

MEMORANDUM

To: The Judicial Conference of the United States

From: Law Clerks for Workplace Accountability¹

Date: July 20, 2018

Re: Response to the Federal Judiciary Workplace Conduct Working Group's June 1, 2018, Report

INTRODUCTION

In December 2017, following several reports of harassment by a prominent federal judge, Chief Justice Roberts convened a Workplace Conduct Working Group for the Federal Judiciary (“Working Group”) to address the issues of harassment and other inappropriate conduct in the judicial workplace. Around the same time, we—a group of former and current law clerks—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.

Over the past several months, the Working Group met to prepare recommendations for the Judicial Conference of the United States. Members of Law Clerks for Workplace Accountability have participated in three Working Group meetings in Washington, D.C., on an ad hoc basis.²

On June 1, 2018, the Working Group published its Report (“Report”) to the Judicial Conference of the United States (“Judicial Conference”). One of our members, Jaime Santos, previewed our response to that Report when she, James

¹ Law Clerks for Workplace Accountability was formed in 2018 by members of the original group that organized the December 2017 letter to the Judiciary (discussed in the first paragraph of the Introduction) to continue advocating for the reforms recommended in that letter. Members include Deeva Shah, Priya Srinivasan, Claire Madill, Sara McDermott, Jaime Santos, Kendall Turner, and Laura Ferguson. More information about Law Clerks for Workplace Accountability can be found on our website, <http://www.clerksforaccountability.org/>.

² We have also attended two meetings with the Ninth Circuit Workplace Environment Committee and one meeting with the D.C. Circuit Workplace Conduct Committee.

Duff, Director of the Administrative Office of the U.S. Courts, and Jenny Yang, former Chair of the Equal Employment Opportunity Commission, testified before the Senate Committee on the Judiciary on June 13, 2018. As Ms. Santos explained, there is much in the Report that we find encouraging—especially the Working Group’s dedication and willingness to meaningfully engage with the issue of harassment in the federal Judiciary. Ms. Santos, however, also expressed our concern that many of the Report’s recommendations are too vague to provide significant guidance. Furthermore, the Report omits several policies, procedures, and practices that would improve the federal Judiciary’s handling of, and response to, workplace harassment.

We write to expand on Ms. Santos’s testimony and provide additional feedback regarding the Working Group’s Report. First, we discuss the aspects of the Report that we find encouraging. Second, we discuss the areas where we think that the Report should be more specific. Third, we discuss those recommendations that we encouraged the Working Group to adopt, but that were not included in the Report.

I. Encouraging Aspects of the Working Group’s Report

We are pleased that the Working Group’s Report acknowledged many of the significant barriers to reporting misconduct. We believe that several of the recommendations discussed in this section are important first steps to preventing harassment and ensuring that when it does occur, it is reported and addressed effectively. Moreover, we are encouraged that the Working Group intends to continually evaluate its initiatives. In furtherance of these shared goals, we urge the Judicial Conference to implement the following recommendations immediately:

First. The Working Group asked the Judicial Conference to revise the Judiciary’s Code of Judicial Conduct to reflect that judges have an obligation to report misconduct. *See* Report at 21-28. The Report repeatedly emphasizes that judges have a responsibility to “curtail inappropriate workplace conduct by others, including other judges.” *Id.* at 24. We think this point is crucial, as it signals to court employees—and the public at large—that the Judiciary is committed to preventing harassment from the top down and that ignoring a peer’s misconduct is unacceptable.

We believe that the Working Group’s proposal to revise the Code of Conduct would be stronger if the Code specified what kinds of conduct that judges have an

obligation to report and how judges should report such conduct. For example, if a private conversation between judges does not resolve the issue, or if the misconduct poses a risk to the physical or emotional health of a judiciary employee, judges should have an ethical obligation to report such conduct to the Office of Judicial Integrity.

The Report also notes that employee dispute resolution (“EDR”) plans should require chief district judges and chief bankruptcy judges to inform chief circuit judges or circuit judicial councils of any allegations of misconduct. We agree. The Judicial Conference should further require chief judges to report allegations of misconduct to the Office of Judicial Integrity. Codification of these obligations would provide the Administrative Office of the U.S. Courts with much-needed data regarding misconduct allegations. It would also provide information about particular circuits or districts that may need additional training. It would send a strong signal that the Judiciary takes reports of harassment seriously. Finally, it would ensure that districts and circuits cannot operate in isolation, which can conceal and enable misconduct.

Second. The Judicial Conference should expand the scope of all relevant misconduct policies to include externs and other court staff that are not necessarily covered under many current EDR policies. The Report rightly notes the power disparities between externs, job applicants, court staff, and judges. To have any practical effect, that recognition must be translated into concrete changes in the way judicial policies discuss harassment. We are concerned that, for example, the Seventh Circuit explicitly excludes externs and job applicants from the scope of coverage for its harassment policies. We urge the Judicial Conference to make a uniform rule expanding all relevant misconduct policies to externs, job applicants, and all current staff. For harassment policies to have teeth, the Judicial Conference should ensure that all of these individuals have recourse in what is often a very vulnerable situation.

Third. We agree with the Working Group’s recommendation that former employees should have ongoing access to guidance on the scope of their obligation to protect chambers’ confidentiality. This would ensure that former employees feel comfortable reporting harassment without fear of retaliation. The Report recommends extending the Model EDR plan’s reporting time limit to 180 days from the date of the alleged violation; however, we would recommend that the time limit be extended to at least one year following the violation, *i.e.*, the term of a typical clerkship. Often, it is not until a term law clerk completes her clerkship that she

has time to reflect on any potential misconduct and benefits from the physical separation that reduces the fear of immediate retaliation for reporting misconduct.³ A year-long reporting period can better accommodate these concerns, and would thus likely encourage a higher level of reporting. We also recommend that the Judicial Conference amend the Model EDR procedures to clarify whether the first or last date of misconduct experienced starts the 180-day clock if a person experiences multiple, ongoing instances of misconduct.

We agree that traditional rules about standing⁴ should not apply to the Judicial Conduct and Disability complaint process, and that the Conduct Rules and commentary should expressly state as much. The Model EDR process similarly should not apply traditional rules of standing, so as to facilitate early reporting and action.

Fourth. We support the Working Group's recommendation that the Judicial Conference create a national Office of Judicial Integrity. A separate department that specifically addresses harassment allegations would serve multiple purposes. First, as we understand it, under the existing reporting mechanisms (*i.e.*, the EDR process and the Judicial Conduct and Disability Act process), judges receive and evaluate reports of harassment and determine whether an investigation is warranted.⁵ The Office of Judicial Integrity, by contrast, would create necessary separation between the Judiciary and an available reporting mechanism, helping some victims feel more comfortable coming forward. Second, such an office would allow for large-scale analysis of demographic data and nationwide harassment reports. It could encourage uniformity of reporting mechanisms, policies, and responses across circuits and districts. Third, the Office could provide stronger training and support for EDR coordinators nationwide. It could also continually evaluate the effectiveness and readability of EDR and other harassment policies. Finally, this Office would help establish informal mechanisms to provide advice, intervention, and support to employees. But as the Working Group acknowledges,

³ Bond, Heidi. Letter to the Senate Committee on the Judiciary (June 11, 2018), *available at* <http://www.courtneymilan.com/metoo/workinggroupletter.pdf>.

⁴ Traditionally, standing doctrine in federal courts requires that a plaintiff himself or herself must claim the redressable injury from the alleged misconduct. While this requirement is necessary for Article III adjudication of a claim within the federal court system, the same requirement should not apply to proceedings under the Judicial Conduct & Disability Act. We agree that complainants themselves need not be the subject of the alleged misconduct.

⁵ Typically, a chief judge or another appointed circuit or district executive receives complaints of harassment and determines how the claim will proceed.

all of this is only achievable if this Office is truly independent from the influences of district or circuit management and Human Resources.

Fifth. We were happy to see the Report recommend bystander intervention training to educate judges, supervisors, and other employees who witness misconduct about how to report and respond to the misconduct. We reiterate that such training is a key step to protecting victims and ensuring the reliability of reports. Such training also bolsters the Report’s findings that workplace conduct does not just involve sexual harassment, but can also include a broad range of misconduct. We urge the Judicial Conference to make resources available for ongoing, robust training and issue a set of evidence-based best practices for the districts and circuits to implement effective bystander training.

II. Recommendations for Improvements

As the Report acknowledges, even the best processes for addressing harassment are ineffective if employees do not use them or are unaware that such processes exist. The Report includes a thorough exploration of why victims are hesitant to report, including a lack of confidence that they will be believed, concerns about retaliation, and a lack of remedies justifying that risk of retaliation. While the Report makes several important observations, its recommendations for eliminating obstacles to reporting may be difficult to implement effectively without further guidance. And, as discussed above with regard to the Office of Judicial Integrity, creating effective processes requires resources, time, and clarity in implementation. We are concerned that the lack of clarity in defining and implementing certain recommendations could make them ineffective in practice and—at times—even stifle reporting. Our concrete suggestions to help avoid this outcome are provided below.

First. The Report recommends that “proportionate corrective action” be taken where misconduct has occurred without further defining that term. The Report does not clarify what processes and remedies are available to a complainant, especially when the accused employee is a sitting federal judge. The Report also does not explain who will conduct investigations or how these investigations will proceed. We recommend that the Judicial Conference adopt a clear definition of harassment, provide non-exhaustive examples of what constitutes harassment, identify the remedies available to victims of harassment, and explain in detail what the investigation process entails. These details should include information about who will be responsible for investigating allegations of misconduct, what kind of

authority investigators will have in collecting information, what rights victims have during investigations and hearings, and how impartiality will be ensured. Victims are not likely to take the personal risk of reporting harassment unless they understand how the investigative process will proceed and are confident that any investigation will be handled fairly, thoroughly, and impartially. Furthermore, we recommend that the Judicial Conference work closely with subject-matter experts to craft reporting and investigative mechanisms that will be effective and impartial. These subject-matter experts exist throughout the government, within universities, and at virtually every public company given corporate ethics requirements found in the Sarbanes-Oxley Act of 2002.

Similarly, the Report recommends a range of punishments for judges ranging from private censure to public censure to impeachment recommendations. We recommend that the Judicial Conference give additional guidance about what types of harassment (*e.g.*, verbal, physical, comments based on race or gender identity) would warrant each type of punishment and who would decide that punishment at the district and circuit level. Clarity on the process and available remedies will encourage higher rates of reporting.

Second. We were pleased to learn of the Working Group's recommendation that court protection programs should include the option of transfer or alternative work arrangements. Report at 38-39. We strongly believe that a transfer program would be one of the most effective mechanisms for reporting harassment and protecting victims while ensuring that chambers continue to manage their caseloads. The Report should clarify whether such transfers would be available during the investigations into credible harassment claims or only after adjudication. We strongly recommend that the Judicial Conference allocate funding for transfers both during and after investigations. 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. Moreover, the Judiciary should avoid putting a complainant in harm's way during investigations that implicate a complainant's physical safety by making some form of transfer available throughout the investigations. The Judicial Conference should also note that the transfer can take multiple forms, including transfers within the same courthouse, district, or circuit, and even transfers that allow for remote work until adjudication.

Third. The Report mentions following up with law schools, but it does not explain how the Judiciary might reach out to law schools or what information it might seek. We recommend that the Office of Judicial Integrity reach out annually

to the deans and clerkship offices of law schools to ask for anonymized reports of misconduct that the schools have received from past clerks and externs. This information gathering could supplement the Judiciary-wide climate survey suggested by Ms. Yang during the Senate Judiciary Hearing. We also recommend that the Office of Judicial Integrity work with law schools—with input from law students—to craft an avenue for schools to report students’ allegations of misconduct of members by the Judiciary without facing retaliation in the form of reduced clerk hiring. This avenue would exist in addition to the multiple reporting procedures available to Judiciary employees themselves. In our view, such an avenue should insulate law schools and law students from the fear that any member of the Judiciary or any circuit-specific staff members could learn the identity of the reporting law school. Only if law schools have a confidential reporting system will they consider partnering with the Judiciary to thoroughly report allegations of harassment. Finally, we encourage the Judiciary to work with law schools to establish clear guidelines and expectations regarding law schools’ reporting obligations. For example, the Judiciary could solicit information about any credible allegations of harassment or other misconduct on an annual basis and anonymize this information when it is collected.⁶

Fourth. The Working Group discussed the importance of training judges on their duties as managers. We recommend explaining how often refresher trainings for judges will occur and how to ensure that judges receive and understand training materials—even if they do not attend the meeting where the issue is discussed. Similarly, the Report noted the importance of trainings for new employees. We recommend describing the specific enforcement mechanisms that will be used to ensure that all new employees, including externs, receive trainings and materials even when they work in districts or circuits without formal orientation trainings.

Fifth. The Working Group recommends that “the Judiciary as a whole consider possible mechanisms for improving the transparency of the [Judicial Conduct & Disability Act (“JC&D”)] process.” Report at 31. We agree. However, we believe it is important to explain who within “the Judiciary as a whole” has the authority to change such mechanisms and set out the schedule during which such considerations will take place. This clarity is especially relevant to any changes regarding the “lack of punishment for a judge who, under allegations of serious misconduct, retires or resigns and thereby terminates the disciplinary proceeding.”

⁶ Memorandum from Law Students on Law Schools’ Role in Combating Harassment in the Judiciary, to the Judicial Conference of the U.S. (July 2018) (on file with the authors) (forthcoming).

Report at 11. While the Report mentions the concern that a judge should not be able to retire his way into mootness,⁷ the Report offers no clarity on what steps the JC&D process could implement instead, such as continuing disciplinary proceedings after retirement, referral to the state bar, or any other institutional review. We recommend that the Judicial Conference add specific provisions to the JC&D to address these concerns. We also recommend that the Judicial Conference add specific procedures governing when institutional review would occur, and what policies govern such a review. (In our view, this institutional review should occur any time a judge resigns or retires pending an investigation, and if allegations are made against a judge who is deceased but served as a judge within the last several years before he passed away.) Finally, the Report also notes that “public confidence in the JC&D Act would benefit if the Judiciary . . . made decisions on those complaints more readily accessible.” Report at 11. We agree with this recommendation but ask the Judicial Conference to clarify who within the Judiciary would complete this task and how frequently such information would be made public.

Sixth. The Working Group discussed several changes—such as exit interview surveys and website improvements—that would likely encourage greater reporting and prevent further harassment if properly implemented. It is important that the mechanisms used are created by experts in the field. For example, exit interview surveys and website information should be crafted by experts who create such surveys for larger companies and/or other parts of the government, and who understand what distinguishes the Judiciary from other workplaces. Similar to reporting procedures, exit interview surveys should also be handled by someone other than a judge, at least initially. We hope that the Judicial Conference will provide guidance about whether the exit interview surveys will be standardized nationally, whether each circuit and district will be responsible for such surveys, and whether the interview results will be reported to the Office of Judicial Integrity and the public.

Seventh. While the Working Group noted in its Report that harassment incidents are not isolated, the Report does not explain the basis for this finding. The Working Group’s forward-facing approach has benefits, but even a forward-facing approach requires a thorough retrospective review of what contributed to past cases of harassment and the prevalence of harassment in the Judiciary.

⁷ For example, the Judicial Council of the Second Circuit concluded that it lacked the authority to investigate harassment allegations against Judge Kozinski once he retired.

Publicly acknowledging institutional problems that contributed to harassment publicly is crucial to understanding the problem and how to fix it. Moreover, acceptance of responsibility is a key element in restoring public trust. We hope that the Judicial Conference will encourage further retrospective review and will share the results of this review with the public.

Eighth. The Report notes that people in power should not attempt to avoid harassment concerns by hiring fewer women, people of color, and people from other marginalized groups. To avoid diminishing opportunities for people in these groups, we recommend that the Judicial Conference require the Office of Judicial Integrity to use the demographic information available to the Administrative Office (which Director Duff referenced in his Senate Judiciary Committee testimony) to analyze overall hiring trends year-to-year. The Administrative Office or the Office of Judicial Integrity should publicize this information to assure the public that there are, in fact, similar percentages of male and female clerks, as mentioned in Director Duff's Senate testimony. Data about harassment complaints and hiring numbers for women and other underrepresented groups should also be included in these public reports. Additionally, data regarding the outcomes of any proceedings should also be publicized—perhaps in the Judiciary's annual report.

Ninth. The Working Group's Report does not clarify which of its recommendations would be made mandatory by the Judicial Conference, or which would be subject to the discretion of each circuit. We strongly urge the Judicial Conference to implement reforms that will be *required* within each circuit. To be sure, circuits should be welcome to provide additional mechanisms, policies, training, and other reforms that are responsive to local needs, but taking strong action to address harassment in the Judiciary should not be optional.

III. Recommendations Absent from the Report

When testifying before the Senate Committee on the Judiciary, Director Duff represented that the Working Group had adopted all of our suggestions, with exception of our recommendation that the Working Group take more time in crafting its recommendation. We would like to note a few other issues, recommendations, or changes that we submitted to the Working Group but were omitted from the Report so that the Judicial Conference may consider them. Specifically, we recommend:

1. Soliciting input from law clerks as permanent members of any continuing working group;
2. Creating a more robust national reporting mechanism;
3. Conducting a thorough retrospective analysis of harassment in the Judiciary;
4. Ensuring circuits and districts apply the recommendations uniformly;
5. Establishing a permanent standing committee; and,
6. Crafting concrete solutions to address the risk of retaliation.

Each is discussed in turn.

- 1. Soliciting input from law clerks as permanent members of any continuing working group**

The Report was created by the Working Group, which had no current or recent former law clerks as permanent members. While members of Law Clerks for Workplace Accountability were invited to meet with the Working Group on an *ad hoc* basis, no current or former clerk was named as a permanent member of the group. Clerks did not attend every meeting and did not have access to the information and data that the Working Group relied upon when creating its Report. Nor did any law clerk have the opportunity to review the details of the Report before it was published.

We ask for a permanent seat at the table. As outsiders to the Working Group, we were solicited to brainstorm ideas and to react to proposals, but our requests for specifics were repeatedly rebuffed. Our recommendations were necessarily less responsive to the Working Group's specific concerns because we were not given access to the documents and data—including the thousands of comments the Judiciary received from current and former employees—considered by the Working Group in formulating its Report. Nor did any clerks have the opportunity to comment on the Report before it was submitted to the Judicial Conference despite our repeated requests. Many of the changes we suggest in this memorandum could have been a part of the Report had clerks been fully involved in the decisionmaking process.

By denying current and recent clerks such access, the Working Group deprived itself of a valuable perspective on the power dynamics that make reporting

difficult.⁸ Established judges and judiciary officials, no matter how well intentioned, cannot be expected to acknowledge their own blind spots—let alone to override those blind spots—when crafting policies and procedures to address harassment. Moreover, current and recent clerks who have first-hand experiences with the systems under revision have a unique perspective regarding the need for specificity and accountability in the Working Group’s recommendations. One reason why the existing policies and procedures have been ineffective is because judges and court executives wrote them alone, using vague language that fails to provide adequate guidance to employees. History is likely to repeat itself if law clerks continue to be excluded from the decisionmaking table.

An overarching theme of our criticisms of the Report is that it lacks the specificity required for effective implementation of any recommendation. It is also essential to promoting public confidence in the Judiciary’s ability to prevent and redress sexual harassment. If clerks had been made permanent members of the Working Group, believe that some of this lack of specificity could have been avoided. During our meetings with the Working Group, we asked what exactly the planned exit interview surveys would say, who would send them out, what form they would take, and when they would be sent out. We were told, however, that we did not need to worry about those details. But it is the details that affect whether employees feel comfortable reporting harassment and understand that they have an established, trusted venue in which to do so. Without details in the Report’s recommendations, courts are likely to continue to have disparate processes and policies for handling harassment, and employees are likely to continue to feel unsure about their rights and remedies.

Finally, giving law clerks a formal seat at the table in the Working Group’s future efforts would help to restore public confidence in the Judiciary. In our interactions with the Working Group over the past three months, we have seen an engaged group of judges and Judiciary officials who have shown an earnest desire to effect change. We have also seen a devoted effort amongst law clerks to improve the institution that they all respect.

The Judiciary did not decide on its own to start addressing issues of harassment. In part, the Judiciary is making progress because law clerks have nudged it along—by reporting their experiences, by urging the Judiciary to take

⁸ The federal Working Group was not alone in its decision to exclude law clerks as permanent members. Law clerks are not permanent members of any of the circuit-specific working groups, either.

action, and by providing specific reform recommendations. We believe that effective change is change that involves the stakeholders at every step of the process and we encourage the Judicial Conference to take the same holistic view in its recommendations.

2. Creating a more robust national reporting mechanism

We initially asked the Working Group to establish a national, confidential reporting system. Many clerks fear retaliation or feel uncomfortable reporting within their own district or circuit. Currently, clerks are often directed to report to their circuit or district's chief judge, who may be friends with the accused judge or may even be the harasser himself. A national reporting system would address many such concerns.

During his Senate testimony, Director Duff represented that the Working Group wanted to establish a national reporting system. But we see no such clear recommendation within the Report itself. The Report does “recommend[] the establishment of offices at both the national and circuit level to provide employees with advice and assistance with their concerns about workplace misconduct.” Report at 37. But this language suggests that the offices will act solely in advisory roles, and will not function as independent, out-of-circuit reporting avenues. 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 should not just serve as a place for guidance but also as a location for employees to report harassment if they feel uncomfortable doing so in their own district or circuit. Furthermore, all districts and circuits should be required to report any complaints to the national reporting system to ensure that the Judiciary continues to have a thorough understanding of the scope of any harassment concerns and an evolving framework of processes and remedies.

3. Conducting a thorough retrospective analysis of harassment in the Judiciary

The Working Group's Report contains no retrospective examination of employees' experiences with harassment and abusive behavior. Nor does it suggest that the Judicial Conference conduct any such analysis in the future. The Report's commentary on the Judiciary's history of harassment is contained in a single sentence: “the Working Group believes that inappropriate conduct, although not

pervasive in the Judiciary, is not limited to a few isolated incidents.” Report at 6. Despite repeated requests during Director Duff’s Senate testimony for statistics—both about harassment and about the composition of the Judiciary’s employees generally—Director Duff was unable to cite to any specifics. Yet, through our work on this issue, we have talked to dozens of former law clerks and believe that harassment in the Judiciary is much more pervasive than suspected.

While we agree with the Working Group’s strategic choice to be forward-looking in its goals, we also believe the Judiciary will be successful in that endeavor only if it attends to the lessons of history; a careful investigation, before events grow too stale, may be the only means to understand how harassment has been allowed to flourish in some dark corners of the Judiciary. But the Report does not attempt to quantify the prevalence of harassment in the Judiciary. The Report also does not contain other useful statistics, such as the race and gender of law clerks. Statistical information about the gender and racial composition of law clerks and other judicial employees would be helpful for several reasons. For example, until women and men are represented as law clerks in similar proportions, women will likely remain more reluctant to report harassment. Furthermore, tracking the number of female law clerks, and especially the number of women in particular chambers, can provide some insight into whether particular judges, districts, or circuits avoid hiring women out of retaliation or out of fear of being accused of harassment.

It is unfortunate that, as far as we can tell, the Working Group does not intend to examine past instances of harassment, their prevalence, and how they were handled within the Judiciary. We recommended that the Working Group send a confidential reporting form to all law clerks from the past ten years soliciting information regarding their experiences with harassment and recommendations for improvement. While the Working Group did solicit information from former law clerks via a mailbox on uscourts.gov, that mailbox only sought information about prospective policies; it did not seek retrospective information. In fact, the instructions for the mailbox specifically stated that the Working Group would not consider any specific instances of harassment it received in the comments.

The scandal surrounding Judge Kozinski provides a unique opportunity for the Judiciary to examine these issues. How did Judge Kozinski manage to engage in sustained harassment for such a long period of time? How many people, including judges, were aware of his harassment? Why didn’t his victims report him sooner? The Working Group does not appear to have interviewed any of the individuals involved, including victims and other employees at the Ninth Circuit,

such as judges. By failing to address the fallout of the numerous allegations against Judge Kozinski directly—or further investigate allegations as to any reported harasser—the Working Group lost an opportunity to learn from its past mistakes and to craft future policies to avoid these mistakes. The Judiciary also missed the opportunity to publicly acknowledge its own failings that allowed this behavior to continue for decades, to demonstrate a genuine understanding of what should have been done in the past, and to commit to specific, meaningful changes that employees and members of the public can trust. Acceptance of responsibility is difficult, as judges know better than most, given their unique role in the sentencing context. But it is critical to ensure that victims feel heard and future victims feel comfortable coming forward.

4. Ensuring that circuits and districts apply the recommendations uniformly

The Report does not address the fact that the vast majority of circuits and districts have not taken any public steps toward addressing workplace misconduct. The Report states that “several circuits and district courts already have launched their own workplace initiatives,” but cites only three circuits and districts: the Ninth Circuit, the Seventh Circuit, and the District of Utah. Report at 8 n.21. We are also aware that the D.C. Circuit has established a working group. The Judicial Conference should at the very least encourage—and preferably mandate—that all circuits and districts undertake some sort of review address the issue of workplace harassment. As noted above, it should adopt robust minimum policies and procedures that are required in every circuit.

5. Establishing a permanent standing committee

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. The Working Group’s Report does not indicate what will happen with the Working Group in the future. 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 periodically re-examine whether the policies and recommendations that are ultimately implemented are actually effective and whether they need to be adjusted. Law clerks, both current and recent former, should also be invited to be members of that committee. In the alternative, or 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 those individuals in the Judiciary who have the least power and the greatest chance of experiencing harassment. This clerk committee is especially critical because of high clerk turnover; most clerks only serve for a year and cannot help effectuate change otherwise.

6. Crafting concrete solutions to address the risk of retaliation

Possibly the largest barrier to the reporting of harassment is the victim's fear of retaliation. The Report correctly recognizes this problem, noting that every employee should be able to "seek and receive remedial action free from retaliation." Report at 20. It also says that retaliation "will not be tolerated" and "constitutes misconduct." Report at 26, 31. But the Report does not specify how the Judiciary should go about determining 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 judge. 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.

CONCLUSION

We appreciate and encourage the efforts taken by the Working Group to confront workplace misconduct within the Judiciary. We believe that these steps represent an important step forward. But, as reiterated above, making these changes permanent requires resources, time, and clarity in implementation. Our comments and suggestions are geared towards making the Working Group's efforts successful so that its efforts benefit future generations of law clerks and the institution of the Judiciary itself. We would welcome the opportunity to discuss these issues and any proposed reforms with the Judicial Conference.