of discretion in these circumstances, each chief is free to craft his or her own approach to recusing himself or herself in these circumstances. Although chiefs must of course have some discretion in addressing allegations of misconduct where his or her own interests are implicated, no one benefits from this discretion being completely

[28] Draft Rules, Rule 11, cmt.

rudderless—not the chief who must decide whether recusal is appropriate, not the complainant who may wish there to be recusal guidelines in place, and not the public who may wonder about the recusal decision-making process.

b. Although the report of the federal judiciary's working group on workplace misconduct recommended that courts provide the option of transfer or alternative work arrangements for victims of alleged misconduct, the recommendations nowhere mention this potential remedy. We strongly believe that a transfer program would be one of the most effective mechanisms for encouraging individuals to report harassment and protecting victims while ensuring that chambers continue to manage their caseloads. An employee is unlikely to bring harassment claims if she knows that she must continue working in close proximity with the accused for the duration of an investigation. We accordingly recommend that the Judicial Conference expressly incorporate this remedy into the Rules, clarify whether transfers would be available during the investigations into credible harassment claims or only after adjudication, note that a transfer can take multiple forms (including transfers within the same courthouse, district, or circuit, and even transfers that allow for remote work until adjudication), and allocate funding for transfers both during and after investigations.

6. Subject judges are afforded a breadth of rights during judicial misconduct investigations, including the right to respond to a complaint, the right to counsel, the right to call witnesses, the right to offer oral argument, the right to attend any hearing, and the expectation of reimbursement of attorneys' fees for misconduct allegations that are unsubstantiated.[29] These rights are important, and we commend them. But victims of workplace harassment or misconduct by a judge should have similar rights in misconduct proceedings.[30] If a victim of judicial misconduct is brave enough to come forward and report misconduct, or brave enough to be willing to participate in misconduct proceedings once such a complaint is identified, then he or she should have the right to present argument, to present witnesses, to attend hearings, and to receive reimbursement of fees in substantial cases. After all, these types of proceedings implicate victims' own personal and professional reputations, just as they implicate the reputations of subject judges. Moreover, because the judiciary is not covered by Title VII, Judicial Misconduct and Disability Act proceedings are the key avenue of relief for victims of workplace harassment or misconduct by a judge. Affording victims rights in these types of proceedings would encourage employees to report misconduct, encourage participation in hearings, and demonstrate that the judiciary fully supports employees who are victims of inappropriate workplace conduct.

We understand that these types of rights do not make sense in *every* case. But in cases involving employees who were subject to alleged harassment or inappropriate workplace conduct, we

[29] *See id.*, Rules 14, 15.
[30] *Contra id.*, Rule 16.

believe they are vital to promote reporting and encourage participation in the investigative process.

7. Finally, we note that many of the Judicial Conference's proposed changes to the Rules are fairly modest. We are concerned that insufficient thought has been given to whether the structure of investigating and resolving judicial misconduct is, more fundamentally, sound and workable with respect to harassment allegations and other forms of inappropriate workplace conduct. Both the Judicial Conduct and Disability Act process and the EDR process require investigation by a judge or by groups of judges and adjudication by groups of judges, rather than by neutral and disinterested individuals. This is of significant concern to us for several reasons.

a. First, judges are often asked to investigate misconduct by other judges within the same circuit. It is unthinkable that a judge would preside over a case involving one of his best friends as a litigant or counsel for a litigant, yet the Rules readily permit exactly this arrangement in Judicial Conduct and Disability Act proceedings. This arrangement not only puts judges in difficult positions; it also compromises employees' and the general public's confidence in the judiciary's handling of misconduct complaints. Even if judges were able to set aside their personal biases during investigations, tasking them with investigating their own colleagues and friends still appears highly improper and may undermine public confidence in the judiciary. The Judicial Conference should strive to craft a system that avoids the appearance of impropriety as well as actual impropriety.

b. Second, judges are generally not trained to investigate workplace misconduct allegations—which are difficult to analyze properly even for the most seasoned investigators. Nor are victims likely to feel comfortable confiding in them about harassment or inappropriate conduct by their judicial peers. Accordingly, allowing panels of judges to investigate these sensitive and complex issues is unlikely to advance a goal of true fact-finding. We have been told that, in some cases, attorneys from the local area are hired to conduct investigations about judges. But this approach is not required by the Rules. Moreover, we are concerned that local attorneys (who often appear before the circuit and may fear retaliation as well) would have difficulty being truly objective or being perceived as truly objective investigators of judicial misconduct.

c. Third, to the extent the Rules contemplate that judges will serve as both investigators and adjudicators in misconduct proceedings, this conflation of duties is not conducive to objective fact-finding and resolution. In most instances, investigators and adjudicators are distinct entities so that one can act as a check on the other. Investigators can often become inadvertently biased by their own examination of the evidence and the theories they develop and pursue during an investigation; an objective set of eyes at the conclusion of an investigation helps to offset investigative bias.

For these reasons, we urge the Judicial Conference to consider whether the Rules' fundamental structure for investigating and resolving complaints is adequate for cases involving harassment or inappropriate workplace conduct by judges. It may be perfectly adequate for complaints of judicial disability, alleged violations of political-activity rules, or violations of other rules of canons in which there is no human victim. But for complaints (whether filed or identified) about harassment or inappropriate workplace conduct by a judge, we strongly believe that, at a minimum, disinterested outside individuals with considerable experience and training should be the investigators, and that these cases should be resolved outside of the circuit in which they arise.

IV. Miscellaneous

Although we realize the request for public comments is limited to the proposed changes to the Code and the Rules, we wish to reiterate some additional recommendations that can be effectuated outside those frameworks.

1. To begin, there are several important recommendations we made to the Working Group on which we have seen no action. These include the creation of a more robust national reporting mechanism, the completion of a thorough retrospective analysis or climate survey regarding harassment in the judiciary, the establishment of a permanent standing committee that can continually evaluate the efficacy of the judiciary's efforts to redress and prevent harassment, and the creation of concrete solutions to address the risk of retaliation. We summarize our reasons for making these recommendations below:

a. We asked the Working Group to establish a national, confidential reporting system. Many law clerks fear retaliation or feel uncomfortable reporting within their own district or circuit. Currently, law clerks are often directed to report to their circuit's or their district's chief judge, who may be friends with the accused judge or may even be the accused judge. A national reporting system would address many of these concerns. We ask the Judicial Conference to consider creating a robust national system operating within the Office of Judicial Integrity that would both report and investigate misconduct while functioning independently of any circuit or district. This system would allow employees to report harassment even when they feel uncomfortable doing so in their own district or circuit.

b. Neither the Working Group nor the Judicial Conference has recommended a retrospective examination (or a climate survey) of employees' experiences with harassment and abusive behavior. While we believe that a forward-looking approach to addressing these issues is important, we also believe the judiciary will be successful in that endeavor only if it attends to the lessons of history. A careful assessment of employees' past experiences witnessing or being subjected to harassment or other abusive behaviors, before events grow too stale, would allow the judiciary to understand how harassment has

been allowed to flourish in the past and how prevalent misconduct currently is. It would also allow the judiciary to identify particular regions in which more focused attention to these issues is necessary. Moreover, acknowledging past shortcomings is a key element in restoring public trust. We hope that the Judicial Conference will encourage further retrospective review of misconduct in the judiciary, conducted by a neutral, third-party expert in workplace climate surveys, and will share the results of this review with the public.

c. The issue of harassment in the judiciary is complex, and the power dynamics inherent to the judiciary will likely continue to cause problems related to reporting. Our understanding, however, is that the Working Group may not continue to exist after the 2018 Judicial Conference. We recommend that a standing committee within the Office of Judicial Integrity be established and periodically re-examine whether the policies and procedures designed to prevent and redress misconduct are effective. Current and former law clerks should be invited to be formal members of that committee. In addition, a separate committee comprising current or recent former law clerks should be established within the Office of Judicial Integrity so that the judiciary will always have available the perspective of these individuals.

d. Possibly the largest barrier to the reporting of harassment is the victim's fear of retaliation. Although the proposed amendments prohibit retaliation, they do not specify how the judiciary should determine whether retaliation has occurred and, in instances where it learns of retaliation, what remedies are available for the victim and what disciplinary action may be taken against an offending employee. We recommend that the Judicial Conference craft specific proposals to address retaliation and include them in its Model EDR plan, training programs, and other efforts to address harassment, drawing upon the expertise of corporations, educational institutions, and other government agencies that have implemented successful anti-retaliation initiatives

2. While many courts have taken action, several have not—and are under no obligation to do so. We strongly urge the Judicial Conference to implement reforms that will be *required* in all circuits. Taking strong action to address harassment in the judiciary should not be optional.

3. Finally, we note that none of the proposed amendments pertain to Supreme Court Justices, who are not bound by the Code or the Rules. Although we recognize that promulgating a code of conduct for that Court is outside the purview of the Conference, we nevertheless urge the Court to adopt voluntarily a code of conduct by which its members would be bound.

V. Conclusion

The Judicial Conference has made important strides in addressing harassment and misconduct. But this work must be just the beginning of a sustained, long-term effort. The judiciary must

hold itself accountable for removing the barriers to reporting. We encourage the Judicial Conference to think broadly about the significant systemic reforms that could better address harassment, the power dynamics between judiciary employees, and employees' concerns with retaliation, and not feel cabined to simply tinkering around the edges when proposing reforms. We also encourage the Judicial Conference to reach out more broadly to judicial employees, including current and former clerks, when crafting changes to the Rules and the Code. Such outreach will help ensure that the Rules and the Code will, in practice, encourage employees to report judicial misconduct without fear of reprisal or retaliation.

Sincerely,

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