

## Taking Courthouse Discrimination Seriously: The Role of Judges as Ethical Leaders

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### I. INTRODUCTION

For decades sexual harassment has persisted as a pernicious problem in the judiciary.<sup>1</sup> As with a malignancy, it results in negative consequences when not revealed and addressed. Often persons who are subject to or aware of sexual misconduct do not report the concerns because of the power differential and other circumstances of the judicial workplace tend to chill the willingness to disclose the misconduct.<sup>2</sup> When allegations of misconduct are made, judges have faced discipline for sexual misconduct that violates codes of judicial conduct.<sup>3</sup> In some of the matters, decisionmakers imposed sanctions.<sup>4</sup> Other allegations have ended before discipline due to the judges' retirement or

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1. Since the 1990s, commentators have noted failures to address the serious problem of sexual harassment in the judiciary. *See, e.g.*, Marina Angel, *Sexual Harassment by Judges*, 45 U. MIA. L. REV. 817, 841 (1991) (emphasizing the importance of “vigorous enforcement” of provisions in the ABA Code of Judicial Conduct that address sexual harassment).

2. *See infra* notes 67–69 and accompanying text. For a thorough discussion of risk factors for sexual harassment in the judiciary, including the power disparity impacting reporting, see Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 615–20 (2020).

3. “For almost 40 years, state supreme courts and judicial conduct commissions have found sexual misconduct by judges subjects those judges to disciplinary actions for violating the code of judicial conduct.” Cynthia Gray, *Sexual Harassment and Judicial Discipline*, JUDGES’ J., Fall 2018, at 14 [hereinafter *Sexual Harassment and Judicial Discipline*]. The *Judicial Conduct Reporter*, a publication of the National Center for State Courts Center for Judicial Ethics, periodically reports the outcomes of state judicial discipline proceedings. *See, e.g.*, *What judges said to women that got them in trouble in 2020*, JUD. CONDUCT REP., Winter 2021, at 13, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0016/60631/JCR\\_Winter\\_2021.pdf](https://www.ncsc.org/_data/assets/pdf_file/0016/60631/JCR_Winter_2021.pdf) [<https://perma.cc/89TR-XCQX>].

4. *See, e.g.*, *In re Seraphim*, 294 N.W.2d 485, 495 (Wis. 1980) (imposing a three-year, uncompensated suspension on a judge whose misconduct included “unprivileged and nonconsensual” conduct towards women in five incidents).

resignation.<sup>5</sup>

Periodically, the news media plays a role in reporting allegations.<sup>6</sup> In 2017, allegations against Judge Alexander Kozinski, a high-profile judge with the U.S. Court of Appeals for the Ninth Circuit, obtained a good deal of coverage in both the popular press and academic journals.<sup>7</sup> A December 8, 2017 article in the *Washington Post* revealed former law clerks' and externs' accusations that Judge Kozinski had engaged in sexual misconduct.<sup>8</sup> Following this newspaper story, the Chief Judge of the Ninth Circuit commenced a misconduct inquiry.<sup>9</sup> By December 18, 2017, Judge Kozinski resigned his position.<sup>10</sup>

The Kozinski controversy evidently captured the attention of Chief Justice John G. Roberts, Jr. In his year-end report for 2017, Chief Justice Roberts directly addressed the problem of sexual harassment in the judiciary. After describing other challenges facing the courts, the last section of the report referred to a new challenge in the coming year,

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5. For review of a number of investigations into federal judges that were commenced but concluded with no determination on the merits because the judge resigned or left the court, see Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NW. U. L. REV. 953, 963–76 (2020) (proposing reforms to ensure that investigations of judicial misconduct are completed). In a Memorandum of Decision involving findings of judicial misconduct by Judge Carlos Murguia from the U.S. District Court in Kansas, the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States explained that it was required to conclude the proceedings following the resignation and removal of the judge's judicial functions. Committee on Judicial Conduct and Disability of the Judicial Conference of the United States, C.C.D. No. 19-02, *In re Complaints Under the Judicial Conduct and Disability Act*, No. 10-18-90022, Mar. 3, 2020, [https://www.uscourts.gov/sites/default/files/c.c.d.\\_no\\_19-02\\_march\\_3\\_2020\\_0.pdf](https://www.uscourts.gov/sites/default/files/c.c.d._no_19-02_march_3_2020_0.pdf) [<https://perma.cc/7ATC-4XBT>].

According to the Committee, “[c]oncluding a misconduct proceeding upon a judge’s resignation serves important institutional and public interests, including prompting subject judges who have committed misconduct to resign their office.” *Id.* at 10.

6. For a discussion of the media role in exposing sexual misconduct in the judiciary, see Renee Knake Jefferson, *Judicial Ethics in the #MeToo World*, 89 FORDHAM L. REV. 1197 (2021).

7. See, e.g., Litman & Shah, *supra* note 2, at 603–08; Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down After Accusations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017), <https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html> [<https://perma.cc/H22E-Z3SR>].

8. Matt Zepotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html) [<https://perma.cc/MA4Z-LETS>] (reporting that six former clerks and externs had described a range of inappropriate sexual conduct and comments by Kozinski).

9. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/8JCM-UPHM>].

10. *Id.*

stating: “Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune.”<sup>11</sup>

To tackle the problem, the Chief Justice stated that he had asked the Director of the Administrative Office of the U.S. Court to assemble a working group to examine practices and to address issues.<sup>12</sup> Following the Chief Justice’s directive, James C. Duff, the Director of the Administrative Office of the U.S. Court and the Secretary of the Judicial Conference of the United States (Judicial Conference), established the Federal Judiciary Workplace Conduct Working Group (Working Group).<sup>13</sup>

After nearly five months of intensive study and deliberations, including substantial research, meetings, and data gathering, the Working Group released a forty-five-page report with appendices (Working Group Report).<sup>14</sup> The report summarizes what the Working Group learned from study and input from interested constituencies, subject-matter experts, other interested groups, and employee comments.<sup>15</sup> The report also makes specific recommendations in three discrete areas: (1) substantive standards; (2) procedures for seeking advice, assistance or redress; and (3) educational efforts.<sup>16</sup>

Based on recommendations in the Working Group Report, the Judicial Conference approved a number of reforms related to workplace misconduct in the federal judiciary. The reforms included revising the Code of Judicial Conduct for U.S. Judges, as well as procedural and programmatic changes intended to help the federal judiciary deal with misconduct. While acknowledging the importance of changes made, those who participated in the Working Group Report recognize that addressing workplace safety still requires attention and vigilance.<sup>17</sup> In

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11. CHIEF JUSTICE JOHN G. ROBERTS, JR., 2017 YEAR END REPORT ON THE FEDERAL JUDICIARY 11 (2017).

12. *Id.*

13. James C. Duff, *The Federal Judiciary Workplace Conduct Working Group*, JUDGES’ J., Fall 2018, at 8. The Working Group, consisting of five women and three men, was a diverse and distinguished group of judges and senior judiciary executives. *Id.*

14. Federal Judiciary Workplace Conduct Working Group, *Report of the Federal Judiciary Workplace Conduct Working Group* (2018) [https://www.uscourts.gov/sites/default/files/workplace\\_conduct\\_working\\_group\\_final\\_report\\_0.pdf](https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf) [<https://perma.cc/8JE5-4VRL>] [hereinafter *Working Group Report*].

15. *Id.* at 5.

16. *Id.* at 20–21.

17. After reviewing the significant changes adopted by the federal judiciary to begin improving the workplace environment, the Honorable M. Margaret McKeown—a member of the

addition, state judiciaries and other regulators should follow the lead of the federal judiciary, taking steps to study the issues of harassment and other discrimination in the judiciary to determine what changes should be made to improve the manner in which such misconduct is prevented and addressed.

To help inform such efforts, this Article uses the Working Group Report as a springboard for considering lessons for state judiciaries interested in improving the way harassment and other discrimination is handled. To provide background for such a discussion, Part II discusses some of the key findings made by the Working Group. Thereafter, the Article turns to who, what, and how questions. Part III addresses the “who” by considering the reach of the judicial conduct rules. Specifically, the discussion considers the responsibility of judges in ensuring that other judicial personnel comply with rule provisions related to bias, harassment, and other discrimination. In considering how misconduct is revealed, Part IV reviews issues and obstacles related to reporting misconduct. Part V examines the specific language of applicable ethics codes on what types of discriminatory conduct are addressed in codes. In considering policies, procedures, and players, each part identifies steps that can be taken to improve how bias, harassment, and discriminatory conduct can be prevented and addressed. In addition to procedural rule changes and substantive changes related to judicial codes of conduct, Part VI emphasizes the importance of judiciaries examining their ethical infrastructure, which includes formal measures and informal influences, as well as the culture and climate in which they are embedded.<sup>18</sup> To address serious problems, such as bias, harassment and other discrimination in the judiciary, the conclusion emphasizes the vital role of judges, who embrace their roles as ethical leaders, holding themselves and others accountable for proper conduct.

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Federal Judiciary Workplace Conduct Working Group—acknowledges that changing “the workplace landscape with respect to harassment and bullying” will take “ongoing vigilance and attentiveness.” M. Margaret McKeown, *The Judiciary Steps up to the Workplace Challenge*, 116 NW. U. L. REV. ONLINE 275, 304 (2021).

18. For a discussion of how the ethical infrastructure framework can be used to evaluate and improve formal policies and procedures, as well as informal influences and the climate in which they are embedded, see Susan Fortney, *Preventing Sexual Harassment and Misconduct in Higher Education: How Lawyers Should Assist Universities in Fortifying Ethical Infrastructure*, 103 MINN. L. REV. HEADNOTES 28, 31 (2018) [hereinafter *Preventing Sexual Harassment and Misconduct*].

## II. REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP

In his 2017 Year-End Report of the Federal Judiciary, Chief Justice John G. Roberts, Jr. highlighted the importance of workplace safety. He tasked the Working Group with conducting a “careful evaluation of whether standards of conduct and the procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.”<sup>19</sup> He also tasked the Working Group with considering whether codes of conduct needed changes, including ones to provide employees more guidance on confidentiality and reporting instances of misconduct.<sup>20</sup>

Pursuant to this charge, the Working Group conducted a thorough study, including data gathering from the entire Federal Judiciary—judges, court unit executives, managers, supervisors, as well as employees, law clerks, interns, externs, and other volunteers.<sup>21</sup> At the conclusion of the investigation, the Working Group set forth their findings and recommendations in the Working Group Report released on June 1, 2018.<sup>22</sup>

In presenting its findings, the Working Group relied heavily on a 2016 study report of the Select Task Force of the United States Equal Employment Opportunity Commission (EEOC Study) that analyzed the prevalence of harassment, employees’ responses, risk factors, and steps that can be taken to prevent and remedy inappropriate conduct.<sup>23</sup> The Working Group Report both embraced the recommendations in the EEOC Study and applied them to the judicial workplace.<sup>24</sup> In addition, the Working Group Report used the EEOC Study framework in evaluating information and formulating steps to address the problem of workplace harassment and inappropriate behavior within the judiciary.<sup>25</sup> Applying the steps described in the EEOC Study, the Working Group Report posed the following questions:

- (1) Does the judiciary demonstrate committed and engaged leadership?

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19. ROBERTS, *supra* note 11, at 11.

20. *Id.*

21. *Working Group Report, supra* note 14, at 3.

22. *Id.* at 1.

23. *Id.* at 2.

24. *Id.* at 4.

25. *Id.* at 7.

- (2) Does the judiciary require consistent and demonstrated accountability?
- (3) Does the judiciary have strong and comprehensive policies?
- (4) Does the judiciary provide trusted and accessible complaint procedures?
- (5) Does the judiciary provide regular, interactive training tailored to the organization?<sup>26</sup>

After addressing each of these questions, the Working Group Report offered recommendations to reach its goal of creating “an exemplary environment in which every employee is not only free from harassment or inappropriate behavior, but works in an atmosphere of civility and respect.”<sup>27</sup> Specifically, the Working Group made and discussed the following recommendations:

First, the Judiciary should revise its codes and other published guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behavior. Second, the Judiciary should improve its procedures for identifying and correcting misconduct, strengthening, streamlining, and making more uniform existing processes, as well as adding less formal mechanisms for employees to seek advice and assistance. Third, the Judiciary should supplement its educational and training programs to raise awareness of conduct issues, prevent harassment, and promote civility throughout the Judicial Branch.<sup>28</sup>

The Working Group Report concluded by recommending that the Judicial Conference undertake an ongoing program to promote a culture of mutual understanding and respect by improving its standards of conduct, its procedures for addressing inappropriate behavior, and its educational and training programs for judges, supervisors, and employees.<sup>29</sup>

Within sixteen months following the release of the Working Group Report, the judiciary implemented nearly all the Working Group’s

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26. *Id.* at 8–18.

27. *Id.* at 20.

28. *Id.* at 21.

29. *Id.* at 45.

recommendations.<sup>30</sup> Moreover, the Administrative Office of the U.S. Courts and some appellate courts have taken additional steps by devising “less-formal channels for guidance on and resolution of misconduct allegations.”<sup>31</sup> Most notably, the Administrative Office created the Office of Judicial Integrity to provide assistance in handling workplace disputes.<sup>32</sup>

The Judicial Conference of the United States also moved forward with recommendations, approving revisions to the Code of Conduct for United States Judges, as well as revisions to the Rules for Judicial-Conduct and Judicial-Disability Proceedings.<sup>33</sup> The Judicial Conference also approved a significantly revised and simplified Model Employment Dispute Resolution Plan stating that harassment, discrimination, abusive conduct, and retaliation are prohibited and providing several options for employees to report and seek redress for wrongful conduct.<sup>34</sup> These changes help clarify standards of conduct for judges and judiciary employees and provide procedural options.<sup>35</sup> At the same time, they clearly communicate that each federal judge has a duty to maintain the judiciary’s high standards by holding others accountable for workplace misconduct.<sup>36</sup> In fact, tolerating cognizable misconduct by failing to

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30. STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1–3 (U.S. Courts, 2019), [https://www.uscourts.gov/sites/default/files/working\\_group\\_status\\_report\\_to\\_jcus\\_september\\_2019.pdf](https://www.uscourts.gov/sites/default/files/working_group_status_report_to_jcus_september_2019.pdf) [<https://perma.cc/HS9V-SPDL>] [hereinafter WORKING GROUP STATUS REPORT].

31. Duff, *supra* note 13, at 8.

32. See Debra Cassens Weiss, *Federal Judiciary Hires Its First “Judicial Integrity Officer” to Handle Workplace Conduct Matters*, A.B.A. J. (Dec. 4, 2018, 3:29 PM), [https://www.abajournal.com/news/article/federal\\_judiciary\\_hires\\_its\\_first\\_judicial\\_integrity\\_officer\\_to\\_handle\\_work](https://www.abajournal.com/news/article/federal_judiciary_hires_its_first_judicial_integrity_officer_to_handle_work) [<https://perma.cc/Q4VF-733P>] (noting the officer will identify workplace trends, provide guidance, and answer questions). According to James Duff, who formed the Federal Judiciary Workplace Conduct Working Group at Chief Justice Roberts’s behest:

The primary purpose of the office will be to counsel and advise callers and potential complainants on all their options early in the process as well as facilitate informal resolution of issues, rather than conduct investigations. The office will work with individuals and direct them to resources for recourse and investigation in their circuit or court unit. Office staff also may assist the responsible circuit or courts with resources necessary to conduct an investigation involving issues of judicial integrity, as well as conduct systemic analyses and reviews of workplace problems on its own.

Duff, *supra* note 13, at 11.

33. See WORKING GROUP STATUS REPORT, *supra* note 30, at 3–7 (referring to specific rule changes including those that expressly state that sexual and other discriminatory harassment, abusive conduct, and retaliation are cognizable misconduct, as is the failure to report misconduct to the chief district or chief circuit judge).

34. WORKING GROUP STATUS REPORT, *supra* note 30, at 11–15.

35. *Id.*

36. *Id.*

report violates the revised Code of Conduct for United States Judges.<sup>37</sup> For the reasons discussed below, state judiciaries should also expressly address judges' responsibility to serve as ethical leaders in maintaining the high standards of the judiciary, both in their own conduct and in not tolerating misconduct by others.

### III. WHO SHOULD PROMOTE PROFESSIONAL CONDUCT IN THE JUDICIARY: JUDGES' RESPONSIBILITY AS ETHICAL LEADERS

The theme of ethical leadership ran throughout the Working Group Report. While recognizing the importance of the leadership demonstrated by Chief Justice Roberts in forming the Working Group and the efforts of the Judicial Conference, the Working Group Report noted that leadership must extend throughout the judiciary.<sup>38</sup> As the Report states, “[i]t is therefore vital that judges and court executives ensure, through educational programs, performance reviews, and other mechanisms for motivating positive change, that judges, executives, supervisors, and managers at every level throughout the Judiciary demonstrate the same strong commitment to workplace civility.”<sup>39</sup>

As suggested in the Working Group Report, a zero-tolerance message should come from the top of the organization and be embraced by judges and other leaders throughout the organization. The Code of Conduct for U.S. Judges imposes on each judge the professional obligation to keep the judicial house clean and to hold other judges accountable for departing from standards of conduct. To do so, the Working Group stated that judges have a “responsibility to promote appropriate behavior in the workplace, and that responsibility should extend beyond one’s own chambers.”<sup>40</sup> Finding that neither the Judiciary’s Code of Conduct nor its education program provided sufficient guidance on dealing with colleagues’ inappropriate behavior, the Working Group stated that the Code of Conduct “should make clearer that judges cannot turn a blind eye to a colleague’s mistreatment of employees, and the training programs for new and experienced judges

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37. *Id.* at 8–9.

38. *Working Group Report*, *supra* note 14, at 8.

39. *Id.*

40. *Id.* at 13. The Working Group Report acknowledged that some reluctance to report judicial misconduct may stem from judges’ respect for each other’s independence and authority to dictate chamber affairs. *Id.*



should provide direction on how to navigate this sensitive issue.”<sup>41</sup> In its recommendations, the Working Group urged the Committee on Codes of Conduct of the Judicial Conference (Judicial Conference Committee) to clarify that judges also have an obligation to take appropriate action when they learn that court employees have treated others inappropriately.<sup>42</sup>

The Judicial Conference Committee accepted this recommendation and proposed rule changes later adopted by the Judicial Conference on March 12, 2019.<sup>43</sup> The revised Code provisions and commentary clarify judges’ reporting responsibilities by making them more explicit. Canon 3.B(4) under the Code of Conduct now addresses the standard of conduct as follows:

A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not engage in retaliation for reporting of allegations of such misconduct. A judge should seek to hold court personnel who are subject to the judge’s control to similar standards in their own dealings with other court personnel.<sup>44</sup>

Amended Canon 3.B(6) sets forth the following obligations of judges to act when they learn about misconduct by another judge: “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.*” (Revisions in italics).<sup>45</sup>

Taken together, Canon 3.B(4) and 3.B(6) clarify judges’ obligations as ethical leaders to take action when they learn about misconduct by court personnel or other judges. The new commentary to the Code describes the rationale for imposing these clarified obligations:

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41. *Id.*

42. *Id.* at 24–25.

43. *Judicial Conference Approves Package of Workplace Conduct Reforms*, U.S. CTS. (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms> [<https://perma.cc/P7CJ-J8P8>].

44. GUIDE TO JUDICIARY POLICY 7–8 (U.S. CTS. 2018), [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_u.s.\\_judges\\_-\\_proposed\\_changes\\_-\\_9-13-2018.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_u.s._judges_-_proposed_changes_-_9-13-2018.pdf) [<https://perma.cc/ZEY3-FQGT>] (draft) (displaying amended language in red).

45. *Id.* at 8.

Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence.<sup>46</sup>

Under these provisions, it is professional misconduct for a judge to turn a blind eye to other judges' or judiciary employees' misconduct.<sup>47</sup> Judges should lead by example by setting expectations and holding other judges and judiciary employees accountable for misconduct.

Similarly, state codes of judicial conduct should expressly cover judges' supervisory and monitoring responsibilities. Although recent attention on harassment in the judiciary has focused on harassment by judges, persons involved in addressing the problem report learning about numerous incidents where women have "experienced or witnessed sexually inappropriate treatment by their co-clerks, by other chambers staff, or by court staff."<sup>48</sup> As suggested by Jamie Santos, a former judicial law clerk who has assisted various working groups to address inappropriate conduct in the judicial workplace, the issue of sexual

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46. *Id.* at 12. The amended Commentary also addresses the tension between maintaining confidentiality and taking action upon learning reliable evidence indicating misconduct: "A judge, in deciding what action is appropriate, may take into account any request for confidentiality made by a person complaining of or reporting misconduct." *Id.* See also GUIDE TO JUDICIARY POLICY 8 (U.S. CTS. 2019), [https://www.uscourts.gov/sites/default/files/judicial\\_conduct\\_and\\_disability\\_rules\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf) [<https://perma.cc/U9YF-G6KY>]:

Cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably likely to constitute judicial misconduct or disability. A judge who receives such reliable information shall respect a request for confidentiality but shall nonetheless disclose the information to the relevant chief district judge or chief circuit judge, who shall also treat the information as confidential. Certain reliable information may be protected from disclosure by statute or rule. A judge's assurance of confidentiality must yield when there is reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary. A person reporting information of misconduct or disability must be informed at the outset of a judge's responsibility to disclose such information to the relevant chief district judge or chief circuit judge.

47. As explained by James C. Duff, the former director of the Administrative Office of the U.S. Courts, wrongful behavior flourishes when authorities and colleagues turn a blind eye, "[b]ut where harassment is clearly not tolerated, inappropriate workplace behavior diminishes." Duff, *supra* note 13, at 9.

48. Jamie A. Santos, *When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary*, 54 CT. REV. 156, 156–57 (2018).

harassment “transcends job title and jurisdiction.”<sup>49</sup> State judiciaries, like the federal judiciary, should consider their codes of conduct, personnel policies, and processes for dealing with such misconduct by court personnel.

The current version of the ABA Model Code of Judicial Conduct addresses judges’ responsibilities related to bias, harassment, and discriminatory conduct by court personnel. Rule 2.3(B) of the ABA Model Code of Judicial Conduct states in part:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.<sup>50</sup>

Thirteen states have virtually identical provisions to those in ABA Model Rule 2.3(B), including the last portion of the Rule that addresses a judge’s duty not to permit bias, prejudice, and harassment by persons subject to the judge’s direction and control.<sup>51</sup> Three states, however, have no anti-bias rule.<sup>52</sup> For the reasons set forth in the Working Group Report, judiciaries with no anti-bias rule should amend their codes of judicial conduct to expressly state that judges have a duty to refrain from and prevent harassment and other discriminatory conduct by court personnel.

A state code may include an anti-bias rule, but not expressly address the judge’s responsibility with respect to harassment and other misconduct by other personnel.<sup>53</sup> More generally, state ethics codes may include a version of Rule 2.12 from the ABA Model Rules of Professional Conduct, which states:

(A) A judge shall require court staff, court officials, and others subject

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49. *Id.* at 157.

50. MODEL CODE OF JUD. CONDUCT r. 2.3(B) (AM. BAR ASS’N 2020).

51. The judicial ethics codes for the following states include provisions that largely track language from ABA Rule 2.3: Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Montana, Nebraska, Nevada, New Hampshire, Ohio, Utah, and Wyoming. State Rule Category Spreadsheet on file with the KANSAS LAW REVIEW [<https://perma.cc/9VV6-TMX9>].

52. *Id.* (identifying Alabama, Illinois, and North Carolina as states with no express anti-bias rule in their judicial ethics codes).

53. *E.g.*, N.J. CT. r. 3.6.

to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.<sup>54</sup>

Even in jurisdictions with clear rules, a survey revealed few reported decisions holding a judge accountable for misconduct by persons under the judge's direction or control.<sup>55</sup> One reported case illustrates how the disciplinary authorities approached alleged misconduct involving the failure to take appropriate action when the judge was aware of harassment by a member of the judge's staff. In that 2020 case, the Supreme Court of North Carolina considered whether a court of appeals judge should be censured for violations of Canons under the North Carolina Code of Judicial Conduct prohibiting conduct prejudicial to the administration of justice.<sup>56</sup> According to the Judicial Standards Commission, the judge committed misconduct by allowing his executive assistant and law clerk, a close personal friend, to create a toxic environment for others.<sup>57</sup> After reviewing the Judicial Standards Commission's findings of fact and conclusions related to the employee's inappropriate conduct, noting resignations by other staff, and hearing concerns reported by another judge, the Supreme Court of North Carolina concluded that the judge did not take corrective action to deal with the employee's misconduct.<sup>58</sup> The Court rejected the judge's argument that he could not be held accountable for actions of other

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54. MODEL CODE OF JUD. CONDUCT r. 2.12 (Am. Bar Ass'n 2020).

55. Disciplinary decisions made by state judicial conduct bodies may not be reported in electronic databases if the matters are not appealed to state courts. Such decisions may be found on the website or in journals and newsletters covering judicial discipline developments. *E.g.*, *Judicial Conduct Reporter*, NAT'L CTR. FOR STATE CTS., <https://www.nesc.org/topics/judicial-officers/ethics/center-for-judicial-ethics/judicial-conduct-reporter> [<https://perma.cc/76YT-38ZU>] (last visited Mar. 27, 2022).

56. *In re Murphy*, 852 S.E.2d 599, 601 (N.C. 2020).

57. *Id.* at 601–02. *See also id.* at 613 (“The Commission concluded that respondent’s conduct was prejudicial to the administration of justice, because, among other things, he contributed to and enabled a toxic work environment in his chambers, and because his interactions with [the human resources office] undermined the dignity of the Court of Appeals.”).

58. *Id.* at 611–12 (referring to Canon 2 of the North Carolina Code of Judicial Conduct, which states that “[a] judge should not allow the judge’s family, social or other relationships to influence the judge’s judicial conduct or judgment”). Although the judge eventually asked the employee to resign, the Judicial Standards Commission found that the judge condoned the workplace misconduct and therefore contributed to and enabled a toxic work environment. *Id.* at 613.

personnel, noting that the North Carolina Code of Judicial Conduct specifically states that a judge should require “dignified and courteous” behavior of a judge’s staff.<sup>59</sup> The Court noted the judge violated Canon 1 “by being dismissive of and turning a blind eye to comments and incidents that took place both within and outside of his presence.”<sup>60</sup>

The North Carolina case clarifies that the basis for discipline was not vicarious responsibility for the misconduct of the judge’s staff member. Rather, the judge faced discipline for his own conduct in failing to require “dignified and courteous” behavior from his staff.<sup>61</sup> The case is also noteworthy because North Carolina’s Code of Judicial Conduct does not include an express provision prohibiting bias, prejudice, or harassment by a judge or persons subject to a judge’s direction and control.<sup>62</sup> Nevertheless, the Supreme Court of North Carolina concluded that the judge violated other portions of the Code.<sup>63</sup>

With the attention of the #MeToo movement, the International Bar Association’s Us Too Report on sexual harassment and bullying in the legal profession,<sup>64</sup> and the Working Group Report, judicial conduct regulators may receive more complaints involving bias, harassment and other discriminatory conduct by court personnel. Currently, different explanations may account for the lack of complaints and disciplinary matters related to judges’ supervisory responsibilities and misconduct by court personnel and chambers staff. The most positive explanation is

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59. *Id.* at 613.

60. *Id.* at 611.

61. *Id.* at 613.

62. *See generally* N.C. CODE OF JUD. CONDUCT (SUP. CT. OF N.C. 2015).

63. *In re* Murphy, 852 S.E.2d at 612 (quoting Canon 3(A)(3), which states that “[a] judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge’s official capacity, and should require similar conduct of lawyers, and of the judge’s staff, court officials and others subject to the judge’s direction and control,” and Canon 3(B)(2), which states that “[a] judge should require the judge’s staff and court officials subject to the judges direction and control to observe the standards of fidelity and diligence that apply to the judge”).

64. The International Bar Association’s (IBA) Legal Policy and Research Unit conducted the largest-ever global survey of nearly 7,000 legal professionals in 135 countries. US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 8 (Int’l Bar Ass’n 2019), <https://www.ibanet.org/MediaHandler?id=B29F6FEA-889F-49CF-8217-F8F7D78C2479> [hereinafter *Us Too Report*]. As stated by IBA President Horacio Bernardes Neto, the research “provides quantitative confirmation that bullying and sexual harassment are endemic in the legal profession.” *Id.* at 7. For example, the study revealed that one in three female respondents and one in fourteen male respondents reported experiencing sexual harassment. *Id.* at 11. For a discussion of the study’s findings and recommendations for employers, bar associations, and regulators, see Susan Saab Fortney, *Keeping Lawyers’ Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 GEO. J. LEGAL ETHICS 891, 918–27 (2020).

there are few reported matters because judges are hiring and supervising personnel who abide by high standards.<sup>65</sup> Another possibility is that judges are effectively dealing with misconduct by others.<sup>66</sup> A more pessimistic possibility is that the supervisory responsibility is somewhat a dead letter. Another explanation may relate to the reluctance of lawyers and others to report misconduct by judges or those working under judge's direction and control. As discussed below, misconduct likely will not be revealed or addressed if victims and others fail to report because they fear retaliation or other negative consequences.

#### IV. HOW ACCOUNTABILITY CAN BE ADVANCED: DEVELOPING OPTIONS FOR REPORTING MISCONDUCT

The Working Group Report noted that “[t]he most significant challenge for accountability . . . arises from the reluctance of victims to report misconduct.”<sup>67</sup> Although the Working Group found that the Judicial Conduct and Disability (JC&D) Act and Employment Dispute Resolution (EDR) Plans are effective when their provisions are invoked, the Working Group noted that neither the JC&D Act nor the EDR Plans can “ensure accountability if victims are unwilling to come forward.”<sup>68</sup> As explained in the Working Group Report, “[v]ictims are hesitant to report harassment and other inappropriate behavior for a variety of reasons, including lack of confidence that they will be believed, fear that no action will be taken, and concerns that a complaint will subject them to retaliatory action or affect future job prospects.”<sup>69</sup>

The Working Group identified “vigilance on the part of judges themselves,” as the first step to demonstrating accountability and intervening when necessary to protect an employee from another's misconduct.<sup>70</sup> To address this concern, the Working Group recommended that “the Committee on Judicial Conduct and Disability

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65. See Scott D. Makar, *Judicial Staff and Ethical Conduct*, FLA. B.J., Nov. 1992, at 10 (noting that there are few reported instances of judicial staff improprieties in Florida because presumably Florida's judges “generally select staff members who abide by high ethical standards”).

66. To communicate to clerks and other judicial employees the expectation that they comply with codes of conduct, a court may require that judicial staff members take an affirmative oath to uphold ethical guidelines, or their employment may be conditioned on adherence to the judge's code of conduct and court policies prohibiting types of misconduct. *Id.* at 13.

67. *Working Group Report*, *supra* note 14, at 12.

68. *Id.* at 10, 12.

69. *Id.* at 12.

70. *Id.* at 13.

provide additional guidance . . . on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation."<sup>71</sup>

The Working Group also found that the judiciary must reduce barriers to reporting.<sup>72</sup> For example, the Working Group proposed that the Committee on Judicial Conduct and Disability clarify—through the conduct rules, commentary, or other guidance—that confidentiality obligations should never be an obstacle to reporting judicial misconduct or disability.<sup>73</sup> In response to this recommendation, “the Judicial Conference adopted a new JC&D Rule and related Commentary emphasizing that nothing in the JC&D Rules regarding confidentiality of the complaint process prevents a judicial employee from reporting or disclosing misconduct or disability.”<sup>74</sup>

The Working Group also emphasized the importance of providing alternative avenues for advice, counseling, and assistance.<sup>75</sup> Following this recommendation, the federal judiciary developed multiple avenues to report, discuss, and resolve workplace concerns.<sup>76</sup> The revised Model EDR Plan now provides new flexible and more informal ways for reporting and resolving allegations of wrongful conduct.<sup>77</sup>

Leaders in state judiciaries should take note of the federal judiciary initiatives that recognize the importance of providing multiple reporting options. They should also examine rules, policies, and procedures that hinder or otherwise undermine the willingness to report misconduct and seek assistance.

One clear obstacle to reporting is that rules and procedures require persons sign or verify a complaint alleging misconduct by a judge. Lawyers and court personnel may see the identification requirement as an unsurmountable obstacle to reporting. They justifiably may fear the negative reaction, even retaliation, by the judge who is the subject of the

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71. *Id.* at 31.

72. *Id.* at 12.

73. *Id.* at 30–31.

74. WORKING GROUP STATUS REPORT, *supra* note 30, at 9.

75. *Working Group Report*, *supra* note 14, at 31.

76. McKeown, *supra* note 17, at 289 (describing changes that explicitly provide employees multiple options).

77. WORKING GROUP STATUS REPORT, *supra* note 30, at 1. For a discussion of federal judiciary initiatives, including the establishment of the Office of Judicial Integrity at the Administrative Office of the U.S. Courts to provide additional informal avenues for advice and assistance, *see* Duff, *supra* note 13, at 11–12 (referring to the goal of early and equitable intervention and resolution). “[I]nformal channels will provide employees full, objective knowledge of their options and also offer an opportunity for a wide range of avenues for addressing problematic behavior.” *Id.* at 11.

judicial complaint.<sup>78</sup> Despite the fact that rules for handling complaints may require confidential treatment of the complaint, prospective reporters may also be concerned that their dealings with other lawyers, as well as members of the judiciary, may suffer if others learn about the complaint.

Recognizing these concerns, the rules for complaints against federal judges now provide for anonymous complaints. Although the procedure is somewhat complex, anonymous complaints are forwarded to the chief judge of the circuit.<sup>79</sup> Relying on this anonymous option, complaints naming federal judges have been filed anonymously.<sup>80</sup> Federal judiciary employees also may use an online reporting mechanism to provide information anonymously to the Office of Judicial Integrity.<sup>81</sup>

Unlike the federal judiciary, state judiciaries use different approaches to allowing anonymous complaints.<sup>82</sup> The websites for nineteen judicial conduct authorities expressly state that anonymous filings are permitted.<sup>83</sup> By contrast, the websites for twenty state authorities refer to

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78. See Samuel K. Benham, *Judicial Purgatory: Strategies for Lawyers*, 58 *DRAKE L. REV.* 585, 601 (2010) (citing a letter from Louisiana Governor Bobby Jindal in which he explained his veto of a bill eliminating anonymous complaints because he was concerned that it would result in citizens being discouraged from filing complaints due to possible retaliation and therefore fewer incidents of actual misconduct would be prosecuted).

79. Although the revised federal rules state that the complainant must include a contact address, sign the complaint, and verify statements in writing under penalty of perjury, the rule provides any submission that does not meet these requirements must be reviewed under Rule 5(b). *GUIDE TO JUDICIARY POLICY 8* (U.S. CTS. 2019), [https://www.uscourts.gov/sites/default/files/judicial\\_conduct\\_and\\_disability\\_rules\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf) [<https://perma.cc/37T7-L8T9>]. As explained in the commentary to Rule 5:

Subsection (b) provides that submissions that do not comply with the requirements of Rule 6(d) must be considered under Rule 5(a). For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information and as a possible basis for the identification of a complaint under the process described in Rule 5(a).

*Id.* at 15.

80. *Working Group Report*, *supra* note 14, at app. 10 (letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley dated Jan 12, 2018).

81. McKeown, *supra* note 17, at 302 (“While the ability to respond directly is limited with anonymous complaints, information is aggregated and reviewed for patterns, trends, and other information that may provide insight on potential training needs or other interventions.”).

82. Most judicial conduct commissions require that complaints be in writing, and many allow electronic submissions. *Judicial Conduct Complaint Formats*, 43 *JUD. CONDUCT REP.* 8 (2021).

83. During January 2022, Jeana Ayres, Research Assistant for Susan Fortney, contacted intake personnel at judicial conduct authorities around the U.S. She asked about the states’ approach to anonymous complaints and set forth the results in a spreadsheet dated January 31, 2022. The spreadsheet is on file with the *KANSAS LAW REVIEW*.



the requirement that complaints be signed, verified, or notarized.<sup>84</sup> Telephone inquiries to representatives in those states revealed that six of the state authorities will accept anonymous filings although their websites do not disclose the anonymous reporting option.<sup>85</sup> Even though state authorities may relax requirements described on their websites and open investigations on their own based on anonymous complaints, the procedural rules described on state websites should clearly permit anonymous complaints. Unless a website expressly refers to accepting anonymous complaints, prospective complainants may not pursue grievances for fear of reprisal or other negative consequences if confidentiality is breached, and their identity is revealed to the respondent judge.<sup>86</sup>

Allowing anonymous complaints increases the chances that serious misconduct will be reported, while providing some measure of protection to those who report.<sup>87</sup> Anonymous complaints also may protect the judiciary if the reports enable the judiciary to address problems before the misconduct becomes public knowledge and an embarrassment to the judiciary.<sup>88</sup>

Those who oppose allowing anonymous complaints assert that such complaints will “subject judges to the annoyance and frustration of baseless investigations.”<sup>89</sup> Such a concern does not appear to recognize that anonymous submissions only start an inquiry. To move forward with a complaint, judicial conduct authorities may need to uncover and present other evidence that the respondent judge is able to challenge,

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84. *Id.*

85. *Id.* The websites for the remaining eleven states were unclear, but telephone inquiries revealed that three allowed anonymous complaints and seven did not. Authorities for the final state did not return telephone calls. *Id.*

86. After reviewing the requirements for judicial complaints in Pennsylvania that appear to discourage anonymous complaints, one author concludes that “the average person is likely to assume by looking at the complaint that he or she must identify himself or herself.” Sarah L. Primrose, *When Canaries Won't Sing: The Failure of the Attorney Self-Reporting System in the “Cash-for-Kids” Scheme*, 36 J. LEGAL PRO. 139, 161 (2011). In pointing to an anonymous complaint that encouraged the Federal Bureau of Investigation to begin an investigation in a corruption case, the author suggests that the judicial corruption may have continued even longer in the absence of the anonymous complaint. *Id.* at 162.

87. Cynthia Gray, *Anonymous Complaints*, JUD. ETHICS & DISCIPLINE (June 19, 2018) <https://ncscjudicialethicsblog.org/2018/06/> [hereinafter *Anonymous Complaints*] (using the synopsis of a number of cases, including one in which a judge was removed from office for her physical and psychological dependence on prescription medications, to illustrate the importance of allowing the anonymous reporting option).

88. Primrose, *supra* note 86, at 162–63.

89. David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 953 (2009).

unless the judge elects to admit the allegations.<sup>90</sup>

When the determination is made to pursue a complaint submitted anonymously, the identity of the anonymous reporter may become apparent to the judge because few may know about the alleged misconduct. In such situations, the judge who is the subject of the complaint may be able to put the pieces together to discern the identity of the person who filed the anonymous complaint. Nevertheless, this risk is less than in a regime requiring that complaining persons provide their names.<sup>91</sup>

Focusing on the responsibility of lawyers to help preserve the integrity of the judiciary, anonymous complaints improve the likelihood that attorneys will discharge their obligations under state versions of ABA Model Rule of Professional Conduct 8.3.<sup>92</sup> Rule 8.3 effectively deputizes each licensed attorney to play a role in maintaining the professional standards of a self-regulating legal profession. Specifically, Rule 8.3 requires that lawyers report professional misconduct of lawyers and judges when the misconduct raises a substantial question as to the individual's fitness to practice law or serve as a judge.<sup>93</sup> Despite the laudatory objective of requiring lawyers to play a role in upholding the standards of the legal profession and judiciary, Rule 8.3 is one of the most ignored and unenforced professional conduct rules.<sup>94</sup> Although

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90. *Anonymous Complaints*, *supra* note 87. Similarly, in the federal system, a matter would not move forward unless “the chief judge finds the anonymous allegation and supporting evidence . . . sufficiently credible to justify identifying a complaint and commencing an investigation.” Pimentel, *supra* note 89.

91. Pimentel, *supra* note 89 at 951 (citing the Kastenmeier Commission Report suggestion that no complaint is truly anonymous).

92. See Philip Bogdanoff, *Disorder in the Court*, 29 OHIO L. 10, 12 (2015) (stating that “[i]t is essential to our system of justice that attorneys report violations of the Code of Judicial Conduct,” otherwise the public cannot have confidence in the impartiality and integrity of our system of justice).

93. Model Rule of Professional Conduct 8.3 states:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers [sic] assistance program.

MODEL RULES OF PRO. CONDUCT r. 8.3(b) (AM. BAR ASS'N 2021).

94. See Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How is it Used*

regulators have pursued lawyers for failing to report other lawyers, there are disproportionately low numbers of complaints filed by attorneys against judges.<sup>95</sup> Because of the risks associated with reporting a judge, many lawyers may look for excuses for not reporting.<sup>96</sup>

Anonymous reporting may address these concerns and contribute to more lawyers stepping up and fulfilling their obligations to file judicial misconduct complaints.<sup>97</sup> As described in Professor David Pimentel's thorough examination of lawyers reporting judicial misconduct, anonymous complaints are the "best hope for obtaining attorney input and participation in the misconduct process, and for that reason, the system will be far better served if it welcomes them."<sup>98</sup>

#### V. WHAT MISCONDUCT SHOULD JUDICIAL CONDUCT CODES ADDRESS: EXPRESSLY DESCRIBING TYPES OF MISCONDUCT BASED ON BIAS, HARASSMENT, AND DISCRIMINATION

Based on their study and investigation of workplace concerns, the Working Group identified a "number of areas where the codes and publications warrant clarification and revision to leave no doubt that disrespect, abuse, and harassment are impermissible and should be reported without fear of retaliation or adverse consequences."<sup>99</sup> Specifically, the Working Group noted that the codes and publications do

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*and What are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 747 (2003) (stating that Rule 8.3 "embodies one of the most underenforced, and possibly unenforceable, mandates in legal ethics."). Although regulators have pursued lawyers for failing to report other lawyers, there are very few reported cases involving lawyers' obligations to report judges. For a discussion of limited enforcement of lawyers' duty to report professional misconduct, *see id.* at 755–59.

95. A. Rebecca Williams, *An Inside Job: Using in-Court Sting Operations to Uncover Corruption in an Inadequate Self-Regulating System*, 28 GEO. J. LEGAL ETHICS 969, 983 (2015) (citing a 2006 study released by the Judicial Conduct and Disability Act Study Committee that revealed that attorneys only filed 81 out of 3,912 complaints filed against federal judges between 2001 and 2005).

96. In practice, Rule 8.3(b) obligations are "typically outweighed by the attorney's personal interest in maintaining cordiality with the court and their duty to represent the client's interest to the best of the attorney's ability." Alison Shlom, *Moving Towards an Impartial Judiciary: Recommendations to Prevent and Discipline Judicial Bias*, 29 WIDENER COMMONWEALTH L. REV. 135, 147 (2020).

97. When the New York State Bar Association debated a proposal to amend the state's ethics rule to require lawyers to report serious misconduct of judges, the proposed rule was voted down on the expressed concern that "a judge who knows that a lawyer has reported misconduct could hold it against the lawyer in current or future cases." Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 729–30 (1997).

98. Pimentel, *supra* note 89, at 913.

99. *Working Group Report*, *supra* note 14, at 14.

not provide “sufficiently clear advice on some pivotal questions respecting prohibited conduct and responses to harassment.”<sup>100</sup> For example, the Working Group Report observed “that the codes and publications do not provide clear guidance on protection from harassment based on sexual orientation or gender identity.”<sup>101</sup>

To address this concern, the Working Group recommended amendments to the Code of Conduct to clarify that impermissible harassment, bias, or prejudice includes harassment based on race, color, religion, national origin, sex, age, disability, or other bases (including sexual orientation or gender identity).<sup>102</sup> In response to this recommendation, the Judicial Conference added Commentary to Canon 3B(4) and Rule 4(a)(3), noting that “cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.”<sup>103</sup> Although workplace concerns provided the impetus for the Working Group to propose Code and Rule changes, the amended language is not limited to harassment and discrimination in the judicial workplace. As written, the revised language also covers harassment, bias, and prejudice in the treatment of litigants and their lawyers.<sup>104</sup>

Following the lead of the federal judiciary, the ABA and state judiciaries should amend their codes of conduct to include gender identity in describing the impermissible bases for harassment, bias, or prejudice. The current version of the ABA Model Code of Judicial Conduct generally provides that a “judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”<sup>105</sup> That proscription is followed by a prohibition stating:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including

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100. *Id.* at 15.

101. *Id.*

102. *Id.* at 6.

103. GUIDE TO JUDICIARY POLICY 11 (U.S. CTS. 2019), [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf) [<https://perma.cc/C25F-8SJA>].

104. *Id.* Under Rule 4(a)(3) cognizable misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. *Id.* at 13. Cognizable misconduct includes: (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or (C) creating a hostile work environment for judicial employees. *Id.* at 11 (quoting RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS RULE 4(a)(3)).

105. MODEL CODE OF JUD. CONDUCT r. 2.3(A) (AM. BAR ASS’N 2011).

but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.<sup>106</sup>

By adding “gender identity,” this rule provision would clearly communicate that prohibited conduct includes harassment, bias, or prejudice on the basis of gender identity.<sup>107</sup> This move would help educate judges that there is a problem in the judiciary with such improper conduct—whether it be differential treatment of persons in the judicial workplace, lawyers, or clients who appear in court proceedings.<sup>108</sup> If judges better understand these issues, they can educate and hold court personnel accountable for proper conduct at the courthouse.

#### VI. ASSESSING AND IMPROVING THE ETHICAL INFRASTRUCTURE OF THE JUDICIARY: DEVELOPING A RESEARCH AND ACTION AGENDA

As noted above, the Working Group's recommendations for addressing inappropriate conduct in the federal judiciary workplace fell in three discrete areas: (1) substantive standards; (2) procedures for seeking advice, assistance, or redress; and (3) educational efforts.<sup>109</sup> A evaluation of these recommendations reveals that they largely related to the way ethical standards are formally communicated and monitored through reporting.

In addition to examining and improving procedural and substantive conduct rules, federal and state judiciaries should engage in more comprehensive and systematic examinations of the judiciaries' ethical infrastructures for preventing and addressing harassment and other misconduct by judges and other court personnel. In legal ethics circles,

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106. *Id.* at R. 2.3(B).

107. A few state codes already include “gender identity” in the list of prohibited bases for bias, discrimination, and prejudice. *See, e.g.*, MAINE CODE OF JUD. CONDUCT R. 2.3(B) (2017). For a comparison of approaches used by states, *see Charts Comparing Individual Jurisdictional Judicial Conduct Rules to ABA Model Code of Judicial Conduct*, A.B.A. (June 23, 2020), [https://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/aba\\_model\\_code\\_comparison/](https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/aba_model_code_comparison/) [<https://perma.cc/5WRL-F7F5>].

108. “Although implicit in discrimination on the basis of ‘sex’ and ‘gender,’ an express provision regarding gender *identity* would better guide judges in understanding the repercussions of their actions in court proceedings by explicitly flagging the issue.” Francesco G. Salpietro, *R-E-S-P-E-C-T: Transgender Pronoun Preference and the Application of the Model Code of Judicial Conduct*, 53 CT. REV. 162, 169 (2017).

109. *Working Group Report*, *supra* note 14, at 20–21.

Professor Ted Schneyer first used the term “ethical infrastructure” to refer a law firm’s policies and operating procedures that cut across particular lawyers and tasks.<sup>110</sup> Business ethics scholars fleshed out the analytical framework in using a more comprehensive conceptualization of ethical infrastructure.<sup>111</sup> As described by Professors Ann E. Tenbrunsel, Kristin Smith-Crowe, and Elizabeth E. Umphress, an organizational ethical infrastructure consists of “formal and informal systems—each including communication, surveillance, and sanctioning components—as well as the climates that support these systems.”<sup>112</sup>

In the judiciary, formal systems used to communicate standards include codes of conduct, other official policy statements, and training programs. Although these types of formal controls are important in communicating standards and expectations, a multi-year consensus study of sexual harassment in higher education from the National Academies of Sciences, Engineering, and Medicine concluded that policies and procedures should be treated as the “floor” for compliance with legal obligations.<sup>113</sup> Rather than simply focusing on legal compliance, the National Academies study urged moving beyond basic legal compliance to address organizational climate issues and promote a culture of civility and respect.<sup>114</sup>

Similarly, it is incumbent that decisionmakers in the federal and state judiciaries recognize that formal systems are just one component of the ethical infrastructure. In addition to formal controls, such as code provisions and training programs,<sup>115</sup> they should seriously consider

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110. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991). Because various ethical lapses related to organizational controls, such as problems related to a firm’s conflict-checking procedures, could not be attributable to individual lawyers, Professor Schneyer proposed disciplining the entire law firm rather than limiting discipline to individual lawyers. *Id.* at 41.

111. See *Preventing Sexual Harassment and Misconduct*, *supra* note 18, at 33–37 (applying the ethical infrastructure framework in examining sexual harassment and misconduct in universities and colleges).

112. Anne E. Tenbrunsel, Kristen Smith-Crowe, & Elizabeth E. Umphress, *Building Houses on Rocks: The Role of Ethical Infrastructure in Organizations*, 16 SOC. JUS. RSCH. 285, 287 (2003).

113. NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, MEDICINE, SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 93 (Paula A. Johnson, Shelia E. Widnall & Fraizer F. Benya eds., 2018).

114. “Changing the organizational climate will reduce the likelihood that harassment occurs, because perpetrators will know that there are serious consequences for harassing others. Further, persons harassed should be more comfortable pursuing complaints when they understand that the organization does not tolerate sexual harassment.” *Preventing Sexual Harassment and Misconduct*, *supra* note 18, at 30.

115. Referring to the Working Group’s focus on trainings for judge, law clerk and staff, a former federal judge questioned the content and effectiveness of training done for legal compliance

informal influences, such as incentives, and the climate and culture in which the formal and informal systems are embedded.<sup>116</sup> As noted by James C. Duff, the former director of the Administrative Office of the U.S. Courts who appointed the Working Group, “achieving uniform cultural change requires more than a written policy or even the moral urgings of colleagues. It requires a comprehensive and meaningful strategy for change and a long-term commitment to a safe and fair workplace for every employee.”<sup>117</sup> Judiciaries could also use a strategic and comprehensive approach in studying and improving how they deal with misconduct involving bias, harassment, and discrimination of litigants and their lawyers.

Several commentators have called for a critical examination of how judiciaries deal with misconduct involving bias, discrimination, and harassment.<sup>118</sup> Experts in the field of organizational and professional ethics could partner with judiciaries and use the ethical infrastructure framework in studying formal controls, informal influences, and the climates and cultures in which they are embedded. Based on what they learn, the researchers can share best practices for examining and improving the ethical infrastructure related to preventing and addressing bias, discrimination, and harassment at the courthouse.

## VII. CONCLUSION

The Working Group Report presented several recommendations intended to improve accountability in the federal judiciary. Informed by the Working Group Report and the experience of the federal judiciary, this Article urges state judiciaries to follow the lead of federal judiciary and make changes to address judges’ responsibilities related to defining, monitoring, reporting, and preventing misconduct.

Although the federal judiciary has already made a number of changes, experts concur that much work still needs to be done at the state

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purposes, referring to it as nothing more than a “fig leaf.” Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 92–93 (2018).

116. See Helen Hershkoff, *Some Questions About #MeToo and Judicial Decision Making*, 43 HARBINGER 128, 132 (2019) (suggesting that publishing statistics about complaints could contribute to increased transparency, creating institutional incentives to “curtail unacceptable behavior”).

117. Duff, *supra* note 13, at 10 (noting that the dispersed environment of the large and diverse judiciary with offices nationwide present challenges to change).

118. See, e.g., Litman & Shah, *supra* note 2, at 599 (urging a “sustained, public reflection about how words, actions, attitudes, and institutional arrangements allow harassment to happen” in federal courts).

and federal levels.<sup>119</sup> To tackle the challenge, decisionmakers in judiciaries should recognize that addressing misconduct involving bias, harassment, and discrimination requires a comprehensive and critical examination of ethical infrastructure, including formal policies, informal influences, and the climate and culture in which they are embedded.

A key component of any such examination is the consideration of the role of leadership. Relying on the EEOC, the Working Group noted that leadership of an organization must show its commitment “to a diverse, inclusive, and respectful workplace in which harassment is not accepted.”<sup>120</sup> The ethical infrastructure analytical framework also recognizes that leadership shapes standards and conduct through both formal communications, informal messages, and incentives.

While commending Chief Justice Roberts for his leadership in spearheading a study of workplace conduct in the federal judiciary, the Working Group Report recognized that “leadership must extend throughout the Judiciary, beginning with judges.”<sup>121</sup> As stated, “[i]t is therefore vital that judges and court executives ensure, through educational programs, performance reviews, and other mechanisms for motivating positive change, that judges, executives, supervisors, and managers at every level throughout the Judiciary demonstrate the same strong commitment to workplace civility.”<sup>122</sup>

One way that federal and state judges demonstrate their commitment to high standards of conduct is to hold accountable other judges who engage in misconduct involving bias, harassment, and discrimination.<sup>123</sup> In addition, judges should take seriously their supervisory responsibilities and address misconduct by court personnel. Beyond dealing with misconduct by others, judges should also consider the informal influences and climate, including communicating that bias, harassment, and other discrimination will not be tolerated. As respected

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119. See, e.g., Duff, *supra* note 13, at 12 (reviewing changes made in the federal judiciary and referring to the continuing work necessary to meet the goal of an “exemplary workplace”). See also, Deborah Wood Smith, *Workplace Harassment in State Courts*, 57 No. 4 JUDGES’ J. 30, 30, 32 (explaining that the development of a culture that is responsive to workplace misconduct is more than a one-time human resources training, but an “ongoing process”).

120. *Working Group Report*, *supra* note 14, at 8.

121. *Id.*

122. *Id.*

123. As explained by one author, “if the federal judiciary is vigilant and confronts judicial misbehavior promptly and effectively, with rigor and integrity, it should be able to preserve both its independence and the system of self-governance it has guarded so carefully.” Michael Traynor, *Some Friendly Suggestions for the Federal Judiciary about Accountability*, 168 U. PA. L. REV. ONLINE 128, 149 (2020).



leaders, judges can steer the ship by staying informed, acting intentionally in setting the tone, and providing examples both in chambers and in dealing with concerns throughout the judicial workplace.<sup>124</sup>

Leadership programs for judges should include training on how to recognize and handle inappropriate conduct by others and how to take steps to create a culture and climate for reducing and preventing harassment and other discrimination at the courthouse. Most importantly, by embracing their position as ethical leaders, judges play an instrumental role in maintaining the integrity of the judicial process and preserving judicial independence while cultivating a healthy and impartial environment for employees, as well as litigants and their lawyers.

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124. A wide range of resources and trainings provide guidance to judges. For example, The Judicial Engagement Network provides resources for judges to learn how to help address discrimination against LGBTQ survivors of domestic violence and sexual assault. See Todd Brower & Elizabeth Berns, *What Judges Need to Know about LBGTQ*, JUD. ENGAGEMENT NETWORK, <https://judicialengagementnetwork.org/resources/lgbtq> [https://perma.cc/FD9U-RN6F].