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To:	AO Code and Conduct Rules
Cc:	Resnik, Judith; Gluck, Abbe
Subject:	Comments of Professors Abbe Gluck & Judith Resnik on the both Code and the JC&D Rules
Date:	Tuesday, November 13, 2018 11:38:41 PM
Attachments:	Judicial Conference Workplace Comment Gluck Resnik.pdf.pdf

Dear Committees on Codes of Conduct and Judicial Conduct and Disability:

We are professors at Yale Law School and we submit the attached comment on the proposed changes to both the Code and the JC&D Rules in our individual capacities. We do not speak on behalf of any entity. We thank you for your consideration.

Sincerely,
Abbe R. Gluck and Judith Resnik

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

Comments
of

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November 13, 2018

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We are law professors who teach and write about procedure and the federal courts. We have also worked in these courts, both as law clerks and as lawyers. In addition, we have served on committees devoted to the courts and worked on projects aiming to enhance equitable treatment in workplaces, including educational institutions.[1]

We appreciate the special place the federal courts have in shaping (to borrow Daniel Meltzer's formulation) our "common intellectual tradition."[2] As a workplace for some 30,000 judicial employees, the federal judiciary is also a unique environment for young lawyers to enter public service.

Like many others, we commend the Judicial Conference for chartering this inquiry into workplace standards. We welcome the opportunity to comment on the proposed amendments to the Code of Conduct for United States Judges and the Rules for Judicial Conduct and Judicial Disability Proceedings, and to learn more about the impact of such changes on each Circuit's Employment Dispute Resolution (EDR) plan.

Over the past weeks, we have had the pleasure of observing the efforts of a large group of Yale Law School students who have studied these changes. Several testified before the Judicial Conference committees, and the group is now filing detailed written comments. As we have reflected on the students' reaction to the proposed changes, we thought it would be helpful to file brief comments to underscore our understanding of the concerns animating the intense focus on the working environment of the federal judiciary.

We believe that, when revising rules governing the judicial workplace, multiple perspectives need to be taken into account, including those of individuals who perceive themselves subjected to harassing or otherwise unacceptable workplace behavior; judges in charge of their own chambers; the judiciary as a whole; and litigants and the public in general. All rely on the federal courts to exemplify fairness and the dignified treatment of individuals.

Everyone merits fair and even-handed interactions, and the federal courts should employ practices that ensure confidence in the system. Indeed, as the Judicial Conference's 2015 Strategic Plan underscores, the federal judiciary is committed to ensuring "high standards of

[1]For example, Professor Abbe Gluck is a Member of the Council of the American Law Institute, a Commissioner of the Uniform Law Commission, and has served on Yale Law School's Title IX Committee and as Secretary of the board for the Fund for Modern Courts. Judith Resnik is also a member of the American Law Institute and is one of the Advisers to the American Law Project, Principles of the Law: Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities. In addition, Professor Resnik was appointed by then-Chief Judge Clifford Wallace to serve as a member of the Ninth Circuit Gender Bias Task Force, whose report, *The Effects of Gender in the Federal Courts*, was published in 67 S. CAL. L. REV. 727-1106 (1994). Professor Resnik is also a founding member of Yale University's Women's Faculty Forum, created in 2001 and focusing on enabling the University's scholarship, teaching, and workplace practices to reflect its commitments to equality.

[2] *See* Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. CHI. L. REV. 423, 427 (1989).

conduct and integrity for judges and staff," and needs to "[r]ecruit, develop, and retain highly competent staff."[3] As the current moment reveals, this commitment requires understanding the "shifting career expectations and changes in how staff communicate and interact."[4]

These concerns are appropriately at the center of the June 1, 2018 *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States*.[5] We write to suggest, however, that the Working Group's assessment of the judicial workplace and its goals for revised practices have not yet been fully translated into the proposals for revisions to the Code of Conduct and Rules sent out for comment on September 13, 2018. Thus, we urge additional revisions to address the disjuncture between the vision of the Working Group's report and the September proposals.

Before turning to specific recommendations, we wish to raise a larger concern. Given the aims and ambition of the Working Group's report, the Code of Conduct and the Rules may not be the only legal vehicles to use to respond to the range of concerns and goals of the Working Group. As such, it may be valuable for the Committees to ask the Working Group to reflect on what other modifications of extant practices or new provisions should be developed.

In terms of the proposals currently set forth, we believe that five facets merit revision or clarification. First, with respect to scope and definitions, the rules should repeatedly incorporate recognition of the interaction among different forms of harassment, as bias and stereotyping can be based on the intersections of sexual identity, race, ethnicity, religion, age, or disability. Further, and as others have detailed, the implementation of the proposals' laudable aim of precluding behavior that is not only harassing but also "abusive, prejudiced, or biased"[6] remains unclear. The proposals need to include examples of the kinds of behavior that fall within its prohibition so that rights and expectations are well understood by all involved.

Second, we believe that the timeframe to report needs to be clarified and expanded, both in general and especially for short-term employees such as law clerks. As the comments submitted by the Yale Law students note, the Code of Conduct currently appears to permit an unlimited time for reporting. In contrast, the Model EDR Plan appears to provide a 180-day

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[3] JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 9, 17 (2015), http://www.uscourts.gov/sites/default/files/federaljudiciary_2015strategicplan.pdf.

[4] *Id*. at 10.

[5] REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (2018), http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

[6] CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (Proposed Changes 2018), http://www.uscourts.gov/sites/default/files/code_of_conduct_for_u.s._judges_-_proposed_changes_-_9-13-2018.pdf..

statute of limitations.[7] As currently written, it is unclear which document's provisions govern what circumstances and whether pursuing complaints under the Code of Conduct tolls the time for reporting under the EDR. Resolving this ambiguity will benefit everyone involved.

If it is the EDR that governs in any situation, another concern emerges, which is that the 180-day window is too short for at least some categories of employees.[8] For example, as teachers of past and future law clerks, we believe that for those clerking, the short-term nature of that employment and its importance to launching legal careers make the 180-day window counterproductive. Individuals often need to think long and hard before bringing complaints, and those who may come forth are unlikely to do so until they are well established in the next phase of their careers. Indeed, as the Working Group noted, in 2016, of the 1,303 "misconduct" complaints filed against judges, none came from "law clerks or judiciary employees."[9]

Thus, barring complaints after 180 days will not promote—and could well deter—reporting. Given the Working Group's aim to facilitate reporting, we hope that the Judicial Conference will clarify whether a time limit on filing a complaint exists and, if so, that any limit imposed will permit a much longer interval to report after the end of employment. We recognize that the judicial branch has many different types of employees and that the public also may file complaints against judges. That the ideal timeframe for reporting may not be the same for different populations makes the issue of limits challenging. That said, given that the goal, as stated by the Working Group, is to encourage reporting, an extended timeframe is critical.

Third, as both the Working Group and the Yale Law students recommend, multiple channels for reporting are key. Many workplaces have focused on the question of how people enter into their complaint systems, and many have concluded that opening up channels of communication—both formal and informal—is essential.

The Working Group's observations do not appear to have been implemented in the current proposals, which emphasize the chief judge as the primary recipient of reports. We understand that the Judicial Conduct and Disability Act of 1980 adopted that model, but retaining it in this context undermines the goals articulated by the Working Group and in the 2015 Judicial Conference's Strategic Plan. Individuals may have many reasons to feel unease about reporting to the chief judge. As the Working Group discussed, "power disparities" are acute within a judge's chambers, and the goals include making EDR plans "user-friendly."[10] The hierarchical relationship of an administrative assistant or a law clerk to a chief judge puts a

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[7] *See* JUDICIAL CONFERENCE OF THE U.S., MODEL EMPLOYMENT DISPUTE RESOLUTION (EDR) PLAN ch. X, § 8 (2018), http://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2b-model-edr-plan.pdf.

[8] Here, we depart from the views of the Working Group, which commended the 180-day time limit. WORKING GROUP REPORT, *supra* note 5, at 35.

[9] *Id.* at 10.

[10] *Id.* at 3, 33.

burden on the very junior individual.[11] Further, given the geographical diversity within the federal system, a chief judge may sit far from other judges within a circuit. Thus, in addition to the chief judge as one of the reporting options, we suggest that the rules identify other judges as well as select non-judicial staff in each district and circuit as eligible both to be consulted informally and to receive reports about actions that may be in violation of the Code of Conduct and the Rules.

We also support the creation of an Office of Judicial Integrity, which we understand may be placed within the Administrative Office of the United States Courts.[12] That office could be another avenue for reporting. Building in that additional option entails a useful redundancy, reflective of our legal system, in which rules and practices vary somewhat across the federal circuits and from federal to state courts. These commitments to the overlapping layers of courts within this federal system offer an important insight into how this proposed Office could serve both as a recipient of complaints and, as we discuss below, for data collection and dissemination.

Likewise, having redundancy in data collection would be wise. Ideally, data collection on reports should occur at district, circuit, and national levels. The new Office would be one excellent resource not only by serving as a repository for data but also by periodically providing reports about complaints received in the different Circuits. As is the custom in universities such as ours, the compilation of such data comes without identification of individuals but helps to bring awareness of these issues to the fore. The goal of changing norms requires both information collection and distribution in a fashion that is respectful of individual privacy and clear about what constitutes misbehavior.

Moreover, a compilation of the outcomes, from findings of no violation to sanctions imposed and remedies provided, would serve as one route to explaining the norms and expectations. The range of sanctions provided, for example, in the Judicial Conduct and Disability Act of 1980, were responsive to concerns at that time. As the Working Group discussed, the question of appropriate remedies and sanctions in this context requires exploration. Learning about both remedies and sanctions used in different federal districts and circuits would make a significant contribution to shaping practical guidelines for how to respond when misconduct has been established.

Fourth, more needs to be said about remedies. Both the Working Group and the Yale Law student comments urge that clear paths be developed for individuals during the course of their employment to transfer to different chambers. For short-term or long-term employees, alternative work arrangements may be essential once complaints are pending—and, potentially in circumstances when complaints are still in informal stages. We know from individual instances that some circuits have made such accommodations, and moreover, that such provisions are

[11] One model, as noted by the Working Group, comes from the Ninth Circuit, which has created a new office of Director of Workplace Relations. *Id.* at 37.

[12] *Id.*

made when judges become unable to work. Making clear that transfer can be an option when circumstances warrant would be an important improvement. We also suggest examining what other remedies are warranted, including counseling on health issues and job placement.

Finally, because we sit at the intersection between students applying for clerkships and judges eager to know about the work of these applicants, we believe the question of what information can responsibly flow between the judiciary and the academy needs to be explored. Law schools and the judiciary have a uniquely close relationship when it comes to clerkship placement and recommendations. We suggest that a subcommittee be identified to work with law school faculty and deans to develop guidelines about when and how information ought to be shared across institutions, once credible evidence of conduct violating the Code of Conduct and Rules comes to light.

In sum, we appreciate the decision of the Chief Justice and of the Judicial Conference to launch this project of revising workplace rules. We hope that the many comments received will contribute to a working set of guidelines in which all employees of the federal judiciary can flourish. Thank you for your consideration.