

December 20, 2017

To Hon. Anthony J. Scirica, Chair of the Committee on Judicial Conduct and Disability; Hon. Jeremy D. Fogel, Director of the Federal Judicial Center; James C. Duff, Director of the Administrative Office of the U.S. Courts; and Chief Justice Roberts, Presiding Officer of the Judicial Conference of the United States:

Please find enclosed a letter that asks the federal judiciary to consider ways to address workplace harassment within the federal court system and offers several suggestions regarding this issue. The 695 signatories to the letter (who signed as of 7:00 pm EST on Wednesday, December 20, 2017) include 480 former clerks, 83 current clerks (some have asked to remain anonymous), and 120 law professors. The letter remains open for signatures; an updated list of signatories can be found at <http://bit.ly/2BunWnv>.

We appreciate your prompt consideration of this important issue. We are especially encouraged that the Federal Judicial Center has already begun to revise the Law Clerk Handbook to address some of our concerns. We would welcome the opportunity to work with the judiciary to develop effective solutions to ensure that those who experience or witness harassment have adequate reporting avenues and feel comfortable using those avenues.

Sincerely,

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To Hon. Anthony J. Scirica, Chair of the Committee on Judicial Conduct and Disability; Hon. Jeremy D. Fogel, Director of the Federal Judicial Center; James C. Duff, Director of the Administrative Office of the U.S. Courts; Chief Justice Roberts, Presiding Officer of the Judicial Conference of the United States:

We are writing this letter as current and former judicial clerks, interns, externs, employees, or lawyers otherwise familiar with the federal courts. We believe that significant changes are necessary to address the potential for harassment of employees who work in the federal court system, the confidentiality principles that apply to work in chambers, and the risk that these confidentiality provisions can be used to shield, if not enable, harassment. We ask the judiciary to consider ways to address workplace harassment in the federal courts and implement effective solutions to this problem. We also offer several suggestions below.

First, we ask that the Federal Judicial Center revise the Law Clerk Handbook to provide specific guidance on these issues. The Law Clerk Handbook provides insight on the basic role of a clerk and the duties that a clerk has to her judge. Though the Handbook had long failed to even contemplate the possibility that a clerk may face harassment in her job,<sup>1</sup> we were encouraged to see that the Federal Judicial Center revised the Handbook this week to make clear that nothing “prevents a clerk, or any judiciary employee, from revealing misconduct, including sexual or other forms of harassment, by their judge or any person.”<sup>2</sup> The revised Handbook now also states that law clerks “are encouraged to bring such matters to the attention of an appropriate judge or other official.”<sup>3</sup> These changes are a step in the right direction. Nevertheless, we believe the Handbook still provides inadequate guidance about when confidentiality applies, when a judge may or may not compel a clerk’s silence on a matter, what constitutes personal misconduct instead of judicial misconduct, and how to report such misconduct—including who is “an appropriate judge or other official” to whom misconduct should be reported. We ask that the Federal Judicial Center involve current clerks in drafting any future revisions related to harassment to ensure the Handbook fulfills its goal of clearly informing the reader of the available procedures.

Second, we ask the Administrative Office of the U.S. Courts to revise the Code of Conduct for Judicial Employees. That Code provides ethical canons for all judicial

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<sup>1</sup> Though this letter is framed primarily to address concerns about sexual harassment against women, its recommendations are equally relevant to men or women who may face harassment on the basis of sex, race, sexual orientation, gender identity, or another protected status.

<sup>2</sup> Federal Judicial Center, *Law Clerk Handbook* 7-8 (3d ed. rev. 2017), available at <https://www.fjc.gov/sites/default/files/2017/Law%20Clerk%20Handbook.pdf>.

<sup>3</sup> *Id.* at 8

employees, including permanent staff, interns, and externs. Like the Law Clerk Handbook, it stresses the importance of confidentiality.<sup>4</sup> Also like the Law Clerk Handbook, it does not provide adequate guidance about how judicial employees should handle harassment should they encounter it during their employment. We ask that the Administrative Office revise the Code or otherwise provide guidance to judicial employees regarding when confidentiality applies, what constitutes harassment, and how to report such misconduct.<sup>5</sup>

Third, we ask that issues regarding harassment, confidentiality, and avenues for reporting misconduct be addressed with all law clerks during law clerk orientation, with all employees during new employee orientation, and with all law clerks, interns, and externs at the beginning of their terms of service to the extent they do not attend a formal orientation.

Fourth, we ask that the judiciary develop a confidential national reporting system—or a standardized procedure that applies to all Circuits—that a clerk, intern, or judiciary employee can access if she feels she is being harassed or if she believes she has witnessed misconduct by a judge or another judiciary employee. At this point in time, we are unaware of a central person or institution that an employee can turn to when faced with harassment at work. In the past, clerks have been told to report any harassment to their judge or that any reports of harassment will be provided to their judge. This system is flawed for a number of reasons, including that the judge may be the perpetrator of the misconduct or the clerk may be new to the environment and unsure of how to interact with the judge. We understand that such a system may not currently exist because of concerns regarding judicial independence or confidentiality. But confidentiality and independence do not and should not protect personal misconduct. A confidential reporting system would provide vital guidance to all employees facing precarious situations without forcing these individuals to report directly to their judge or their judge's colleagues. A clear central reporting system, either nationally or by circuit, would allow employees to report misconduct when it occurs and would provide a channel for action outside of contacting the press or simply hoping that the situation goes away.

Fifth, we ask that the federal judiciary take steps to publicly reassure individuals who are considering reporting accounts of sexual misconduct or harassment that their stories will be heard and that they need not fear retaliation. There are multiple ways to do so. For example, Chief Justice Roberts could address this issue in his year-end report.<sup>6</sup>

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<sup>4</sup> Code of Conduct for Judicial Employees § 320, Canon 3D.

<sup>5</sup> To the extent federal courts have developed their own employee manuals, we encourage them to revise those documents to reflect the changes to the Code of Conduct and provide court-specific guidance.

<sup>6</sup> Letter from Rebecca L. Brown et al. to Hon. John G. Roberts, Jr., Chief Justice of the United States (Dec. 14, 2017), *available at* <https://fixthecourt.com/wp-content/uploads/2017/12/Profs-letter-to-CJ-Roberts-12.14.17.pdf>.

Finally, we ask the judiciary to immediately form a working group of judges, current and former law clerks,<sup>7</sup> and judiciary employees to further develop ways to address these issues. We ask that this group be composed of a diverse racial and gender mix of individuals.

We wish to emphasize the incredible honor of serving the federal judiciary. For some, working for a federal court may be the most enjoyable job they hold in their legal career. For all of us, the experience is an incredible privilege for which we are so grateful. Just as judges devote many hours (indeed, years) of guidance, instruction, mentorship, and sponsorship to their law clerks and other employees, clerks and employees are often happy to make significant sacrifices to serve and honor their judges. We also understand the important role that confidentiality plays in creating a relationship of trust inside judicial chambers. We wish to preserve these vital aspects of the in-chambers experience while ensuring that the sacrifices employees are expected to make do not include their dignity, their self-worth, or their bodily autonomy. Many of us did not experience harassment during our time with the judiciary, but we all want to ensure that the appropriate procedures and policies are in place to address harassment within the federal judicial system going forward. Taking action to advance these goals will not only improve the status of women in the federal judicial system, it will also serve as a much-needed example for the legal profession as a whole.

We would welcome the opportunity to speak with members of the Committee on Judicial Conduct and Disability, the Board of the Federal Judicial Center, the Administrative Office of the U.S. Courts, or the Judicial Conference of the United States.

cc: Chief Judges of the U.S. Courts of Appeals and the Court of International Trade

Respectfully submitted

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<sup>7</sup> We believe that former law clerks may be more willing to speak freely regarding these issues than current law clerks.

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