

# New Developments in Workplace Sexual Harassment

January 27 - 28, 2022

**Continuing Legal Education  
(CLE) materials**

Berkeley Center on Comparative  
Equality and Anti-discrimination  
Law

# PLENARY 2



# Evaluation of Staff Engagement in Initiatives to Address Gender- Based Violence

POSSIBILITY  
 SEEDS

COURAGETOACT.CA  
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## Land Acknowledgement

We would like to begin by acknowledging that this work is taking place on and across the traditional territories of many Indigenous nations. We recognize that gender-based violence is one form of violence caused by colonialism that is used to marginalize and dispossess Indigenous peoples from their lands and waters. Our work on campuses and in our communities must centre this truth as we strive to end gender-based violence. We commit to continuing to learn and grow and to take an anti-colonial and inclusive approach to the work we engage with. It is our intention to honour this responsibility.

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Women and Gender  
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# Evaluation of Staff Engagement in Initiatives to Address Gender-Based Violence



## Why Evaluate Staff Engagement?

The report produced for the Courage to Act project reads in part as follows:

“If we’re using homegrown kinds of programming then we do need to do some sort of evaluation to make sure that we’re actually accomplishing something and we know that those sort of satisfaction kind of evaluations at the end are not what we need to be doing, but then there should be funding to actually hire the research staff to actually assist with this [...].”

(Comment made in a session of Educating Students, Listening and Learning)  
(Khan et al. 2019).

The individuals who facilitate preventive training sessions on SV and GBV or who launch initiatives to address these forms of violence have considerable know-how and a good idea of what works and what doesn’t in prevention. However, these programs are rarely evaluated, even though evaluation is a critical step if we are to understand the impact of training on culture, behaviours and engagement levels. Evaluating that impact can help us determine:

- Whether the programs are producing the desired outcomes
- Whether there are any unintended consequences
- What improvements can be made
- What changes the programs elicit among participants
- And other elements (see Shackman, 2018)

## When Should the Evaluation Be Carried Out? (Flood & Rowe, 2021)

- 1. Evaluating needs: Before developing a program, campaign, training session, etc.**
  - This step can optimize the time and energy you invest in developing tools specific to the institution's needs.
- 2. Evaluating the process: During implementation or execution**
  - This step makes it possible to collect participant feedback and make any necessary adjustments to optimize results and buy-in.
- 3. Evaluating effectiveness: Immediately after execution**
  - This step provides a clearer understanding of whether the program, campaign or training session met its stated objectives.
- 4. Evaluating the medium-term impact (a few weeks or months after execution) and long-term impact (a few years after execution)**
  - This step shows whether the goals and objectives continue to be met over time.



## How Should the Evaluation Be Carried Out? (See Townsend, 2009)

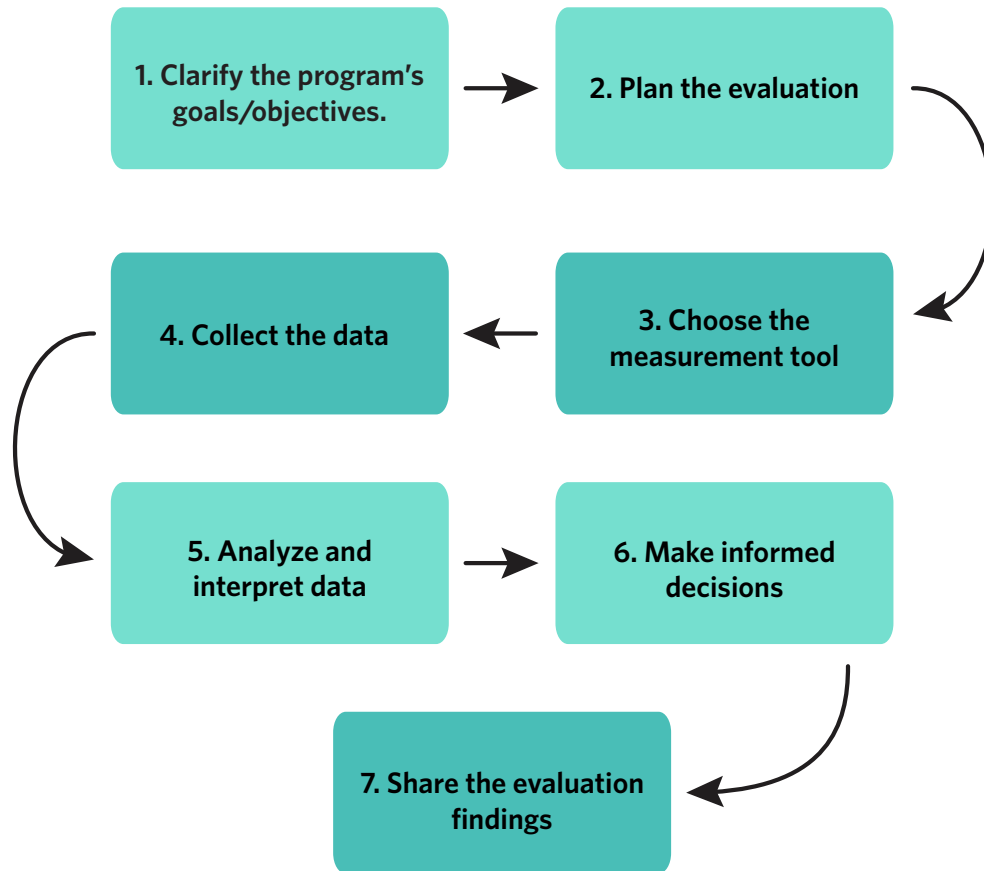


Figure adapted from Townsend (2009)

Before getting started, it is always useful to **plan** each step in the process, asking yourself questions such as the following:

### 1. Clarify the program's goals/objectives

- The answer will be different for each situation.

### 2. Plan the evaluation

- What do you want to measure?
- Why do you want to measure it?
- Who will have access to the evaluation results?

- How long will the data-gathering step last (for example, a 10-minute survey vs. an hour-long interview)?
- How big will the sample be?

### 3. Choose the measurement tool

- What are your resources and constraints?
- Who will write the questions? Would you prefer to adapt an existing tool?
- Who has the necessary expertise to draft a questionnaire?
- How can you formulate effective questions? Examples: avoid multiple negatives, discriminatory points and points with several main ideas (see Hogan, 2012)
- How do you protect respondents' confidentiality?
- Will you conduct a pre-test? Who will be the subjects?

### 4. Collect your data

- Who is your target population, and how will you recruit it?
- What platform will you use to conduct the survey (e.g., Survey Monkey, Lime Survey, Google Surveys, etc.)?
- How long will data collection last?

### 5. Analyze and interpret the data

- Who will be in charge of storing and analyzing the data once it has been collected?
- What analysis method will be used?
- How will the findings be used?
- What are your team's constraints, and who can you turn to for assistance?

### 6. Make informed decisions

- For example: improve the program, make recommendations, expand the knowledge base, etc.
- Have you taken any steps to ensure that the evaluation will be an ongoing process?

### 7. Share the evaluation findings

- With whom do you want to share the findings?
- How do you wish to do so?



## What Should Be Evaluated?

There is a wide range of possibilities. You can draw inspiration from the following proposals and the associated questionnaires, which can be a good starting point. If the questionnaire that interests you most is in another language and you want to translate it, you can use the method suggested by Robert Vallerand (1998). Again, feel free to modify these options according to your own specific needs.

- The effectiveness of a training session or other initiative (see Kirkpatrick & Kirkpatrick, 2006)
- The effectiveness of an educational institution's awareness campaign (see Potter, 2012)
- A long-term cultural change (for example, see Johnson & Johnson's Rape Culture Inventory)
- Biases or perceptions of bias about a given subject (for example, see the Illinois Rape Myth Acceptance Scale by Payne et al., 1999, or the Acceptance of General Dating Violence Scale by Foshee et al., 1996)
- Staff engagement (see Appendix 1)
- Active witness behaviours (Banyard et al., 2005)
- Etc.

**An SV researcher proposes asking the following five questions following a training session (Banyard et al., 2005).**

1. Did you learn anything that was new or surprising during the training session?  
If so, what was it?
2. After taking part in the training session, I am now going to ...  
[Insert a concrete action here]
3. Would you recommend this program to other people, including your friends?  
Why or why not?
4. List the three things you liked most about the training session.
5. Name three things that you would change about the session, if applicable.

## Measurement Tools (see Shackman, 2018)

There are numerous evaluation methods at your disposal. Here is a brief overview of the most useful methods in our situation, followed by their main advantages and disadvantages.

Tool	Pros	Cons
<b>Survey</b>	<ul style="list-style-type: none"><li>▪ Fast</li><li>▪ Inexpensive</li><li>▪ Findings are easier to analyze</li></ul>	<ul style="list-style-type: none"><li>▪ Data can be influenced by certain personal biases (social desirability or selective memory) (Althubaiti, 2016)</li></ul>
<b>Focus groups</b>	<ul style="list-style-type: none"><li>▪ Allow for a more in-depth understanding of the situation</li><li>▪ A diversified group can provide a richer data set</li><li>▪ Discussions could help improve understanding</li><li>▪ Faster than personal interviews</li></ul>	<ul style="list-style-type: none"><li>▪ Need for the facilitator to be experienced</li><li>▪ Make data analysis more difficult</li></ul>
<b>Personal interviews</b>	<ul style="list-style-type: none"><li>▪ May reveal information that would never have come out of surveys or focus groups</li></ul>	<ul style="list-style-type: none"><li>▪ Require a great deal of time</li><li>▪ Need for the interviewer to be experienced</li><li>▪ Make data analysis more difficult</li></ul>



## Developing or Adapting Your Measurement Tool

A logic model can inform discussions on designing or adapting a selected tool (see McLaughlin & Jordan, 2004). A logic model depicts the links between the theory behind your program, campaign or training session, its objectives, planned activities and anticipated outcomes. It can help you narrow down the questions that you want to ask through your measurement tool.

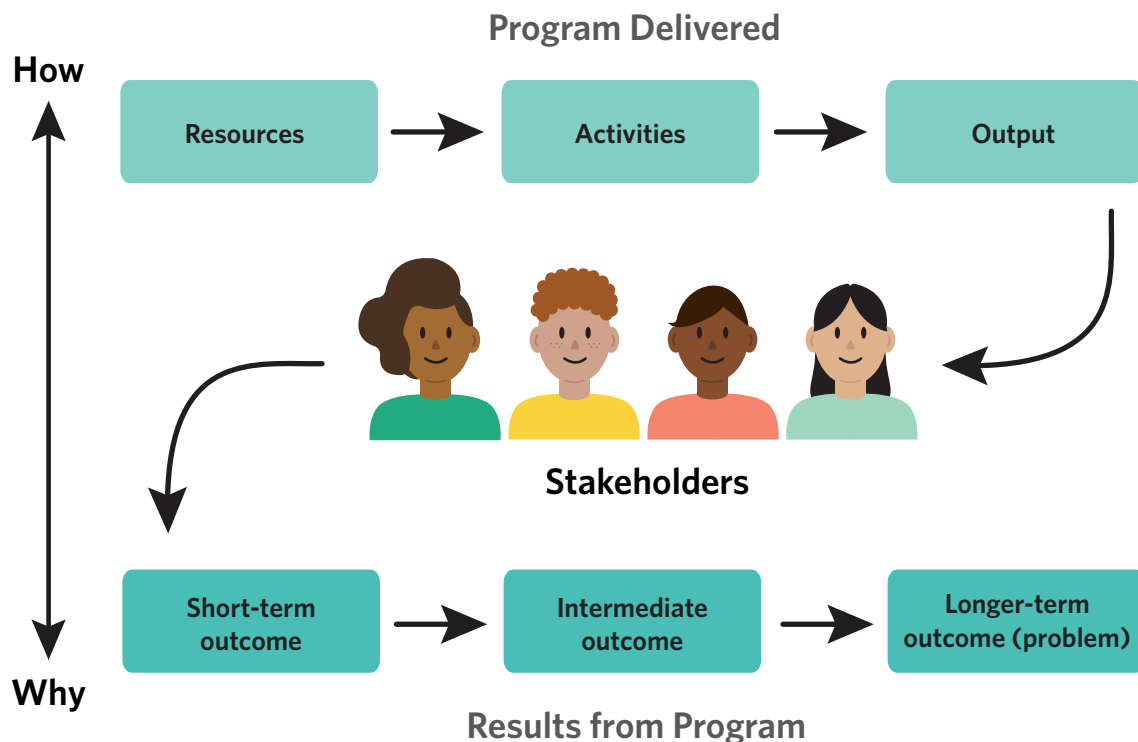


Figure 1.1 Basic Logic Model





# A Concrete Example



By way of example, here is the Courage to Act Francophone Community of Practice's project involving the development of a guide to strategies for engaging Canadian post-secondary institution staff in the prevention of sexual violence (SV). The purpose of this example is to provide a more concrete context for understanding the thought process behind the tool's development and a few possible solutions. We hope that this example will clarify the theoretical concepts underpinning the evaluation process and show what can be done locally to evaluate initiatives when faced with a tight deadline and a small team. Bear in mind that this tool reflects the state of our knowledge at the time of its development and that it can no doubt be improved upon as time goes by.

## Methodology

This project was born after observing the limited interest in SV prevention activities shown by staff in various post-secondary settings. Generally speaking, we were informed that various personnel categories seem to have difficulty understanding their role in prevention, with the result that existing initiatives to educate them about that role do not seem to be fruitful. As a result, the need for a guide to strategies for engaging staff at Canadian post-secondary institutions was identified (Khan et al. 2019). To that end, we first decided to draft a survey to get a clearer idea of staff perceptions about their engagement in SV initiatives and the role they were prepared to play in its prevention. That survey was drawn up between June 1, 2020 and August 10, 2020 based on a literature review, our team members' experience and our logic model (see p. 8).

To recruit survey participants, an e-mail was sent to unions and HR departments at every French-language post-secondary institution across Canada to describe our project and request the institution's participation. Parties that agreed to take part then shared the survey link with their staff members, along with an explanation of the process. The survey was conducted between August 11 and September 4, 2020, and a total of 772 post-secondary institution employees responded. You can find a copy of the survey in the appendix, and an overview of the results will be made available online (Girouard et al., 2020).

Below, the questions posed above in regard to the development of an evaluation plan are presented again, this time using our survey as an example. **If you have questions that are still unanswered after going through this section, do not hesitate to consult the additional resources listed at the end.**

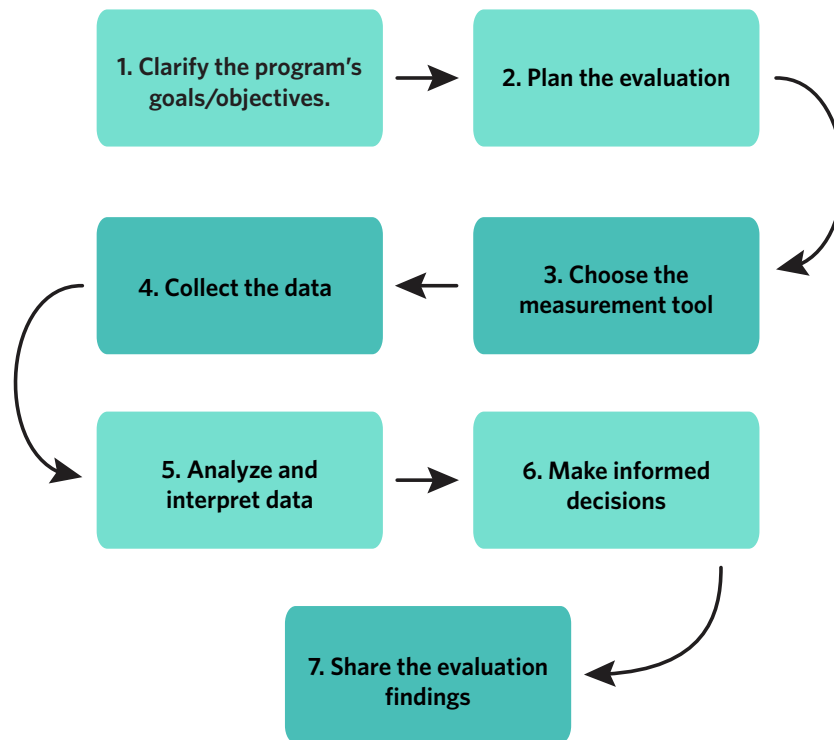


Figure adapted from Townsend (2009)

## A. WHEN SHOULD THE EVALUATION BE CARRIED OUT?

This example focuses on evaluating needs because the survey was conducted before the guide was developed.

## B. HOW SHOULD THE EVALUATION BE CARRIED OUT?

### 1. Clarify the program's goals/objectives.

- Develop strategies to fully engage post-secondary institution staff in efforts to prevent SV

### 2. Plan the evaluation:

- What do you want to measure?
  - Staff's current level of engagement
  - Engagement strategies currently used by managers
  - Staff perceptions and knowledge of SV
  - Measures in place at institutions to prevent SV



- Main barriers to participation in SV prevention measures
- Role that staff members are prepared to play in preventing SV
- Why do you want to measure it?
  - Collect staff input to ensure the guide meets their needs and includes strategies that will actually be implemented
- How long do you want your evaluation to last?
  - 5 to 10 minutes maximum

### 3. Choose the measurement tool

- What are your resources and constraints?
  - We have a good grasp of the literature and contacts who are able to review the tool and distribute it to a great many people.
  - We want to get input from many (>500) people, which requires us to use a survey.
  - We have a better understanding of quantitative analysis.
- Who will write the questions? Or would you prefer to adapt an existing tool?
  - Our subject is ground-breaking. There are no tools designed to measure what we want to measure at this time.
  - We have enough time to develop a tool (two months).
- How did you write your own questions?
  - By basing our work on our logic model, following the recommendations found in the literature, and confirming with people who work in the target settings that we are meeting their needs.
- How will you protect respondents' confidentiality?
  - Individuals taking part will not have to reveal information that can be used to identify them (first and last names, e-mail address, telephone number, address, etc.).
  - The survey consent form will include this statement:
 

“Confidentiality: To ensure respondents cannot be identified, all answers will remain completely anonymous and confidential. We will never ask you to give your name or contact information. Only survey answers will be collected. Answers will be kept for a maximum of five years or for the project's duration.”
- Will you test your evaluation methods before proceeding? Who will the subjects be?

- Pre-testing our evaluation methods will allow us to find any typos in the document and ensure that the language used is gender-neutral and that questions are easy to understand.
- The subjects will be our work colleagues. As a rule, a pre-test can be conducted on a sample outside the study population or on a subset of study participants. The best practice for pre-tests is called the cognitive interview (see Boateng et al., 2018, for more information).

#### 4. Collect your data

- Who is your target population, and how will you recruit it?
  - We wanted to receive input from all post-secondary institution staff members. We therefore drew up a list of HR contacts at every institution and contacted them individually to tell them about our survey. Once they had confirmed that they would take part, we e-mailed them the link to be shared with their staff.
- What platform will you use to conduct the survey (e.g., Survey Monkey, Lime Survey, Google Surveys, etc.)?
  - We decided on Survey Monkey because we already had experience with this platform and because some data analysis can be done directly on the site. However, since certain organizations have free access to various platforms, it may be simpler to proceed in that manner because the institution can sometimes provide assistance.
- How long will data collection last?
  - We had a deadline, and so we capped data collection at four weeks.

#### 5. Analyze and interpret the data

- Who will be in charge of the data once it has been collected?
  - The data was kept by the project consultant, who took steps to keep the data safe, confidential and anonymous on her computer.
- What analysis method will be used?
  - Our needs were descriptive and therefore did not require sophisticated analysis. We simply used the features offered by Survey Monkey.
- How will the findings be used?
  - We only wanted to get a concrete idea of the SV situation in post-secondary settings.
- What are your team's constraints, and who can you turn to for assistance?
  - We noted limitations within our team in terms of gender and cultural diversity, and we took steps to ensure that the distribution of the survey and results did not offend anyone.



## 6. Make informed decisions

- After reviewing our findings, we were able to modify the recommendations set out in the guide to focus on concrete changes that post-secondary staff members could realistically implement in their day-to-day work.

## 7. Share the evaluation findings

- We elected to write a comprehensive report to present the results for anyone working at post-secondary institutions.

### C. DEVELOPING YOUR TOOL: OUR LOGIC MODEL

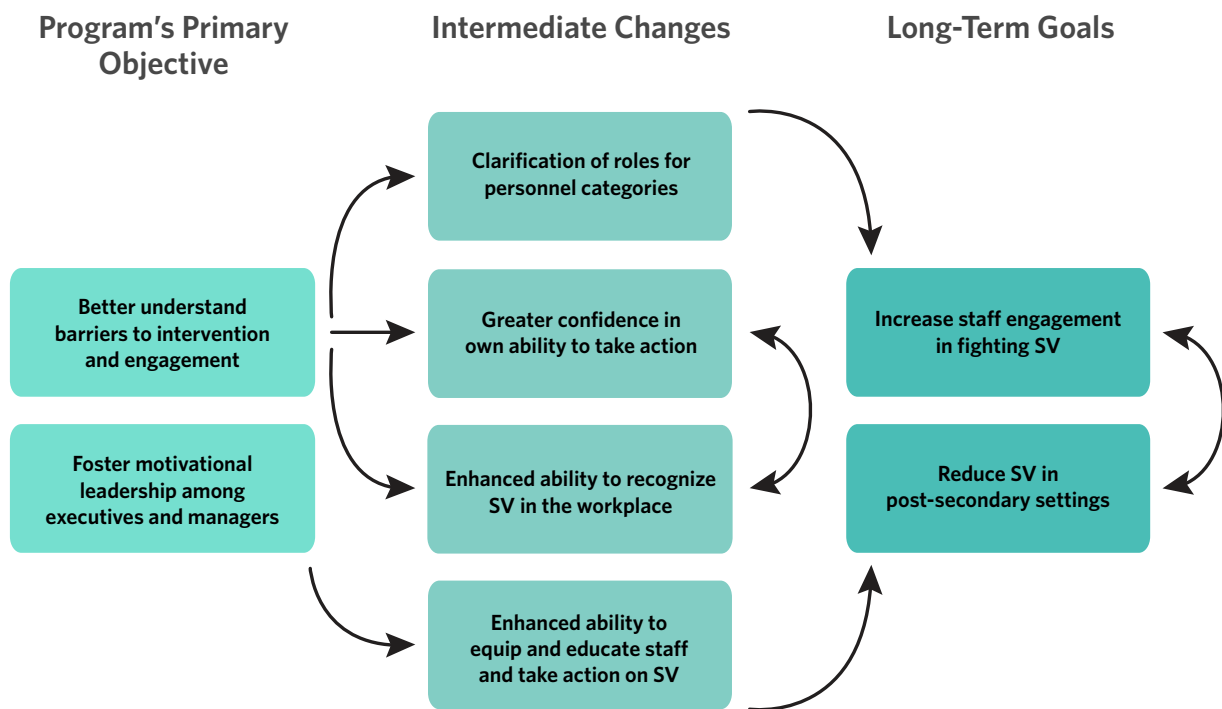


Figure of Our Logic Model

### D. OUR QUESTIONNAIRE: SEE APPENDIX A.

## Conclusion

By way of conclusion, we encourage you not to be afraid to evaluate the measures put into effect by your institution to prevent gender-based violence. As you acquire more and more experience, you will be able to hone your critical thinking regarding those initiatives and continue to expand your skills. In the long term, your commitment to implementing the most effective initiatives for preventing gender-based violence can make a real difference. The content presented in this document is a starting point designed to give you a toehold in the area of evaluation. Do not hesitate to contact

your institution's research teams that are more specialized in this area, to read more resources like those listed on the next page, and to adapt all this material to your own needs and circumstances. In addition, we encourage you to send us examples of the evaluation measures implemented at your institutions or in your workplaces and communities. We may include them in our Documentation Centre to help document the practices in place and inspire other people who wish to evaluate the level of staff engagement at their educational institution.



# Comprehensive Works

Amnesty International. (1999, July). *Evaluation: A Beginner's Guide*.

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# Appendix A: Questionnaire

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## INSTRUCTIONS

If you are employed by a Canadian post-secondary institution, this survey is for you! Thank you very much for taking the time to answer it. Your responses will give us a better understanding of your needs and circumstances and help us tailor our strategies and recommendations to better prevent and address sexual violence (SV) on Canadian campuses. It should take you about 10 minutes to complete the survey. All your responses are anonymous, and there are no right or wrong answers.

1. What gender do you identify as?

- ☐ A. Woman
- ☐ B. Man
- ☐ C. Non-binary or gender-fluid
- ☐ D. Other

2. What is your age group?

- ☐ A. 18 and under
- ☐ B. 18 to 24
- ☐ C. 25 to 34
- ☐ D. 35 to 44
- ☐ E. 45 to 54
- ☐ F. 55 to 64
- ☐ G. 65 and over

3. At what kind of post-secondary institution do you work?

- ☐ A. College-/CÉGEP-level institution
- ☐ B. University-level institution
- ☐ C. Other (please specify): \_\_\_\_\_



4. How big is your institution's student community? You may provide an approximate figure.

- ☐ A. 0 to 499
- ☐ B. 500 to 999
- ☐ C. 1,000 to 2,999
- ☐ D. 3,000 to 4,999
- ☐ E. 5,000 to 9,999
- ☐ F. 10,000 to 19,999
- ☐ G. 20,000 to 29,999
- ☐ H. 30,000 to 39,999
- ☐ I. 40,000 or more

5. Do you work for your union? For example, are you a member of the union executive, or do you sit on any union committees or serve as a union representative?

- ☐ A. Yes
- ☐ B. No

6. To what employment category do you belong?

- ☐ A. Professor
- ☐ B. Other teaching staff (lecturers, lab and practical work technicians, etc.)
- ☐ C. Support and technical personnel (e.g., building maintenance, library operations, student file management, technical and administrative support, service managers, etc.)
- ☐ D. Professional personnel (e.g., guidance counsellor)
- ☐ E. Manager, director, program supervisor, dean or related position, or other executive/management position
- ☐ F. Other: \_\_\_\_\_

## VERSION FOR EMPLOYEES

A broad definition of sexual violence (SV) includes *a range of behaviours such as sexual assault, exhibitionism, voyeurism, sexual harassment, cyberstalking, unwanted touching, threat of rape, sexual blackmail and other unwanted or non-consensual sexual behaviours.*

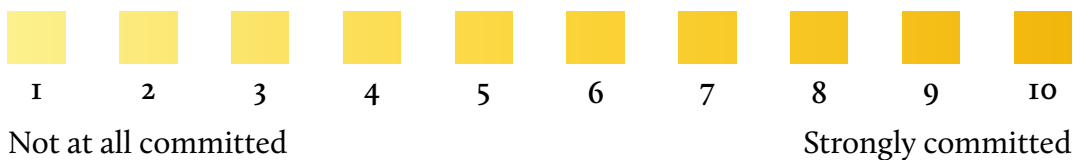
7. How committed do you feel you are to preventing SV in your workplace?



8. How committed do you think your institution's management team is to preventing SV?



9. How committed do you think your immediate superior is to preventing SV? If you do not have a hierarchical superior, please think of a person in authority to whom you occasionally report (such as a program head or a dean or assistant dean in your faculty or school).



10. What do you think of the mandatory SV training offered by your institution?

11. Do you feel that you have any knowledge gaps related to SV? If so, what would you like to know more about?



12. In your view, what measures has your institution put in place to prevent SV?  
Please choose the most appropriate response. *Answer options: I don't know – Absent – Present but could be ameliorated – Present.*

- ☐ A. Clear and transparent policies that identify the steps to be taken and services to be provided in support of individuals experiencing SV
- ☐ B. Senior management team that regularly demonstrates its commitment to preventing SV through words and concrete actions
- ☐ C. Awareness campaigns that inform members of the teaching community about federal and provincial laws as well as the rules and policies of your post-secondary institution
- ☐ D. An impartial service for receiving and handling complaints that is able to provide the necessary follow-up for individuals experiencing SV and ensure they receive the necessary assistance
- ☐ E. A list of confidential and anonymous online options for individuals who have experienced SV and wish to report an incident or incidents
- ☐ F. Surveys prepared for and sent to staff members every year to gauge their perceptions regarding psychosocial safety and find out whether they have witnessed or experienced SV
- ☐ G. Safe and well-lit facilities
- ☐ H. Mandatory training on job-specific SV at every level of the organization
- ☐ I. Compilation of anonymous annual statistics on SV reported to the post-secondary institution's designated authorities
- ☐ J. Other: \_\_\_\_\_

13. What are the main barriers to your participation in efforts to prevent SV?  
You may choose more than one answer. *Answer options: Strongly agree – Agree – Neither agree nor disagree – Disagree – Strongly disagree – Not applicable.*

- ☐ A. I don't feel like it's my responsibility.
- ☐ B. I don't know how to react or what action to take.
- ☐ C. I already have enough to do in my workplace.
- ☐ D. I never see any SV.
- ☐ E. I am not comfortable with the subject.
- ☐ F. I am afraid that people won't believe me or will make fun of me.
- ☐ G. I am afraid to do so and that it won't make any difference.



- ☐ H. I don't want it to have a negative impact on my job.
- ☐ I. I don't want it to have a negative impact on my relationships with my colleagues.
- ☐ J. Other (suggestion): \_\_\_\_\_

14. Which of the following measures and resources would be the most useful in helping you become more engaged in efforts to prevent SV? *Answer options: Very useful – Useful – A little useful – Not at all useful – Not applicable*

- ☐ A. More information on legislation applicable to individuals who have experienced SV and the recourse available to them
- ☐ B. Clear instructions on the role of each department/job category in preventing SV
- ☐ C. Informative presentations (by people who have experienced SV, on the active witness process, etc.)
- ☐ D. Specific SV training courses, tailored to your role
- ☐ E. Identifying mentors (role models) among personnel
- ☐ F. An awareness-raising campaign (for example, stickers and promotional items) to express your commitment to preventing SV
- ☐ G. Clarifying your post-secondary institution's vision, mission, objectives and values in regard to the prevention of SV
- ☐ H. A management team that is more committed to preventing SV
- ☐ I. Other (suggestion): \_\_\_\_\_

15. In your view, what role can you play in preventing SV as a staff member? You may choose more than one answer. *Answer options: check boxes; check all that apply.*

- ☐ A. Take action whenever you witness SV
- ☐ B. Include SV-related examples in your courses (if appropriate and applicable)
- ☐ C. Present yourself as a resource in whom individuals experiencing SV can confide
- ☐ D. Listen to affected individuals' personal accounts (even if you do not publicly present yourself as a resource person)
- ☐ E. Lead by example (refrain from perpetuating SV yourself)
- ☐ F. Discuss SV with your colleagues and acknowledge that it exists
- ☐ G. Educate and inform others about available resources (for example, by including information on the subject in your course plan or e-mail signature)



■ H. Take part in extracurricular workplace awareness activities (for example, staffing an information kiosk or joining an association)

■ I. Other (suggestion): \_\_\_\_\_

## VERSION FOR MANAGERS

A broad definition of sexual violence (SV) includes *a range of behaviours such as sexual assault, exhibitionism, voyeurism, sexual harassment, cyberstalking, unwanted touching, threat of rape, sexual blackmail and other unwanted or non-consensual sexual behaviours.*

7. How committed do you feel you are to preventing SV in your workplace?



1

2

3

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9

10

Not at all committed

Strongly committed

8. How committed do you think your immediate superior is to preventing SV? If you do not have a hierarchical superior, please think of a person in authority to whom you occasionally report (such as a program head or a dean or assistant dean in your faculty or school).



1

2

3

4

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10

Not at all committed

Strongly committed

9. What do you think of the mandatory SV training offered by your institution?

10. Do you feel that you have any knowledge gaps related to SV? If so, what would you like to know more about?



11. In your view, what measures has your institution put in place to prevent SV?  
Please choose the most appropriate response. *Answer options: I don't know – Absent – Present but could be ameliorated – Present.*

- ☐ A. Clear and transparent policies that identify the steps to be taken and services to be provided in support of individuals experiencing SV
- ☐ B. Senior management team that regularly demonstrates its commitment to preventing SV through words and concrete actions
- ☐ C. Awareness campaigns that inform members of the teaching community about federal and provincial laws as well as the rules and policies of your post-secondary institution
- ☐ D. An impartial service for receiving and handling complaints that is able to provide the necessary follow-up for individuals experiencing SV and ensure they receive the necessary assistance
- ☐ E. A list of confidential and anonymous online options for individuals who have experienced SV and wish to report an incident or incidents
- ☐ F. Surveys prepared for and sent to staff members every year to gauge their perceptions regarding psychosocial safety and find out whether they have witnessed or experienced SV
- ☐ G. Safe and well-lit facilities
- ☐ H. Mandatory training on job-specific SV at every level of the organization
- ☐ I. Compilation of anonymous annual statistics on SV reported to the post-secondary institution's designated authorities
- ☐ J. Other: \_\_\_\_\_

12. What are the main barriers to your participation in efforts to prevent SV?  
You may choose more than one answer. *Answer options: Strongly agree – Agree – Neither agree nor disagree – Disagree – Strongly disagree – Not applicable.*

- ☐ A. I don't feel like it's my responsibility.
- ☐ B. I don't know how to react or what action to take.
- ☐ C. I already have enough to do in my workplace.
- ☐ D. I never see any SV.
- ☐ E. I am not comfortable with the subject.
- ☐ F. I am afraid that people won't believe me or will make fun of me.
- ☐ G. I am afraid to do so and that it won't make any difference.



- ☐ H. I don't want it to have a negative impact on my job.
- ☐ I. I don't want it to have a negative impact on my relationships with my colleagues.
- ☐ J. Other (suggestion): \_\_\_\_\_

13. In your view, what role can you play in preventing SV as a manager or supervisor? You may choose more than one answer. *Answer options: check boxes; check all that apply.*

- ☐ A. Present yourself publicly as a resource person in whom individuals experiencing SV can confide
- ☐ B. Take action whenever you witness SV
- ☐ C. Discipline staff members under your responsibility whose words or actions constitute SV
- ☐ D. Put an end to any SV incidents occurring within your unit
- ☐ E. Take actions and maintain messaging that demonstrate your desire to address SV
- ☐ F. Address the issue of SV openly with personnel under your responsibility
- ☐ G. Other (suggestion): \_\_\_\_\_

14. What could help you become more engaged and help your team's efforts to prevent SV? You may choose more than one answer. *Answer options: Not at all relevant – More or less relevant – Relevant – Very relevant – Not applicable.*

- ☐ A. More time to spend on the issue
- ☐ B. A bigger budget for hiring people qualified in the field
- ☐ C. More tools to help you learn how you can take action and help your employees do the same
- ☐ D. More information about the signs and repercussions of SV
- ☐ E. Clear instructions on the role of each department/job category in preventing SV
- ☐ F. Informative presentations (by people who have experienced SV, on the active witness process, etc.)
- ☐ G. Clarifying your post-secondary institution's vision, mission, objectives and values in regard to the prevention of SV
- ☐ H. Other: \_\_\_\_\_

15. So far, in your view, how engaged have the employees that you supervise been in efforts to prevent SV?



16. What techniques are you currently using to raise the level of staff engagement in general?

### END OF SURVEY

Thank you for taking part! Visit our website for more information at [www.couragetoact.ca](http://www.couragetoact.ca)!

If you have witnessed or experienced sexual violence and you want to talk to someone, you can find some of the resources available in your region here: <https://www.quebec.ca/famille-et-soutien-aux-personnes/violences/agression-sexuelle-aide-et-ressources/organismes-d-aide-auxvictimes/>



# Key Principles of Gender- Based Violence Investigations at PSIs:

A Guide for Workplace Investigations

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## **Land Acknowledgment**

We would like to begin by acknowledging that this work is taking place on and across the traditional territories of many Indigenous nations. We recognize that gender-based violence is one form of violence caused by colonialism that is used to marginalize and dispossess Indigenous peoples from their lands and waters. Our work on campuses and in our communities must centre this truth as we strive to end gender-based violence. We commit to continuing to learn and grow and to take an anti-colonial and inclusive approach to the work we engage with. It is our intention to honour this responsibility.

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The background features a dark blue field with large, flowing, pinkish-purple wavy lines. These lines are densely populated with small, bright pink dots. In the lower right corner, there is a distinct area containing several elongated, light blue-green shapes, possibly representing a different data set or a specific feature of interest.

# Introduction



## Courage to Act

Courage to Act is a national initiative to address and prevent gender-based violence (GBV) at post-secondary institutions (PSIs) in Canada. It is led by Possibility Seeds, a project management and policy development organization, directed by Farrah Khan and CJ Rowe, that works alongside communities, organizations, and institutions to cultivate gender equity. The project builds on key recommendations from the vital 2019 Courage to Act report. Funded by Women and Gender Equality Canada (WAGE), it

is the first collaborative of its kind to bring together 150+ GBV experts and advocates across Canada. Over the span of two years, the Courage to Act team and 10 Communities of Practice created a number of cutting-edge resources, presented over a National Skillshare Series from January-August 2021. Starting in Fall 2021, these resources will be piloted, refined, and implemented in order to inform, harmonize, and strengthen efforts to better address and prevent GBV at PSIs in Canada.

## Purpose of and Audience for the Work Community of Practice Tool

Campus workplace GBV complaints are situated at the nexus of an intricate web of legislation, legal standards, policies, collective agreements, and institutional practices. Their complexity introduces significant risk for institutions and the individuals involved. Foundational work carried out by consultants Stéfanie Tougas, Elizabeth Tuck, Rebecca Akong and Angela Bradley at the outset of this project (see Contributors section for details) highlighted a number of limitations in current approaches to campus workplace GBV complaint processes that exacerbate institutional and individual risks. In particular, Tuck and Akong's report identified the quality and effectiveness of an

investigation as a critical component of a fair and meaningful complaint process.

Participants indicated the need for support in conducting and managing comprehensive investigations. For this reason, we have created this tool to support the individuals responsible for ensuring the integrity of an investigation at three key stages, specifically:

1. Those who are tasked with hiring, appointing and/or advising workplace investigators for GBV complaints;
2. Workplace investigators; and

3. Those designated to evaluate the investigation report and advise on or make the decision on outcomes.

This tool provides the foundational principles of comprehensive campus workplace GBV investigations<sup>1</sup>:

- **Trauma-informed practice**
- **Procedural Fairness**
- **Equity**
- **Harm Reduction**

Most PSI policies are clear in their commitment to procedural fairness; what may be less explicit, or even misunderstood, is that a trauma-informed investigation, conducted with an equity lens and an aim to reduce harm, works to increase fairness and enhance the overall investigative process. This tool illustrates how each of these four principles work together to ensure that investigations are conducted and managed appropriately.

The benefits of a comprehensive investigation using the four principles are clear: enhanced well-being, participation and morale of the parties and those around them, retention of qualified personnel, and compliance with legal and regulatory requirements. On the other hand, the consequences of an investigation in which the human experience is neglected can be significant: costly and time-consuming grievances, high staff turnover, absenteeism, disengagement, medical leaves, and toxic workplaces.

The four principles inform the content

of the three checklists included in this guide to use when: (1) considering which investigator to appoint for a particular GBV complaint; (2) conducting investigations supported by the four principles; and (3) evaluating the investigator's report.

This tool should be used as a complement to four other resources that, together, provide a strong framework for applying important and necessary principles and practices to workplace GBV complaint processes at post-secondary institutions:

1. The policies and procedures of your own institution;
2. Courage to Act's Complaints Processes Community of Practice Learning Hub, which includes definitions, key concepts, and links to training for GBV investigators;
3. Environmental Scan of Relevant GBV Policies and Law for Canadian Post-Secondary Institutions (Tougas-Trihey, Naushan & Patel, 2021); and
4. A Comprehensive Guide to Campus Gender-Based Violence Complaints: Strategies for Procedurally Fair, Trauma Informed Processes to Reduce Harm (the Guide), created by Courage to Act's Reporting, Investigation and Adjudication Working Group (Eerkes, De Costa, & Jafry, 2021).

In particular, we recommend that investigators – and those appointing them – read Chapter 9 of the Guide, which walks through specific strategies for a procedurally fair and trauma-

<sup>1</sup> While this tool is aimed at workplace investigations, it is easily adaptable and applicable to investigating student misconduct in GBV cases.



informed investigation to reduce harm. Decision-makers are encouraged to read Chapter 10 - Adjudication, Outcomes and Appeals. In addition, we recommend Chapters 1-3, which provide in-depth introductions to procedural fairness, trauma-informed practice, and harm reduction, respectively. These

concepts, along with a good working knowledge of the institution's policies, procedures and collective agreements, will form the basis for a comprehensive investigation, and the ability to understand, assess, and interpret the investigation report.

## Regulatory Environment

The Environmental Scan of Relevant GBV Policies and Law for Canadian Post-Secondary Institutions (Tougas-Trihey, Naushan & Patel, 2021) provides information about campus sexual violence legislation across the country as well as institutional policies. In addition, those working in and around GBV investigations are governed by a variety of laws, standards, policies and practices.

### Enabling statute

### Employment law

### Common law

### Sexual violence/GBV policies

### Harassment policies

### Human rights legislation

### Occupational health and safety legislation

### Privacy legislation

### Collective agreements

### Equity, Diversity and Inclusion policies

### Respect/civility policies


### Rights and responsibilities

### Post-secondary GBV legislation

### Labour relations

This regulatory framework exists to ensure that what happens in and as a result of GBV investigations is both procedurally fair (the legal standard in administrative law), and non-discriminatory, in that it attenuates systemic and individual biases in the institution and works towards preventing and/or addressing toxic workplaces.

The ultimate goal is to ensure a safe working environment, free from harassment, discrimination, and violence, and to respond appropriately when that is not the case. This requires attending to both the legal requirements and the human experience of parties to a complaint process. The four principles: procedural fairness, trauma-informed practice, equity, and harm reduction strategies, work together to achieve this goal.

The background of the page is white with decorative pink elements. In the top right corner, there is a dense cluster of small pink dots. Along the left and right edges, there are vertical bands of pink brushstrokes and dots. The text is centered in the upper half of the page.

Familiarity with the regulatory framework is key – understanding how human rights and administrative law principles interact within the GBV investigation; ensuring rights and responsibilities are met; infusing trauma-informed practice to bolster the integrity of the investigation; implementing measures to reduce the discriminatory effects of an investigation; all while operating within a unionized environment. The complexity can be overwhelming. This tool aims to simplify the task.



The background is a solid teal color. Overlaid on this are several stylized fingerprint patterns in a bright yellow color. These patterns are arranged in a way that they appear to be scanning or highlighting the central text. The patterns consist of numerous small, irregular dots and lines, mimicking the ridges and valleys of a human fingerprint.

# Four Principles of a Comprehensive Gender-Based Violence Investigation

## Principle One: Trauma-Informed Practice

A trauma-informed approach to investigations is one that understands and responds to – but does not treat – the impact of trauma on all involved. In practice, it requires an investigator who recognizes and understands the variety of physical, psychological, and emotional impacts that trauma can have on complainants, respondents, witnesses, and others who are involved in the complaints process.

This requires a knowledge and understanding of :

- emotional, psychological, and physiological responses to trauma;
- how trauma responses are shaped by social, cultural, institutional, and historical contexts;
- how trauma responses are shaped by a person's past experiences, worldview, and position in society; and
- the role of power.

As you will see, applying a trauma-informed lens to investigations is an important tool to enhance procedural fairness, support equity, and reduce harm inherent in these processes. Trauma-informed practice is integral throughout the complaints process, including pre-, post-, and mid-investigation.

### Pre-investigation

Trauma-informed practice, applied prior to an investigation starting, lays

the foundation for an investigation that is not only trauma-informed, but that is fair, equitable, and reduces harm. One of the defining characteristics of an experience of trauma is a loss of control, making it especially important that all stages of the complaints process be rooted in informed consent. During the “pre-investigation stage,” this means ensuring that all parties know what to expect, the goals and limitations of the investigation, and the roles of each person involved.

This helps provide the complainant with some degree of control or self-determination in that they will better understand what will happen throughout the process, the level of participation they are able to commit to, and the ability to pause or withdraw their own participation, as well as the implications of each of these decisions. For respondents who may be coming to the investigation with their own trauma, managing expectations is one tool to prepare them for the process ahead. For all involved, a clear roadmap of the process mitigates against retraumatization, while also enhancing fairness and reducing harm.

### Investigation

Throughout an investigation, it is important that the investigator apply a strong understanding of trauma and its manifestations in all interactions.



This knowledge should be broad enough to recognize manifestations of trauma in the context of GBV, as well as the myriad individual and social contexts that will shape how a person experiences and responds to trauma (Katz & Haldar, 2016). This will allow an investigator to avoid falling into stereotypes, myths and misconceptions by recognizing that what might be interpreted as dishonesty (e.g., lack of eye contact, evasive answers, distancing, or counterintuitive responses such as laughter), could be symptoms of trauma. It ultimately enables evidence to be collected and assessed in a more fair and impartial manner, strengthening the fairness and equity of the process (Khan, Rowe & Bidgood, 2019; Haskell & Randall, 2019; Houskeeper, 2018; McCallum, 2019).

Understanding trauma and how it manifests requires knowledge of the various frameworks for defining trauma and trauma-informed practice. One important framework is the neurobiology of trauma, which provides the context for how trauma is stored in the brain, and the impacts this has on a survivor's memory encoding and recall, micro-expressions, non-verbal behaviours and verbal responses to questions. This understanding is particularly important to challenge assumptions, biases, and discriminatory stereotypes and contextualize seemingly contradictory behaviours that, if not properly understood, could result in incorrect assessments, unfair processes, and inflict harm on the complainant (Haskell & Randall, 2019; Peña, 2019; Smith, 2017).

Equally important is understanding how a person's past experiences, worldviews, and position in society, as well as the social, cultural, institutional, and historical context, influence trauma experiences and responses, which requires a race and gender analysis (Katz & Haldar, 2016; Garnett, 2016). This is important when interviewing a complainant, respondent, or witness. As trauma manifests itself in a number of different ways and can affect decision-making function, it is possible that where a respondent has experienced past trauma, their memory, affect, and verbal responses will also be affected. Thus, the psychological integrity of all involved in GBV complaint processes ought to be considered.

It is equally important that an investigator respond appropriately to manifestations of trauma, and approach all interactions with an assumption that trauma is present. Doing so helps to avoid (re)traumatization in the complainant, respondent, or witnesses, allows for more complete information to be collected, protects against discriminatory treatment, and reduces harm for all parties and others involved (Alberta Justice and Solicitor General, 2018; American College Health Association, 2020; Katz & Haldar, 2016; Khan et al., 2019; McCauley, 2015; Monahan-Kreishman & Ingarfield, 2018). Note that while it is important to recognize and respond to trauma, neither the presence or absence of trauma should be used as evidence itself, but rather to inform how evidence is collected and assessed (ATIXA, 2019; Lonsway & Archambault, 2019).

## Post-investigation

Trauma-informed practice does not end with the investigation. In fact, it is especially important that those involved in the investigation, including the complainant, respondent, witnesses, investigator, and others who may have been impacted, receive the support necessary to respond to experiences of trauma and potential retraumatization that may arise as a result of the investigation. It is the institution's responsibility to ensure each of these individuals are connected

with resources and support services as they navigate the after-effects of the investigation. For the institution, this requires an strong understanding of the resources and supports available, as well as attention to addressing gaps in access to support, such as limitations under Employee Assistance Programs and ensuring equitable access to support for precarious staff.

For a more detailed discussion, see the Guide, Chapter 2: Introduction to Trauma- Informed Practices, and Chapter 9: Investigation.



## TAKE FIVE FOR TRAUMA-INFORMED CARE

1. Providing a clear roadmap of the process, including what to expect, the goals and limitations of the investigation, and the roles of each person involved introduces a level of **transparency** around the process that supports informed decision-making, self-determination, and a sense of control.
2. Understanding and being able to recognize the signs and symptoms of trauma protects against **stereotypes**, myths, and misconceptions that can be incorrectly interpreted as dishonesty.
3. Allowing for **flexibility** in the investigation process and in the questions asked helps the investigator be responsive to the various ways trauma may manifest and allows for more accurate and complete information to be collected.
4. Using clear, simple, and accessible language, taking steps to reduce the processing load, and checking in with interviewees when **communicating** protect against misunderstandings that may be exacerbated when a person has experienced, or is experiencing trauma.
5. Applying trauma-informed practices to interactions with all parties and others involved in the investigation helps to **mitigate risk** by supporting confidence in the process.

## Principle Two: Procedural Fairness

The legal requirement for procedural fairness in workplace investigations rests on two fundamental elements: the right to a hearing and impartiality (Swaigen, 2010), which in turn lead to a suite of rights for parties to an administrative investigation.

### **Right to a hearing:**

- reasonable disclosure
  - summary of allegations and evidence
  - timely notice
- reasonable opportunity to respond
  - participatory rights
    - opportunity to submit evidence
    - opportunity to counter adverse evidence
  - timely process
  - written reasons

### **Impartiality:**

- Unbiased
  - free from conflicts
  - avoids presumptions
  - open mind
  - avoids stereotypes, myths
- independent
  - free from institutional pressure
  - no interference



Procedural fairness ensures the equitable and impartial administration of complaint processes by providing all parties to an administrative process certain procedural rights, which may be more or less robust depending on the circumstances at play. It is one of the cornerstones of administrative law, the area of law that applies to complaint processes at PSIs. It is imposed upon an investigation to explicitly counter the pressure that tends towards outcomes that may be biased or unfair. Ultimately, everyone in an investigation benefits from procedural fairness.

Procedural fairness is, by its very nature, responsive to the circumstances in a given situation. Therefore, it is variable and flexible, unlike the procedures involved in a criminal trial. Considerations<sup>2</sup> for determining the level of procedural fairness owed in a given case include:

- the legislation or governing policy relevant to the matter;
- the nature of the right at stake;
- the nature of the process selected by the complainant;
- decision makers' choice of procedures once the complainant selects a process; and
- legitimate expectations.

Other legal requirements include applying the “balance of probabilities”- the more likely than not - standard of proof, providing non-discriminatory processes, maintaining a safe and healthy workplace that is free from harassment and violence, and appropriate protection of personal information.

In order to meet these requirements, procedural fairness must be accompanied by measures that attend to the experience of the parties: equity, trauma-informed care, and harm reduction. An enduring misconception in the realm of administrative GBV complaints is that trauma-informed care, equity considerations, and harm reduction measures interfere with procedural fairness. In reality, the four principles, applied together, safeguard against bias or injustice where both parties are concerned.

For an in-depth examination of procedural fairness in PSI policy investigations, see the Guide, Chapter 2: Introduction to Procedural Fairness.

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<sup>2</sup> Baker v. Canada (Minister of Citizenship and Immigration), (1999) continues to be the authority on the standards for procedural fairness in administrative decisions. See Chapter 2 of the Guide for an analysis of how the Baker factors apply to GBV complaints in the PSI sector.



## TAKE FIVE FOR FAIRNESS

1. Reasonable disclosure, reasonable notice, and clear written reasons ensure **transparency** in the investigation.
2. Reliance on **stereotypes**, myths and misconceptions in an investigation introduces unacceptable bias.
3. Procedural **flexibility** allows the investigation to be responsive to the specific situation at hand.
4. **Communicating** key decision points to both parties provides the necessary rights to participate and respond.
5. Making the elements of procedural fairness available to both parties, particularly while including trauma-informed care and applying equity and harm reduction lenses, **mitigates the risk** of judicial review.

## Principle Three: Equity

The third principle, equity, seeks to address power imbalances and impacts of systemic oppression. Upholding the human rights of all parties (which includes a corresponding duty to accommodate) is legally required, but is not sufficient to mitigate the harms inherent in institutional cultures, policies, processes and practices that disproportionately benefit or disempower people according to gender, race, Indigeneity, religion, disability, immigration status, sexual orientation, age, socioeconomic status, and other factors.

Workplace investigations, like other complaints processes, can mimic and reproduce elements of colonial criminal justice systems that criminalize, stereotype and therefore disadvantage racialized and colonized

people. Workplace investigations that do not consider the impacts of systemic oppression on complainants, respondents and witnesses will then carry out processes with inherent biases towards marginalized and vulnerable parties. Failure to rectify and assuage the impacts of systemic oppression compromises the integrity of workplace investigations by inviting reliance on myths and mischaracterizations about racialized and colonized people into the process. Concerns about facing discrimination additionally discourage people most vulnerable to GBV from ever engaging in the process.

To apply principles of equity to workplace investigations, it is necessary to have an understanding of intersectionality,

**“[a] metaphor for understanding the ways that multiple forms of inequality or disadvantage are compounded and create obstacles that often are not considered within conventional ways of thinking,”**

*(Crenshaw, as cited in National Association of Independent Schools, 2018).*

Ensuring equity means recognizing how multiple systems of oppression – colonialism, racism, heterosexism, ableism, classism, and other forms of discrimination – are operating to disadvantage or harm a party to a complaint. This requires attention to power imbalances and intersectionality, and taking steps to mitigate these effects by dismantling internal biases, decolonizing complaints processes and limiting power imbalances wherever possible.

The important thing to remember is that when one party is disadvantaged at any stage of the complaint process, including the investigation, then procedural fairness has been compromised. Applying an equity lens fosters safer processes, thereby reducing harm and traumatization, and promotes procedural fairness. At each step along the way, investigators should be aware of both inherent systemic biases and their own assumptions that affect the fairness of

the process.

For those tasked with choosing investigators, it is integral to keep in mind candidates’ level of education regarding principles of anti-oppression. Training on its own is not enough; the investigator must continuously be alive to the potential for unfair treatment based on race, gender, gender identity, culture, religion, ability, and so on, at all times, and take steps to mitigate it wherever possible.

Lastly, equitable processes require addressing the impacts of power imbalances inherent to investigative processes. From the very outset, parties to a complaint are confined to their roles as contributors of information; other than offering evidence or testimony, they do not have power to make final decisions on the matter relating to the complaint, or assessing the evidence that is provided. Decision-makers and investigators on the other hand have the power to declare findings, render decisions, suggest remedies, and most importantly, apply discipline as a result of workplace investigations. This inevitable power imbalance is exacerbated by privileges afforded by white supremacy, ableism, homophobia, religious persecution, class and other social locations. While completely eliminating power imbalances may not be possible, investigators, as well as people tasked with hiring them, must make attempts to address imbalances throughout the process by offering transparency, support and access to resources during and after investigations.





## TAKE FIVE FOR EQUITY

1. Being **transparent** about the investigator's relationship to the institution helps address power imbalances between the parties and the person tasked with investigating the complaint.
2. Training, certifications and other anti-oppression resources can help investigators remain vigilant in avoiding **stereotypes** based on social location or mischaracterizations of marginalized communities.
3. **Flexibility** in referring to supports for parties that are culturally sensitive promotes equity.
4. Clear **communication** can include access to translation support, or other communication aids, throughout the process.
5. Investigators that are educated in anti-racism are more likely to understand and adhere to human rights legislation, **mitigating the risk** of discriminatory practice.

## Principle Four: Harm Reduction

The fourth principle, harm reduction, refers to a recognition that the processes designed to address gender-based violence in post-secondary institutions can themselves cause harm; and a series of practices that, wherever possible, seeks to limit and reduce the negative consequences of gender-based violence and gender-based violence complaints processes on the involved parties.

“Harm” in this context is attributed to the unavoidable stress, anxiety, discomfort and potential trauma experienced by parties to a complaint upon being interviewed or otherwise contacted about the sensitive, traumatic and emotionally distressing incident of sexual violence that initiated the report.

Despite best efforts to contain,

mitigate and prevent retraumatization by way of procedurally fair, trauma-informed and equitable practices, it is important to acknowledge that eliminating all harm from a complaints process may not be possible.

Workplace investigations are in their very nature “harmful” in the sense that they require the discussion, analysis and recollection of stressful and traumatizing events. Strategies like extending flexibility to parties throughout the complaints process, maintaining transparency, and delivering distressing news with care can help to reduce the overall anxiety experienced by both complainants and respondents.

**Flexibility** in an investigation may come in the form of extending deadlines, rescheduling interviews,

breaking up meetings into smaller segments, or allowing parties to engage with the process at their own pace or by their preferred method and style of communication.

**Transparency** refers to an active effort to inform parties of intentions, trajectories and administrators behind complaints processes. A transparent investigation is one where parties are aware of why they are being engaged, and for what purpose. A transparent investigation is additionally clear about how long the process will last, and when decisions will be made. Parties to a transparent process are informed of the people that will be assessing the information they are

sharing, and what to expect during each stage of the investigation.

**Delivering decisions** with care is the process of sharing findings, sanctions, remedies and other important developments in a complaint with attention to its language, timing and the impact it will have on the people receiving them.

To learn more about the importance of reducing harm, the ways in which it enhances procedural fairness while reducing retraumatization, and specific strategies for implementation throughout the workplace complaints process, refer to Chapter 3 of the Guide.



## TAKE FIVE FOR HARM REDUCTION

1. An investigator can practice **transparency** by offering information about their work history, for example, by giving parties access to their LinkedIn profile.
2. One way to avoid **stereotyping** in an investigation is to ask the parties what kind of guidance, resources, and help would be most useful for them.
3. Parties to a complaint may be triggered and require **flexibility** in the form of time extensions for providing evidence or responding to follow-up questions.
4. **Communications** sent to parties within working hours, Monday through Thursday, ensure that parties are able to access workplace supports when receiving bad news or requests for participation.
5. An investigator **mitigates risk** by being alert to symptoms and effects of trauma, stress, and anxiety for parties as they arise throughout the investigation, not just at the beginning.

## Checklist 1: The Four Principles for those appointing, hiring, and/or advising GBV investigators

The following checklist includes considerations and actions under each of the four principles necessary to uphold the integrity and effectiveness of a workplace GBV investigation. There are both legally required and best practice considerations. It is your duty to ensure that legal requirements are met and that best practices are considered and applied wherever possible.

---

### Trauma-Informed Practice:

- |   |  |
|---|--|
| <input type="checkbox"/> Does the investigator's work and education history include trauma-informed care? (Such as, for example, trauma-informed practitioner certification, or other courses and training pertaining to trauma-informed care?) | <input type="checkbox"/> Does the investigation plan include an identification of potential triggers and how to address them?                  |
| <input type="checkbox"/> Is the investigator able to explain how trauma affects memory encoding, recall, affect and behaviour?  | <input type="checkbox"/> Does the investigator feel comfortable with allowing designated support person(s) to be present during the interview? |
| <input type="checkbox"/> Is the investigator able to apply social, cultural, institutional, and historical contexts, including the role of power, to trauma manifestation?  | <input type="checkbox"/> Are interim measures required while the investigation is underway?  |
|   | <input type="checkbox"/> Have you informed the investigator of support resources available to them?  |

---

### Procedural Fairness

- |  |  |
|--|--|
| <input type="checkbox"/> Does the investigation plan include the required elements of procedural fairness? | <input type="checkbox"/> Reasonable disclosure (for both parties), and |
|--|--|



- ☐ Opportunity to respond (for both parties)
- ☐ Is the investigator

independent?

- ☐ Are there any potential conflicts of interest to manage?

---

## Equity

- ☐ Did you consider equitable representation when hiring or appointing an investigator, including choosing investigators reflective of the diversity of your community and the involved parties?
- ☐ Do the parties involved in the complaints process need translation support? And if so, does your investigator speak the language(s) of the parties/ has the investigator made a commitment to hiring a translator?
- ☐ Does the investigator's work and education background include training pertaining to anti-oppression?
- ☐ Has the investigator received training on dismantling internal/implicit biases?
- ☐ Is the investigator committed to anti-racism, decolonization and other tenets of anti-oppression?
- ☐ Is the investigator trained, equipped and committed to providing accessibility-related

needs throughout the process?

- ☐ Is the investigator aware of power imbalances and how to correct them?
- ☐ How does the investigator plan to address power imbalances in the investigation?
- ☐ Has the investigator conducted investigations within diverse, multiracial communities?
- ☐ Is the investigator trained in investigative processes that are not reliant on a police background or the criminal justice system?
- ☐ Does the investigation plan include strategies for avoiding myths, stereotypes and mischaracterizations of people affected by GBV?
- ☐ Does the investigation plan include strategies for avoiding myths, stereotypes and mischaracterizations of people from historically marginalized communities?

---

## Harm Reduction

- ☐ Does the investigation plan include ways to mitigate harm by providing access to resources and other supports to the involved parties?
- ☐ Is the investigator ready to offer information to parties about their work/education history?
- ☐ Is the investigator prepared to offer flexibility in stages throughout the process, including but not limited to:
  - ☐ Setting up times to conduct interviews/follow up questions
  - ☐ Including support person(s) during interviews
  - ☐ Referring parties to designated and approved supports from the employer
  - ☐ Suggesting interim measures

---

## Have you provided the following resources to the investigator?

- ☐ Applicable policies, procedures, and collective agreements
- ☐ Relevant union and/or student support information
- ☐ A Comprehensive Guide to Campus Gender-Based Violence Complaints: Strategies for Procedurally Fair, Trauma Informed Processes to Reduce Harm
- ☐ [Use The Right Words: Gender-Based Violence Language Guide](#)
- ☐ Letter, email or report templates
- ☐ Confidentiality statement/form
- ☐ Investigator checklist (see Worksheet 2)
- ☐ Relevant support available to the investigator

## Checklist 2: The Four Principles for Workplace Investigations

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### Trauma-Informed Practice

- ☐ Are your communications to involved parties being sent between 9am and 3pm, Monday and Friday (or whenever support services are available)?
- ☐ Have you provided information to all parties and witnesses about what to expect, the goals and limitations of the investigation, and the roles of each person involved?
- ☐ Have you affirmed that the investigation can be stressful, emotional, and frightening?
- ☐ Have you set up a schedule for breaks?
- ☐ Have you informed the interviewee that they can request a break at any time?
- ☐ Does your meeting take place between 9am and 3pm, Monday to Friday (or whenever support services are available)?
- ☐ Is your meeting limited to a 1 hour or 1.5 hour block? Have you communicated this to the interviewee?
- ☐ Have you told the interviewee that they can choose to end the interview at any time and schedule another day to meet?
- ☐ Have you informed the interviewee that they are entitled to:
  - ☐ A support person
  - ☐ Rescheduling the interview
- ☐ Have you prepared questions that focus on what the individual is able to recall? Are you prepared to ask questions that meet the interviewee where they are at?
- ☐ Have you informed the interviewee that if they cannot remember a detail that it is better that they say they do not remember than to fill in details?
- ☐ Have you clearly explained why you are asking tough or challenging questions?
- ☐ Does your interview plan use a “safe interview approach”?
- ☐ Are you conducting the interview in a safe space for the interviewee?
- ☐ What measures will you take if an interviewee is triggered? Are you prepared to respond



to the multitude of trauma responses that may arise?

- ☐ Have you taken into consideration the sensitivity of the questions you are posing and whether or not such questions should be asked over email?
- ☐ Have you asked the interviewee about their preferred method of

communication for follow-up questions?

- ☐ Have you asked the interviewee if they would like their support person included in communications?
- ☐ Do you have a plan to recognize and respond to your own experiences of Trauma Exposure Response?

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## Procedural Fairness

- ☐ Did you send the Notice of Investigation to both parties?
- ☐ Have you given both parties the opportunity to meet with you for a trauma-informed interview?
- ☐ Have you collected all of the available relevant evidence?
- ☐ Were both parties given the opportunity to review and respond to the evidence you've collected?
- ☐ Have you represented both parties' statements and responses in your report?
- ☐ Are your conclusions based on the evidence?
- ☐ Do your credibility assessments take into account the potential presence of trauma?

- ☐ Have you double-checked for myths, stereotypes and misconceptions that introduce bias in your report?
- ☐ Have you used appropriate language in describing the behaviour? (see [Use The Right Words: Gender-Based Violence Language Guide](#))
- ☐ Have you applied the balance of probabilities (50% plus a feather) standard of proof?
- ☐ Have you articulated clear, rational, and evidence-based reasons for your conclusions?
- ☐ Have you conducted the investigation in a timely manner, adhering to timelines in institutional policies or collective agreements where available?

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## Equity

- ☐ Have you included your pronouns in your email?
- ☐ Have you asked the parties for their pronouns?
- ☐ Have you informed the parties they are entitled to an interview that fits their access needs? (i.e. virtual, in-person, on or off-campus, over the phone, or by other means supplied by the PSI)
- ☐ Do your interview questions rely on stereotypes or myths about systemically marginalized communities and people affected by GBV?
- ☐ Have you conducted interviews within racially diverse communities? Does your work and education history include training/experience in the area of anti-oppression?
- ☐ Have you considered the cultural needs of involved parties?

---

## Harm Reduction

- ☐ Did your initial email include an explanation of your role and an overview of the investigative process?
- ☐ Have you informed the complainant you are a neutral, impartial investigator?
- ☐ Does your initial email include a link to your credentials/LinkedIn, and your background as an investigator?
- ☐ If your interview will be conducted over virtual means, have you asked if the complainant has access to a safe, confidential space?
- ☐ Have you offered availability that fits within their timezone?
- ☐ Have you explained the interview process to the complainant, including:
  - ☐ The differences between “balance of probabilities” and “beyond a reasonable doubt”
  - ☐ The concept of findings and how this differs from being found “guilty”
  - ☐ The concept of “evidence” and how evidence will be collected during the investigation

- 
- 
- ☐ Have you arranged for a meeting space that is confidential?
  - ☐ Have you sent an email the day prior confirming whether or not the location you've chosen feels safe for the interviewee?
  - ☐ Have you explained who your report will be shared with within the workplace?
  - ☐ Have you explained how your report will be compiled, and how long this process might take?
  - ☐ Have you informed complainants of delays before they arise?
  - ☐ Have you explained the reason behind delays as much as possible?



## Checklist 3: The Four Principles for those evaluating the investigator's report

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### Trauma-Informed Practice

- ☐ Does the report recognize and account for the potential presence of trauma?
- ☐ Did the investigator take the potential presence of trauma into account in assessing credibility?
- ☐ Did the investigator use trauma-informed interviewing with both parties?

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### Procedural Fairness

- ☐ Did the investigator inform both parties of their right to an advisor, support person and/or union representative?
- ☐ Did the investigator provide reasonable disclosure of the complaint to the respondent?
- ☐ Did the investigator provide the parties with an opportunity to submit additional information and/or evidence in support of their accounts?
- ☐ Did both parties have the opportunity to see and counter evidence that conflicts with their account?
- ☐ Did the investigator interview all of the relevant witnesses?
- ☐ Did the investigator collect all of the available relevant evidence (photos, screenshots, etc.)
- ☐ Does the report detail all of the evidence taken into account in making a finding?
- ☐ Did the investigator apply the balance of probabilities (or more likely than not) standard in coming to their conclusion?
- ☐ Is the reasoning clear and easy to understand?

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### Equity

- ☐ Were all potential power imbalances acknowledged, and

mitigated where possible?

☐ Did the investigator avoid prohibited questions, such as sexual history?

☐ Did the investigator avoid irrelevant victim-blaming questions, such as attire, substance/alcohol use, etc.?

☐ Did the investigator apply the

correct definitions relating to consent and the policy breach?

☐ Did the investigator reject stereotypes, mischaracterizations and myths about racialized and other marginalized communities?

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## Harm Reduction

☐ Did the investigator use appropriate language in describing the incident?

☐ Did the investigator avoid relying on myths, misconceptions or stereotypes?

## Further Reading

The following resources have been identified as useful for further reading to better understand the four principles and their application in investigations into complaints of workplace gender-based violence at post-secondary institutions. This is not a comprehensive list, and therefore it should be supplemented with the resources in Courage to Act's Complaints Processes Community of Practice Learning Hub and the Reporting, Investigation and Adjudication Working Group's "A Comprehensive Guide to Campus Gender-Based Violence Complaints: Strategies for Procedurally Fair, Trauma Informed Processes to Reduce Harm".

- Acton, B. (2019, October 15). *Psychological Trauma and Workplace Investigations: Six Steps for the Best Practice Method to Handle Traumatic Experiences During Investigations*. Falcongate. <https://falcongate.ca/2019/10/15/psychological-trauma-and-workplace-investigations/>
  - Bob Acton comes to trauma-informed investigations with a psychology background, and he has presented a webinar for the Canadian Chapter of the Association of Workplace Investigators (CAWI). The lists in this article are helpful guides to managing a trauma-informed investigation.
- Busby, K., & Birenbaum, J. (2020). *Achieving fairness: A guide to campus sexual violence complaints*. Thomson Reuters.
  - Karen Busby and Joanna Birenbaum, members of Courage to Act's Complaints Processes Community of Practice, wrote this pivotal book on procedural fairness and trauma-informed practice in institutional complaints processes, discussing potential procedural, evidentiary, substantive, and discretionary legal issues.
- Freyd, J. L. (2018, January 11). When Sexual Assault Victims Speak Out, Their Institutions Often Betray Them. *The Conversation*. <https://theconversation.com/when-sexual-assault-victims-speak-out-their-institutions-often-betray-them-87050>
  - Jennifer Freyd's work is at the forefront of employer and institutional responsibility for investigating allegations of sexual violence.
- McCallum, M. (2019, March 13). *Trauma informed practice in workplace investigations*. Canadian Bar Association British Columbia - Workplace Investigations Section. <https://www.cbabc.org/getattachment/Sections-and-Community/Workplace-Investigations/Resources/Minutes/2019/The-Trauma->



Informed-Approach-to-Investigations/CBA-BC-TIP-in-Workplace-Investigations-13Mar19.pdf

- McCallum, M. (Host). (2020-present). *The Trauma-Informed Lawyer* [Audio podcast]. Simplecast. <https://thetraumainformedlawyer.simplecast.com/>
  - Myrna McCallum is a Métis-Cree mother and grandmother from Treaty Six territory (Green Lake & Waterhen Lake First Nation). She is an expert on trauma-informed lawyering, investigations, adjudications and policy development, and conducts workplace investigations.
- Rohman, K. (2020, May 20). *Being Trauma-Informed in the Time of COVID*. Public Interest Investigations, Inc. <https://piila.com/being-trauma-informed-in-the-time-of-covid/>
- Rohman, K., Ingram, B., & Watkins, C. (2018, July 30). *Trauma-Informed Interviewing in Workplace Investigations*. Public Interest Investigations, Inc. <https://piila.com/trauma-informed-interviewing-in-workplace-investigations/>
  - Keith Rohman is a past president of the Association of Workplace Investigators. Keith brings a private investigator background to the work. He is also a proponent of the Forensic Experiential Trauma Interview (FETI) method, developed by Russell Strand.
- Rubin, J., & Thomlinson, C. M. (2018). *Human Resources Guide to Workplace Investigations: A Canadian HR Reporter Special Report*. Thomson Reuters.
  - Rubin Thomlinson is a Canadian law firm focused solely on workplace and institutional investigations. They offer training to HR professionals and workplace investigators as well as consulting and investigating individual cases.
- CertifiedFETI. (n.d.). *What is FETI (Forensic Experiential Trauma Interview)?*. <https://www.certifiedfeti.com/#:~:text=The%20Forensic%20Experiential%20Trauma%20Interview,%2C%20equitable%2C%20and%20of%20fair%20manner>
- Strand, R. (2016, December 21). *Forensic Experiential Trauma Interview: A Trauma Informed Experience* [Webinar]. End Violence Against Women International. <https://evawintl.org/courses/forensic-experiential-trauma-interview-a-trauma-informed-experience/>
  - Russell Strand is a training consultant and retired special agent from the U.S. Army who developed the Forensic Experiential Trauma Interview (FETI) methodology.

- SAMHSA. (2014). Trauma-Informed Care in Behavioral Health Services. Substance Abuse and Mental Health Services Administration (US), Treatment Improvement Protocol Series, No. 57. <https://www.ncbi.nlm.nih.gov/books/NBK207200/>
- SAMHSA's Trauma and Justice Strategic Initiative. (2014). *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*. Substance Abuse and Mental Health Services Administration. [https://ncsacw.samhsa.gov/userfiles/files/SAMHSA\\_Trauma.pdf](https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf)
  - The Substance Abuse and Mental Health Services Administration (SAMHSA) is an agency within the U.S. Department of Health and Human Services. They have published a book and report on trauma-informed care.

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*Informed Processes to Reduce Harm. Courage to Act: Addressing and Preventing Gender-Based Violence at Post-Secondary Institutions in Canada.* URL.

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- Houskeeper, E. (2018, August 2). Legal issues: Understanding trauma and fairness in sexual assault cases. *UVM Out.Reach*. <https://learn.uvm.edu/blog/blog-education/trauma-and-fairness-in-sexual-assault-cases>
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# **Appendix A: Environmental Scan of Relevant GBV Policies and Law for Canadian Post-Secondary Institutions**



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## Land Acknowledgment

We would like to begin by acknowledging that this work is taking place on and across the traditional territories of many Indigenous nations. We recognize that gender-based violence is one form of violence caused by colonialism that is used to marginalize and dispossess Indigenous peoples from their lands and waters. Our work on campuses and in our communities must centre this truth as we strive to end gender-based violence. We commit to continuing to learn and grow and to take an anti-colonial and inclusive approach to the work we engage with. It is our intention to honour this responsibility.

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# Relevant GBV Policies & Laws by Province and Territory

## British Columbia ([link to legislation](#))

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	<p>Yes</p> <p>Definitions</p> <p>“post-secondary institution” means an institution established or continued under one of the following Acts:</p> <p>(a) the College and Institute Act;</p> <p>(b) the Royal Roads University Act;</p> <p>(c) the Thompson Rivers University Act;</p> <p>(d) the University Act;</p>
<b>REQUIRES POST-SECONDARY INSTITUTION(S) TO DEVELOP SEPARATE STAND ALONE SEXUAL VIOLENCE POLICY FOR STUDENTS</b>	<p>Yes</p>
<b>REQUIRES THAT SEXUAL VIOLENCE POLICIES INCLUDE STAFF AND/OR THAT POST-SECONDARY INSTITUTIONS DEVELOP SEPARATE SEXUAL VIOLENCE POLICIES FOR STAFF</b>	<p>Not specifically</p>
<b>LEGISLATION INCLUDES DEFINITION OF SEXUAL VIOLENCE OR SEXUAL MISCONDUCT</b>	<p>Yes,</p> <p>“sexual misconduct” includes the following:</p> <p>(a) sexual assault;</p> <p>(b) sexual exploitation;</p> <p>(c) sexual harassment;</p> <p>(d) stalking;</p> <p>(e) indecent exposure;</p> <p>(f) voyeurism;</p> <p>(g) the distribution of a sexually explicit photograph or video of a person to one or more persons other than the person</p>



	<p>in the photograph or video without the consent of the person in the photograph or video and with the intent to distress the person in the photograph or video;</p> <p>(h) the attempt to commit an act of sexual misconduct;</p> <p>(i) the threat to commit an act of sexual misconduct;</p>
<b>DEFINITION INCLUDES ONLINE BEHAVIOURS/ACTIVITIES</b>	Yes
<b>POLICIES MUST SPECIFICALLY INCLUDE OFF-CAMPUS ACTIONS/ BEHAVIOURS</b>	Not specifically
<b>POLICIES MUST SPECIFY RESPONSE PROTOCOLS FOR THE INSTITUTION WHEN A COMPLAINT/REPORT IS MADE</b>	<p>Yes, article 2.</p> <p>Requirement for policy</p> <p>2 (1) A post-secondary institution must establish and implement a sexual misconduct policy that:</p> <p>(b) sets out procedures for the following:</p> <p>(i) making a complaint of sexual misconduct involving a student;</p> <p>(ii) making a report of sexual misconduct involving a student;</p> <p>(iii) responding to a complaint of sexual misconduct involving a student;</p> <p>(iv) responding to a report of sexual misconduct involving a student</p>
<b>POLICIES MUST SPECIFY TIMELINES FOR REPORTING AN INCIDENT TO LAW ENFORCEMENT</b>	No
<b>POLICIES MUST INCLUDE BYSTANDER INTERVENTION</b>	Not specifically
<b>POLICIES MUST BE MADE IN CONSULTATION WITH STUDENTS</b>	Yes
<b>MANDATORY EVALUATION/REVIEW OF POLICIES</b>	Yes, article 3. At least every 3 years OR if the Minister demands it.

<b>EVALUATION/REVIEWS OF POLICY MUST BE DONE IN CONSULTATION WITH STUDENTS</b>	Yes, article 4: A post-secondary institution must consult with students and with prescribed persons or prescribed classes of persons, if any, when the post-secondary institution  (a) establishes its first sexual misconduct policy under section 2, and  (b) reviews its sexual misconduct policy under section 3 (1).
<b>POST-SECONDARY INSTITUTIONS MUST RELEASE ANNUAL REPORTS TO PUBLIC</b>	Yes, article 4: A post-secondary institution must consult with students and with prescribed persons or prescribed classes of persons, if any, when the post-secondary institution  (a) establishes its first sexual misconduct policy under section 2, and  (b) reviews its sexual misconduct policy under section 3 (1).
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO A GOVERNING BODY</b>	Yes, article 6.
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO THE MINISTER</b>	No
<b>MINISTER MAY REQUIRE POST-SECONDARY INSTITUTIONS TO CONDUCT SURVEYS TO DETERMINE EFFECTIVENESS OF POLICIES</b>	Yes, article 5 (1) The minister may direct a post-secondary institution to conduct a survey for the purpose of assessing the effectiveness of its sexual misconduct policy.

## Alberta

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	<u><a href="#">No act or legal framework, but here is an interesting link to a public guideline</a></u>
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## Manitoba ([link to legislation](#))

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	<p>Yes,</p> <p>Article 2.2(2)</p> <p>This section applies to the following institutions:</p> <p>(a) a university and a college;</p> <p>(b) the Manitoba Institute of Trades and Technology continued under The Manitoba Institute of Trades and Technology Act;</p> <p>(c) an institution that is authorized to grant a degree under The Degree Granting Act.</p>
<b>REQUIRES POST-SECONDARY INSTITUTION(S) TO DEVELOP SEPARATE STAND ALONE SEXUAL VIOLENCE POLICY FOR STUDENTS</b>	Yes
<b>REQUIRES THAT SEXUAL VIOLENCE POLICIES INCLUDE STAFF AND/OR THAT POST-SECONDARY INSTITUTIONS DEVELOP SEPARATE SEXUAL VIOLENCE POLICIES FOR STAFF</b>	No
<b>LEGISLATION INCLUDES DEFINITION OF SEXUAL VIOLENCE OR SEXUAL MISCONDUCT</b>	<p>Yes,</p> <p>Article 2.2 (1)</p> <p>“sexual violence” means any sexual act or act targeting a person’s sexuality, gender identity or gender expression — whether the act is physical or psychological in nature — that is committed, threatened or attempted against a person without the person’s consent, and includes sexual assault, sexual harassment, stalking, indecent exposure, voyeurism and sexual exploitation. (« acte de violence à</p>



	caractère sexuel » ou « violence à caractère sexuel »)
<b>DEFINITION INCLUDES ONLINE BEHAVIOURS/ACTIVITIES</b>	Not specifically
<b>POLICIES MUST SPECIFICALLY INCLUDE OFF-CAMPUS ACTIONS/ BEHAVIOURS</b>	Not specifically
<b>POLICIES MUST SPECIFY RESPONSE PROTOCOLS FOR THE INSTITUTION WHEN A COMPLAINT/REPORT IS MADE</b>	Yes,  Article 2.2(3) In accordance with this section, a board must adopt and implement a policy for its institution that  (c) includes provisions respecting the prevention and reporting of incidents of sexual violence;  (e) establishes complaint procedures and response protocols for incidents of sexual violence.
<b>POLICIES MUST SPECIFY TIMELINES FOR REPORTING AN INCIDENT TO LAW ENFORCEMENT</b>	No
<b>POLICIES MUST INCLUDE BYSTANDER INTERVENTION</b>	No
<b>POLICIES MUST BE MADE IN CONSULTATION WITH STUDENTS</b>	Yes,  Article 2.2(4) In respect of an institution's sexual violence policy, the board must ensure that:  (a) the policy is  (i) developed in consultation with the students
<b>MANDATORY EVALUATION/REVIEW OF POLICIES</b>	Yes, every 5 years.  Article 2.2(5) Within five years after a board adopts its policy under this section, and within each subsequent five-year period after that, the board must undertake a comprehensive review of the policy that includes consultations with students.

<b>EVALUATION/REVIEWS OF POLICY MUST BE DONE IN CONSULTATION WITH STUDENTS</b>	Yes, article 2.2(5) (...) that includes consultations with students.
<b>POST-SECONDARY INSTITUTIONS MUST RELEASE ANNUAL REPORTS TO PUBLIC</b>	<p>Yes and No. The activities and results must be made public. It is not specified that they have to be “reported” or “annual.”</p> <p>The Act specifies in Article 2.2 (4) that “In respect of an institution’s sexual violence policy, the board must ensure that (...)</p> <p>(c) the <b>institution’s activities under the policy and the results</b> of those activities <b>are reported to the public;</b>”</p>
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO A GOVERNING BODY</b>	No
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO THE MINISTER</b>	No
<b>MINISTER MAY REQUIRE POST-SECONDARY INSTITUTIONS TO CONDUCT SURVEYS TO DETERMINE EFFECTIVENESS OF POLICIES</b>	No

## Ontario ([link to legislation](#))

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	<p>“Yes, all public colleges need to have a policy following the Ministry of Training, Colleges and Universities Act, R.S.O. 1990, c. M.19.</p> <p>Article 17(2) This section applies to every college of applied arts and technology and to every university that receives regular and ongoing operating funds from the government for the purposes of post-secondary education.”</p>
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<b>REQUIRES POST-SECONDARY INSTITUTION(S) TO DEVELOP SEPARATE STAND ALONE SEXUAL VIOLENCE POLICY FOR STUDENTS</b>	Yes
<b>REQUIRES THAT SEXUAL VIOLENCE POLICIES INCLUDE STAFF AND/OR THAT POST-SECONDARY INSTITUTIONS DEVELOP SEPARATE SEXUAL VIOLENCE POLICIES FOR STAFF</b>	No
<b>LEGISLATION INCLUDES DEFINITION OF SEXUAL VIOLENCE OR SEXUAL MISCONDUCT</b>	Yes  17. (1) In this section, “sexual violence” means any sexual act or act targeting a person’s sexuality, gender identity or gender expression, whether the act is physical or psychological in nature, that is committed, threatened or attempted against a person without the person’s consent, and includes sexual assault, sexual harassment, stalking, indecent exposure, voyeurism and sexual exploitation.
<b>DEFINITION INCLUDES ONLINE BEHAVIOURS/ACTIVITIES</b>	Not specifically
<b>POLICIES MUST SPECIFICALLY INCLUDE OFF-CAMPUS ACTIONS/ BEHAVIOURS</b>	Not specifically
<b>POLICIES MUST SPECIFY RESPONSE PROTOCOLS FOR THE INSTITUTION WHEN A COMPLAINT/REPORT IS MADE</b>	Yes
<b>POLICIES MUST SPECIFY TIMELINES FOR REPORTING AN INCIDENT TO LAW ENFORCEMENT</b>	No
<b>POLICIES MUST INCLUDE BYSTANDER INTERVENTION</b>	No
<b>POLICIES MUST BE MADE IN CONSULTATION WITH STUDENTS</b>	Yes, 17(4) (4) A college or university described in subsection (2) shall ensure



	that student input is considered, in accordance with any regulations, in the development of its sexual violence policy and every time the policy is reviewed or amended.
<b>MANDATORY EVALUATION/REVIEW OF POLICIES</b>	Yes, 17(5) (5) Every college or university described in subsection (2) shall review its sexual violence policy at least once every three years and amend it as appropriate.
<b>EVALUATION/REVIEWS OF POLICY MUST BE DONE IN CONSULTATION WITH STUDENTS</b>	Yes
<b>POST-SECONDARY INSTITUTIONS MUST RELEASE ANNUAL REPORTS TO PUBLIC</b>	No
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO A GOVERNING BODY</b>	Yes, Annual report to board of governors (7.1) Every college or university described in subsection (2) shall provide its board of governors with an annual report setting out, in respect of the preceding year, the information described in paragraphs 1, 2, 3 and 4 of subsection (7). 2016, c. 2, Sched. 3, s. 2 (1).
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO THE MINISTER</b>	Yes
<b>MINISTER MAY REQUIRE POST-SECONDARY INSTITUTIONS TO CONDUCT SURVEYS TO DETERMINE EFFECTIVENESS OF POLICIES</b>	Yes,  (9) The Minister may conduct, or may direct a college or university described in subsection (2) to conduct or participate in, a survey of students and other persons as identified by the Minister, relating to the effectiveness of the college's or university's sexual violence policy, to the incidence of sexual violence at the college or university and to any other matter mentioned in paragraphs 1 to 4 of subsection (7). 2016, c. 2, Sched. 3, s. 1.

	<p>Same</p> <p>(10) A college or university that is directed by the Minister to conduct a survey described in subsection (9) shall disclose the results of the survey to the Minister. 2016, c. 2, Sched. 3, s. 1.</p>
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## Quebec ([link to act](#))

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	Yes, article 2
<b>REQUIRES POST-SECONDARY INSTITUTION(S) TO DEVELOP SEPARATE STAND ALONE SEXUAL VIOLENCE POLICY FOR STUDENTS</b>	Yes, article 3
<b>REQUIRES THAT SEXUAL VIOLENCE POLICIES INCLUDE STAFF AND/OR THAT POST-SECONDARY INSTITUTIONS DEVELOP SEPARATE SEXUAL VIOLENCE POLICIES FOR STAFF</b>	<p>Some elements</p> <p>Article 3 (2) The policy must also include a code of conduct specifying the rules that a person who is in a teaching relationship with, or relationship of authority over, a student must comply with if the person has an intimate relationship, such as an amorous or sexual relationship, with the student.</p>
<b>LEGISLATION INCLUDES DEFINITION OF SEXUAL VIOLENCE OR SEXUAL MISCONDUCT</b>	<p>Yes</p> <p>Article 1</p> <p>(2) In this Act, the concept of sexual violence refers to any form of violence committed through sexual practices or by targeting sexuality, including sexual assault.</p> <p>(3) It also refers to any other misconduct, including that relating to sexual and gender diversity, in such forms as unwanted direct or indirect gestures, comments, behaviours or attitudes with sexual connotations, including by</p>

	technological means.
<b>DEFINITION INCLUDES ONLINE BEHAVIOURS/ACTIVITIES</b>	Yes, article 1 (3).
<b>POLICIES MUST SPECIFICALLY INCLUDE OFF-CAMPUS ACTIONS/ BEHAVIOURS</b>	Not specifically
<b>POLICIES MUST SPECIFY RESPONSE PROTOCOLS FOR THE INSTITUTION WHEN A COMPLAINT/REPORT IS MADE</b>	Yes
<b>POLICIES MUST SPECIFY TIMELINES FOR REPORTING AN INCIDENT TO LAW ENFORCEMENT</b>	Yes, article 3 (1) 11. the response times for accommodation measures to be implemented under subparagraph 8, services to be offered under subparagraph 9 and actions to be taken under subparagraph 10, which may not exceed 7 days, and the time frame for processing complaints, which may not exceed 90 days.
<b>POLICIES MUST INCLUDE BYSTANDER INTERVENTION</b>	No
<b>POLICIES MUST BE MADE IN CONSULTATION WITH STUDENTS</b>	<p>Yes, article 7</p> <p>7. The educational institution must establish a standing committee made up of students, officers and personnel members, among others, to develop and review the policy and make sure it is followed.</p> <p>The standing committee must, in addition, implement a process to ensure that students, officers, personnel members and their respective associations and unions are consulted during the policy development or review process.</p>
<b>MANDATORY EVALUATION/REVIEW OF POLICIES</b>	Yes, at least every 5 years (article 11)
<b>EVALUATION/REVIEWS OF POLICY MUST BE DONE IN CONSULTATION WITH STUDENTS</b>	Yes



<b>POST-SECONDARY INSTITUTIONS MUST RELEASE ANNUAL REPORTS TO PUBLIC</b>	No
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO A GOVERNING BODY</b>	No
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO THE MINISTER</b>	Yes, article 12
<b>MINISTER MAY REQUIRE POST-SECONDARY INSTITUTIONS TO CONDUCT SURVEYS TO DETERMINE EFFECTIVENESS OF POLICIES</b>	No

## Prince Edward Island ([link to legislation](#))

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	Yes, see s. 2(1), specifically s. 2(1)(d); s. 3(7)(f).
<b>REQUIRES POST-SECONDARY INSTITUTION(S) TO DEVELOP SEPARATE STAND ALONE SEXUAL VIOLENCE POLICY FOR STUDENTS</b>	The act does not specify whether the policy must be separate and distinct from existing non-academic misconduct policies.
<b>REQUIRES THAT SEXUAL VIOLENCE POLICIES INCLUDE STAFF AND/OR THAT POST-SECONDARY INSTITUTIONS DEVELOP SEPARATE SEXUAL VIOLENCE POLICIES FOR STAFF</b>	No
<b>LEGISLATION INCLUDES DEFINITION OF SEXUAL VIOLENCE OR SEXUAL MISCONDUCT</b>	Yes
<b>DEFINITION INCLUDES ONLINE BEHAVIOURS/ACTIVITIES</b>	Yes, see s. 3(1)(b)
<b>POLICIES MUST SPECIFICALLY INCLUDE OFF-CAMPUS ACTIONS/BEHAVIOURS</b>	No

<b>POLICIES MUST SPECIFY RESPONSE PROTOCOLS FOR THE INSTITUTION WHEN A COMPLAINT/REPORT IS MADE</b>	Yes, see s. 3(1)(f).
<b>POLICIES MUST SPECIFY TIMELINES FOR REPORTING AN INCIDENT TO LAW ENFORCEMENT</b>	No
<b>POLICIES MUST INCLUDE BYSTANDER INTERVENTION</b>	No
<b>POLICIES MUST BE MADE IN CONSULTATION WITH STUDENTS</b>	Yes, see s. 3(2).
<b>MANDATORY EVALUATION/REVIEW OF POLICIES</b>	Yes, see s. 5(1).
<b>EVALUATION/REVIEWS OF POLICY MUST BE DONE IN CONSULTATION WITH STUDENTS</b>	Yes, see s. 3(2).
<b>POST-SECONDARY INSTITUTIONS MUST RELEASE ANNUAL REPORTS TO PUBLIC</b>	No
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO A GOVERNING BODY</b>	Yes, see s. 7(e.1). Note that it is not specified whether reports are to be provided on an annual basis. It is simply stated that PSIs must provide reports to a governing body.
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO THE MINISTER</b>	No
<b>MINISTER MAY REQUIRE POST-SECONDARY INSTITUTIONS TO CONDUCT SURVEYS TO DETERMINE EFFECTIVENESS OF POLICIES</b>	No

## Yukon ([link to legislation](#))

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	Yes, as Yukon University is the only publicly-funded PSI in Yukon.
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<b>REQUIRES POST-SECONDARY INSTITUTION(S) TO DEVELOP SEPARATE STAND ALONE SEXUAL VIOLENCE POLICY FOR STUDENTS</b>	Per s. 23(2), there is no strict requirement that the policy stand alone.
<b>REQUIRES THAT SEXUAL VIOLENCE POLICIES INCLUDE STAFF AND/OR THAT POST-SECONDARY INSTITUTIONS DEVELOP SEPARATE SEXUAL VIOLENCE POLICIES FOR STAFF</b>	No
<b>LEGISLATION INCLUDES DEFINITION OF SEXUAL VIOLENCE OR SEXUAL MISCONDUCT</b>	Yes, see s. 23(1).
<b>DEFINITION INCLUDES ONLINE BEHAVIOURS/ACTIVITIES</b>	Yes, see s. 23(2)(a).
<b>POLICIES MUST SPECIFICALLY INCLUDE OFF-CAMPUS ACTIONS/ BEHAVIOURS</b>	No, there is no specification of this nature.
<b>POLICIES MUST SPECIFY RESPONSE PROTOCOLS FOR THE INSTITUTION WHEN A COMPLAINT/REPORT IS MADE</b>	Yes, see s. 23(2)(e).
<b>POLICIES MUST SPECIFY TIMELINES FOR REPORTING AN INCIDENT TO LAW ENFORCEMENT</b>	No
<b>POLICIES MUST INCLUDE BYSTANDER INTERVENTION</b>	Not specifically indicated in Act.
<b>POLICIES MUST BE MADE IN CONSULTATION WITH STUDENTS</b>	Not specifically indicated in Act.
<b>MANDATORY EVALUATION/REVIEW OF POLICIES</b>	Not specifically indicated in Act.
<b>EVALUATION/REVIEWS OF POLICY MUST BE DONE IN CONSULTATION WITH STUDENTS</b>	Not specifically indicated in Act.
<b>POST-SECONDARY INSTITUTIONS MUST RELEASE ANNUAL REPORTS TO PUBLIC</b>	Not specifically indicated in Act.



<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO A GOVERNING BODY</b>	Not specifically indicated in Act.
<b>POST-SECONDARY INSTITUTIONS MUST PROVIDE ANNUAL REPORTS TO THE MINISTER</b>	Not specifically indicated in Act.
<b>MINISTER MAY REQUIRE POST-SECONDARY INSTITUTIONS TO CONDUCT SURVEYS TO DETERMINE EFFECTIVENESS OF POLICIES</b>	Not specifically indicated in Act.

## New Brunswick

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	No public policy or legal framework, but <a href="#">general information at this link</a>
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## Saskatchewan, Nova Scotia, Newfoundland, Northwest Territories & Nunavut

<b>COVERS ALL PUBLICLY FUNDED POST-SECONDARY INSTITUTIONS</b>	No provincial act or legal framework
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Tougas, S., Naushan, A., & Patel, D. (2021). *Environmental Scan of Relevant GBV Policies and Law for Canadian Post-Secondary Institutions*. Courage to Act: Addressing and Preventing Gender-Based Violence at Post-Secondary Institutions in Canada.



# Post-Secondary Institutions' Sexual Violence Policies & Links

Note: "X" denotes that we were unable to locate the policy, or that the policy does not exist

Please note these links may change. If a link no longer works, try navigating from the institution's homepage, linked by name below.

## British Columbia

### UNIVERSITIES:

<b>Vancouver Island University</b>	<a href="https://adm.viu.ca/sites/default/files/policy41.17sexualmisconduct.pdf">https://adm.viu.ca/sites/default/files/policy41.17sexualmisconduct.pdf</a>
<b>Royal Roads University</b>	<a href="https://www.royalroads.ca/current-students/sexual-violence-information-students">https://www.royalroads.ca/current-students/sexual-violence-information-students</a> <a href="https://policies.royalroads.ca/policies/sexual-violence-misconduct-policy">https://policies.royalroads.ca/policies/sexual-violence-misconduct-policy</a>
<b>Simon Fraser University</b>	<a href="https://www.sfu.ca/policies/gazette/general/gp44.html">https://www.sfu.ca/policies/gazette/general/gp44.html</a> <a href="https://www.sfu.ca/sexual-violence.html">https://www.sfu.ca/sexual-violence.html</a>
<b>Trinity Western University</b>	<a href="https://www.twu.ca/sexualized-violence-information-and-response/sexualized-violence-information-and-response">https://www.twu.ca/sexualized-violence-information-and-response/sexualized-violence-information-and-response</a>
<b>Thompson River University</b>	<a href="https://www.tru.ca/current/wellness/sexual-violence/policy-consultation.html">https://www.tru.ca/current/wellness/sexual-violence/policy-consultation.html</a>
<b>University of the Fraser Valley</b>	<a href="https://ufv.ca/media/assets/secretariat/policies/Prevention,-Education-and-Response-to-Sexualized-Violence-(236).pdf">https://ufv.ca/media/assets/secretariat/policies/Prevention,-Education-and-Response-to-Sexualized-Violence-(236).pdf</a>
<b>University of British Columbia</b>	<a href="https://universitycounsel-2015.sites.olt.ubc.ca/files/2019/08/Sexual-Misconduct-Policy_SC17.pdf">https://universitycounsel-2015.sites.olt.ubc.ca/files/2019/08/Sexual-Misconduct-Policy_SC17.pdf</a>
<b>University of Northern British Columbia</b>	<a href="https://www.unbc.ca/sexual-violence">https://www.unbc.ca/sexual-violence</a>



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**University of Victoria**

<https://www.uvic.ca/sexualizedviolence/>

**COLLEGES:**

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**British Columbia Institute of Technology**

<https://www.bcit.ca/safety-security/safety-on-campus/sexual-violence-misconduct/policies-sexual-violence/>

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**Okanagan College**

[https://www.okanagan.bc.ca/sites/default/files/2020-03/sexual\\_violence\\_and\\_misconduct\\_policy.pdf](https://www.okanagan.bc.ca/sites/default/files/2020-03/sexual_violence_and_misconduct_policy.pdf)

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**Ashton College**

x

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**Brighton College**

x

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**Columbia College**

<https://www.columbiacollege.ca/wp-content/uploads/2018/11/Sexual-Violence-and-Misconduct-Policy-2018.pdf>

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**Camosun College**

<http://camosun.ca/about/policies/education-academic/e-2-student-services-and-support/e-2.9.pdf>

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**Canadian College**

x

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**Capilano University**

[https://www.capilanou.ca/student-life/support--wellness/sexual-violence-and-misconduct/?utm\\_source=svm&utm\\_medium=web&utm\\_campaign=Redirect](https://www.capilanou.ca/student-life/support--wellness/sexual-violence-and-misconduct/?utm_source=svm&utm_medium=web&utm_campaign=Redirect)

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**Collège Éducacentre**

<https://educacentre.com/le-college/politiques-institutionnelles-et-politique-de-confidentialite/politique-de-harcelement/>

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**College of the New Caledonia**

<https://cnc.bc.ca/services/counselling/sexual-misconduct>

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<b>College of the Rockies</b>	<a href="https://cotr.bc.ca/student-services/student-support/sexual-violence/">https://cotr.bc.ca/student-services/student-support/sexual-violence/</a>
<b>Douglas College</b>	<a href="https://www.douglascollege.ca/-/media/C858B4C85A38401CB6124E1035561246.ashx">https://www.douglascollege.ca/-/media/C858B4C85A38401CB6124E1035561246.ashx</a>
<b>Emily Carr</b>	<a href="https://www.ecuad.ca/assets/content-images/3.6-Sexual-and-Gender-Based-Violence-and-Misconduct-Policy.pdf">https://www.ecuad.ca/assets/content-images/3.6-Sexual-and-Gender-Based-Violence-and-Misconduct-Policy.pdf</a>
<b>Eton College</b>	<a href="https://www.etoncollege.com/userfiles/files/Safeguarding%20(Child%20Protection)%20Policy%20June.pdf">https://www.etoncollege.com/userfiles/files/Safeguarding%20(Child%20Protection)%20Policy%20June.pdf</a>
<b>Justice Institute of British Columbia</b>	<a href="https://www.jibc.ca/policy/sexual-violence-and-misconduct-students">https://www.jibc.ca/policy/sexual-violence-and-misconduct-students</a>
<b>Kwantlen Polytechnic University</b>	<a href="https://www.kpu.ca/sites/default/files/Policies/SR14%20Sexual%20Violence%20and%20Misconduct%20Policy.pdf">https://www.kpu.ca/sites/default/files/Policies/SR14%20Sexual%20Violence%20and%20Misconduct%20Policy.pdf</a>
<b>Langara College</b>	<a href="https://langara.ca/student-services/student-conduct-and-judicial-affairs/pdfs/Sexual%20Violence%20B3009.pdf">https://langara.ca/student-services/student-conduct-and-judicial-affairs/pdfs/Sexual%20Violence%20B3009.pdf</a>
<b>Native Education College</b>	x
<b>Nicola Valley Institute of Technology</b>	<a href="https://www.nvit.ca/sexualviolencepolicy/default.htm">https://www.nvit.ca/sexualviolencepolicy/default.htm</a>
<b>North Island College</b>	<a href="https://www.nic.bc.ca/pdf/policy-3-34-sexualized-violence-prevention-and-response.pdf">https://www.nic.bc.ca/pdf/policy-3-34-sexualized-violence-prevention-and-response.pdf</a>
<b>Northern Lights College</b>	<a href="https://www.nlc.bc.ca/Portals/o/documents/Policies/A-5_18.pdf">https://www.nlc.bc.ca/Portals/o/documents/Policies/A-5_18.pdf</a>
<b>Northwest Community College</b>	<a href="https://www.coastmountaincollege.ca/docs/default-source/policies/hr-policies-procedures/human-resources-payroll-procedures/sexual-violence-and-misconduct-procedure.pdf">https://www.coastmountaincollege.ca/docs/default-source/policies/hr-policies-procedures/human-resources-payroll-procedures/sexual-violence-and-misconduct-procedure.pdf</a>

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**Okanagan College**

[https://www.okanagan.bc.ca/Assets/Departments+\(Administration\)/Legal+Affairs/Sexual+Violence+and+Misconduct+Policy.pdf](https://www.okanagan.bc.ca/Assets/Departments+(Administration)/Legal+Affairs/Sexual+Violence+and+Misconduct+Policy.pdf)

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**Selkirk College**

<https://policies.selkirk.ca/policy/6030/>

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**Sprott Shaw College**

<https://sprottshaw.com/my-sprottshaw/sexual-misconduct-policy/>

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**Vancouver Community College**

<https://www.vcc.ca/media/vancouver-community-college/content-assets/documents/policies/A.3.10-Sexual-Violence-and-Misconduct-Policy-rev-min-2018-May.pdf>

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**Vancouver Institute of Media Arts**

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## Alberta

### UNIVERSITIES

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**Athabasca University**

[http://ous.athabascau.ca/policy/humanresources/Harassment,%20Violence,%20Sexual%20Violence/HVSV\\_pol.pdf](http://ous.athabascau.ca/policy/humanresources/Harassment,%20Violence,%20Sexual%20Violence/HVSV_pol.pdf)

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**Augustana University College**

<https://policiesonline.ualberta.ca/PoliciesProcedures/Policies/Sexual-Violence-Policy.pdf>

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**Concordia University College of Alberta**

<https://documents.concordia.ab.ca/s/Kegj8bQBTpqC6fiQCJYLtw>

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**The King's University College**

<https://www.kingsu.ca/public/download/documents/46472>

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<b>University of Alberta</b>	<a href="https://policiesonline.ualberta.ca/PoliciesProcedures/Policies/Sexual-Violence-Policy.pdf">https://policiesonline.ualberta.ca/PoliciesProcedures/Policies/Sexual-Violence-Policy.pdf</a> <a href="https://www.ucalgary.ca/policies/files/policies/sexual-violence-policy.pdf">https://www.ucalgary.ca/policies/files/policies/sexual-violence-policy.pdf</a>
<b>University of Calgary</b>	<a href="https://www.ucalgary.ca/policies/files/policies/sexual-violence-policy.pdf">https://www.ucalgary.ca/policies/files/policies/sexual-violence-policy.pdf</a>
<b>University of Lethbridge</b>	<a href="https://uleth.sharepoint.com/sites/Policy/Policies/Forms/AllItems.aspx?id=%2Fsites%2FPolicy%2FPolicies%2FPolicy%5FSexual%2FViolence%5FBOG%20Approved%20June%2013%5F2019%2Epdf&amp;parent=%2Fsites%2FPolicy%2FPolicies&amp;p=true&amp;originalPath=aHRocHM6Ly9rbGVoaC5zaGFyZXBvaW5oLmNvbS86Yjovcy9Qb2xpY3kvRVFLRE5wRol6ZlJNcXRUC3lXQl9lTWNCQXF4MVcyYnkxODBMRUUpOUm5lUUVuQT9ydGltZTRweSimejBZUjJFZw">https://uleth.sharepoint.com/sites/Policy/Policies/Forms/AllItems.aspx?id=%2Fsites%2FPolicy%2FPolicies%2FPolicy%5FSexual%2FViolence%5FBOG%20Approved%20June%2013%5F2019%2Epdf&amp;parent=%2Fsites%2FPolicy%2FPolicies&amp;p=true&amp;originalPath=aHRocHM6Ly9rbGVoaC5zaGFyZXBvaW5oLmNvbS86Yjovcy9Qb2xpY3kvRVFLRE5wRol6ZlJNcXRUC3lXQl9lTWNCQXF4MVcyYnkxODBMRUUpOUm5lUUVuQT9ydGltZTRweSimejBZUjJFZw</a>
<b>MacEwan University</b>	<a href="https://www.macewan.ca/contribute/groups/public/documents/policy/sexual_violence.pdf">https://www.macewan.ca/contribute/groups/public/documents/policy/sexual_violence.pdf</a>
<b>Mount Royal University</b>	<a href="https://www.mtroyal.ca/CampusServices/CampusResources/CampusEquityMeaningfulInclusion/SexualViolenceResponseAwareness/SSDATA_CEMI_SVRA_POLICY.htm">https://www.mtroyal.ca/CampusServices/CampusResources/CampusEquityMeaningfulInclusion/SexualViolenceResponseAwareness/SSDATA_CEMI_SVRA_POLICY.htm</a>

## Saskatchewan

### UNIVERSITIES

<b>First Nations University of Canada</b>	<a href="https://www.fnuniv.ca/about-us/policies/respectful-university/">https://www.fnuniv.ca/about-us/policies/respectful-university/</a>
<b>University of Regina</b>	<a href="https://www.uregina.ca/sexual-violence/">https://www.uregina.ca/sexual-violence/</a> <a href="https://www.uregina.ca/fm/campus-security/safety/index.html">https://www.uregina.ca/fm/campus-security/safety/index.html</a>

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**University of Saskatchewan**

<https://policies.usask.ca/policies/health-safety-and-environment/Sexual%20Assault%20Prevention%20.php>

**COLLEGES**

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**Bethany College**

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**Briercrest College and Seminary**

<https://www.briercrestcollege.ca/doc/?ID=59>

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**Carlton Trail Regional College**

<https://www.carltontrailcollege.com/about-us/our-policies-and-procedures/section-3-human-resources/3.34-sexual-assault>

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**Horizon College and Seminary**

<https://www.horizon.edu/wp-content/uploads/2020/01/Sexual-Assault-Policy-2019.pdf>

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**College Mathieu**

x

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**Cumberland College**

<https://www.cumberlandcollege.sk.ca/docs/319%20Sexual%20Assault%20Policy.pdf>

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**Eston College**

x

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**Great Plains College**

x

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**Nipawin Bible College**

x

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**Northlands College**

<https://trainnorth.ca/wp-content/uploads/publications/policies/508%20Sexual%20Assault.pdf>

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**North West Regional College**

x

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<b>Parkland College</b>	x
<b>Saskatchewan Indian Institute of Technologies</b>	<a href="https://siit.ca/wp-content/uploads/2018/12/Sexual-Violence-Policy.pdf">https://siit.ca/wp-content/uploads/2018/12/Sexual-Violence-Policy.pdf</a>
<b>Saskatchewan Institute of Applied Sciences and Technology</b>	<a href="https://saskpolytech.ca/about/about-us/documents/policies/sexualassaultandsexualviolence605.pdf">https://saskpolytech.ca/about/about-us/documents/policies/sexualassaultandsexualviolence605.pdf</a>
<b>Southeast Regional College</b>	x
<b>St Peter's College</b>	<a href="https://policies.usask.ca/policies/health-safety-and-environment/Sexual%20Assault%20Prevention%20.php">https://policies.usask.ca/policies/health-safety-and-environment/Sexual%20Assault%20Prevention%20.php</a>
<b>Western Academy Broadcasting College</b>	x

## Manitoba

### UNIVERSITIES

<b>Brandon University</b>	<a href="https://www.brandonu.ca/governors/files/Sexualized-Violence-Policy-June-2018-FINAL.pdf">https://www.brandonu.ca/governors/files/Sexualized-Violence-Policy-June-2018-FINAL.pdf</a>
<b>University of Manitoba</b>	<a href="https://umanitoba.ca/admin/governance/media/Sexual_Assault_Policy_-_2016_09_01.pdf">https://umanitoba.ca/admin/governance/media/Sexual_Assault_Policy_-_2016_09_01.pdf</a>
<b>University of Winnipeg</b>	<a href="https://www.uwinnipeg.ca/institutional-analysis/docs/policies/sexual-violence-policy.pdf">https://www.uwinnipeg.ca/institutional-analysis/docs/policies/sexual-violence-policy.pdf</a>
<b>Canadian Mennonite University</b>	<a href="http://www.cmu.ca/docs/studentlife/CMU_CMU_Sexual_Violence_Policy.pdf">http://www.cmu.ca/docs/studentlife/CMU_CMU_Sexual_Violence_Policy.pdf</a>



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**Université de Saint-Boniface**

<https://ustboniface.ca/file/documents---administration/documents---administration--politiques-et-règlements/Politique-en-matiere-de-violence-a-caractere-sexuel.pdf>

**COLLEGES**

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**Assiniboine Community College**

<https://assiniboine.net/sites/default/files/documents/2019-08/m14.pdf>

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**University College of the North**

x

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**Red River College of Applied Arts, Science and Technology**

<https://www.rrc.ca/legal/policies/sexual-violence/>

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**École technique et professionnelle, Université de Saint-Boniface**

<https://ustboniface.ca/une-nouvelle-politique-adoptee-pour-la-securite-de-tous-juin-2017?>

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**Manitoba Institute of Trades and Technology**

<https://mitt.ca/Content/Images/uploaded/policies/sv-1-sexual-violence-policy.pdf>

**Ontario****UNIVERSITIES**

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**Algoma University**

<https://www.algomau.ca/wp-content/uploads/2020/02/Sexual-Violence-Policy-Final-Nov.-13.19-3.pdf>

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**Brescia University College**

<http://brescia.uwo.ca/about/wp-content/uploads/sites/3/2014/03/HR-21-Sexual-Violence-Dec-2017.pdf>

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<b>Brock University</b>	<a href="https://brocku.ca/human-rights/wp-content/uploads/sites/55/Brock-Sexual-Assault-and-Harassment-Policy.pdf">https://brocku.ca/human-rights/wp-content/uploads/sites/55/Brock-Sexual-Assault-and-Harassment-Policy.pdf</a>
<b>Carleton University</b>	<a href="https://carleton.ca/secretariat/wp-content/uploads/Sexual-Violence-Policy.pdf">https://carleton.ca/secretariat/wp-content/uploads/Sexual-Violence-Policy.pdf</a>
<b>Dominican University College</b>	<a href="http://www.dominicanu.ca/sites/default/files/pdfs/Sexual%20Harassment%20Policy_DUC.pdf">http://www.dominicanu.ca/sites/default/files/pdfs/Sexual%20Harassment%20Policy_DUC.pdf</a>
<b>Huron University College</b>	<a href="https://huronatwestern.ca/sites/default/files/Policies%20and%20Procedures/Huron-Sexual%20Violence%20Policy%20FINAL%20-%20Revised%20Dec%202%202019.pdf">https://huronatwestern.ca/sites/default/files/Policies%20and%20Procedures/Huron-Sexual%20Violence%20Policy%20FINAL%20-%20Revised%20Dec%202%202019.pdf</a>
<b>King's University College at Western University</b>	<a href="https://www.kings.uwo.ca/kings/assets/File/policies/SexualViolencePolicy.pdf">https://www.kings.uwo.ca/kings/assets/File/policies/SexualViolencePolicy.pdf</a>
<b>Lakehead University</b>	<a href="https://www.lakeheadu.ca/sites/default/files/uploads/106/policies/Sexual%20and%20Gender%20Based%20Violence%20Response%20Policy.pdf">https://www.lakeheadu.ca/sites/default/files/uploads/106/policies/Sexual%20and%20Gender%20Based%20Violence%20Response%20Policy.pdf</a>
<b>Laurentian University</b>	<a href="https://www.ontario.ca/laws/statute/S16002">https://www.ontario.ca/laws/statute/S16002</a>
<b>McMaster University</b>	<a href="https://www.mcmaster.ca/vpacademic/Sexual_Violence_Docs/Sexual_Violence_Policy_effec-Jan_1,2017.pdf">https://www.mcmaster.ca/vpacademic/Sexual_Violence_Docs/Sexual_Violence_Policy_effec-Jan_1,2017.pdf</a>
<b>Nipissing University</b>	<a href="https://www.nipissingu.ca/sites/default/files/2018-08/NU_Sexual_Violence_Prevention_Support_Response_Policy_Dec_13_2016.pdf">https://www.nipissingu.ca/sites/default/files/2018-08/NU_Sexual_Violence_Prevention_Support_Response_Policy_Dec_13_2016.pdf</a>
<b>OCAD University</b>	<a href="https://www.ocadu.ca/Assets/documents/8011-Policy+on+Prevention+and+Response+to+Sexual+and+Gender-based+Violence.pdf">https://www.ocadu.ca/Assets/documents/8011-Policy+on+Prevention+and+Response+to+Sexual+and+Gender-based+Violence.pdf</a>
<b>Queen's University</b>	<a href="https://www.queensu.ca/sexualviolencesupport/">https://www.queensu.ca/sexualviolencesupport/</a>

<b>Redeemer University College</b>	x
<b>Royal Military College of Canada</b>	<a href="https://www.rmc-cmr.ca/en/college-commandants-office/rmcc-policy-harmful-inappropriate-sexual-behaviour">https://www.rmc-cmr.ca/en/college-commandants-office/rmcc-policy-harmful-inappropriate-sexual-behaviour</a>
<b>Ryerson University</b>	<a href="https://www.ryerson.ca/policies/policy-list/sexual-violence-policy/">https://www.ryerson.ca/policies/policy-list/sexual-violence-policy/</a>
<b>Saint Paul University</b>	<a href="https://ustpaul.ca/print.php?page=398">https://ustpaul.ca/print.php?page=398</a>
<b>St. Jerome's University</b>	x
<b>Trent University</b>	<a href="https://www.trentu.ca/sexualviolence/">https://www.trentu.ca/sexualviolence/</a>
<b>University of Guelph</b>	<a href="https://www.uoguelph.ca/secretariat/policy/1.4">https://www.uoguelph.ca/secretariat/policy/1.4</a>
<b>University of Ontario Institute of Technology</b>	<a href="https://studentlife.ontariotechu.ca/sexualviolence/policy.php">https://studentlife.ontariotechu.ca/sexualviolence/policy.php</a>
<b>University of Ottawa</b>	<a href="https://www.uottawa.ca/administration-and-governance/policy-67-sexual-harassment">https://www.uottawa.ca/administration-and-governance/policy-67-sexual-harassment</a>
<b>University of St. Michael's College</b>	<a href="https://stmikes.utoronto.ca/news/usmc-adopts-u-of-t-policy-on-sexual-violence-and-sexual-harassment/">https://stmikes.utoronto.ca/news/usmc-adopts-u-of-t-policy-on-sexual-violence-and-sexual-harassment/</a>
<b>University of Sudbury</b>	<a href="https://usudbury.ca/images/support/usudbury/Operations/SexualViolenceResponsePreventPOLICY_POLITIQUEInterventPr%C3%AgventionViolenceSexuelle.OCT2017FINAL.BIL.pdf">https://usudbury.ca/images/support/usudbury/Operations/SexualViolenceResponsePreventPOLICY_POLITIQUEInterventPr%C3%AgventionViolenceSexuelle.OCT2017FINAL.BIL.pdf</a>
<b>University of Toronto</b>	<a href="https://governingcouncil.utoronto.ca/secretariat/policies/sexual-violence-and-sexual-harassment-policy-december-12-2019">https://governingcouncil.utoronto.ca/secretariat/policies/sexual-violence-and-sexual-harassment-policy-december-12-2019</a>

<b>University of Trinity College</b>	<a href="https://www.trinity.utoronto.ca/discover/about/working-at-trinity/policies-plans-procedures/statement-of-adoption-u-of-t-policy-on-sexual-violence-sexual-harassment/">https://www.trinity.utoronto.ca/discover/about/working-at-trinity/policies-plans-procedures/statement-of-adoption-u-of-t-policy-on-sexual-violence-sexual-harassment/</a>
<b>University of Waterloo</b>	<a href="https://uwaterloo.ca/secretariat/policies-procedures-guidelines/policies/policy-42-prevention-and-response-sexual-violence">https://uwaterloo.ca/secretariat/policies-procedures-guidelines/policies/policy-42-prevention-and-response-sexual-violence</a>
<b>University of Western Ontario</b>	<a href="https://www.uwo.ca/univsec/pdf/policies_procedures/section1/mapp152.pdf">https://www.uwo.ca/univsec/pdf/policies_procedures/section1/mapp152.pdf</a>
<b>University of Windsor</b>	<a href="https://www.uwindsor.ca/sexual-assault/301/university-policies">https://www.uwindsor.ca/sexual-assault/301/university-policies</a>
<b>Victoria University</b>	x
<b>Wilfrid Laurier University</b>	<a href="https://www.wlu.ca/about/governance/assets/resources/12.4-gendered-and-sexual-violence-policy-and-procedures.html">https://www.wlu.ca/about/governance/assets/resources/12.4-gendered-and-sexual-violence-policy-and-procedures.html</a>
<b>York University</b>	<a href="https://secretariat-policies.info.yorku.ca/policies/sexual-violence-policy-on/">https://secretariat-policies.info.yorku.ca/policies/sexual-violence-policy-on/</a>

## COLLEGES

<b>Université de Guelph, Campus d'Alfred</b>	<a href="https://www.uoguelph.ca/secretariat/policy/1.4">https://www.uoguelph.ca/secretariat/policy/1.4</a>
<b>Algonquin College</b>	<a href="https://www.algonquincollege.com/pd/sa16/">https://www.algonquincollege.com/pd/sa16/</a>
<b>Collège Boréal</b>	<a href="https://www.collegeboreal.ca/nos-campus/securite/politique-sur-le-harcelement-sexuel">https://www.collegeboreal.ca/nos-campus/securite/politique-sur-le-harcelement-sexuel</a>
<b>Cambrian College of Applied Arts and Technology</b>	<a href="https://cambriancollege.ca/about/official-documents-and-policies/sexual-assault-and-sexual-violence/sexual-assault-and-sexual-violence-policy/">https://cambriancollege.ca/about/official-documents-and-policies/sexual-assault-and-sexual-violence/sexual-assault-and-sexual-violence-policy/</a>



<b>Canadore College of Applied Arts and Technology</b>	<a href="https://cdn.agilitycms.com/canadore-college/Attachments/about-us/policies/b-33-sexual-assault-violence-policy-19.pdf">https://cdn.agilitycms.com/canadore-college/Attachments/about-us/policies/b-33-sexual-assault-violence-policy-19.pdf</a>
<b>Centennial College of Applied Arts and Technology</b>	<a href="https://p.widencdn.net/Inxosl/BG100-03-Sexual-Violence-Policy">https://p.widencdn.net/Inxosl/BG100-03-Sexual-Violence-Policy</a>
<b>La Cité collégiale</b>	<a href="https://www.collegelacite.ca/directives/humaines/rh-14">https://www.collegelacite.ca/directives/humaines/rh-14</a>
<b>Conestoga College Institute of Technology and Advanced Learning</b>	<a href="https://studentsuccess.conestogac.on.ca/MyWellness/SexualAssaultAndViolence">https://studentsuccess.conestogac.on.ca/MyWellness/SexualAssaultAndViolence</a>
<b>Confederation College of Applied Arts and Technology</b>	<a href="https://www.confederationcollege.ca/safe-campus/sexual-assault-sexual-violence/sexual-assault-sexual-violence-policy">https://www.confederationcollege.ca/safe-campus/sexual-assault-sexual-violence/sexual-assault-sexual-violence-policy</a>
<b>Durham College</b>	<a href="https://durhamcollege.ca/student-life/health-and-wellness/living-well/sexual-violence-awareness">https://durhamcollege.ca/student-life/health-and-wellness/living-well/sexual-violence-awareness</a>
<b>Fanshawe College of Applied Arts and Technology</b>	<a href="https://www.fanshawec.ca/about-fanshawe/corporate-information/policies/sexual-violence-and-sexual-assault-policy">https://www.fanshawec.ca/about-fanshawe/corporate-information/policies/sexual-violence-and-sexual-assault-policy</a>
<b>Fleming College</b>	<a href="https://flemingcollege.ca/news/fleming-college-finalizes-policy-on-sexual-assault-and-sexual-violence/">https://flemingcollege.ca/news/fleming-college-finalizes-policy-on-sexual-assault-and-sexual-violence/</a>
<b>George Brown College</b>	<a href="https://www.georgebrown.ca/about/anti-racism-equity-and-human-rights-services/sexual-assault-violence">https://www.georgebrown.ca/about/anti-racism-equity-and-human-rights-services/sexual-assault-violence</a>
<b>Georgian College of Applied Arts and Technology</b>	<a href="https://www.georgiancollege.ca/wp-content/uploads/CS-006-Sexual-Violence-Procedure_November-5-2019.pdf">https://www.georgiancollege.ca/wp-content/uploads/CS-006-Sexual-Violence-Procedure_November-5-2019.pdf</a>
<b>Humber College Institute of Technology &amp; Advanced Learning University of Guelph, Kemptville Campus</b>	<a href="https://www.uoguelph.ca/secretariat/policy/1.4">https://www.uoguelph.ca/secretariat/policy/1.4</a>

<b>Lambton College of Applied Arts and Technology</b>	<a href="https://www.lambtoncollege.ca/uploadedFiles/LambtonCollege/Content/Programs/International/Student_Policies/Programs%20-%20International%20-%20Student%20Policies%20-%20Lambton%20in%20Toronto%20-%20Sexual%20Assault%20and%20Sexual%20Violence.pdf">https://www.lambtoncollege.ca/uploadedFiles/LambtonCollege/Content/Programs/International/Student_Policies/Programs%20-%20International%20-%20Student%20Policies%20-%20Lambton%20in%20Toronto%20-%20Sexual%20Assault%20and%20Sexual%20Violence.pdf</a>
<b>Loyalist College of Applied Arts and Technology</b>	<a href="http://www.loyalistcollege.com/wp-content/uploads/2015/03/March-31-2015-LC-Sexual-Assault-Policy-and-Protocol-v2.pdf">http://www.loyalistcollege.com/wp-content/uploads/2015/03/March-31-2015-LC-Sexual-Assault-Policy-and-Protocol-v2.pdf</a>
<b>The Michener Institute for Applied Health Sciences</b>	<a href="https://michener.ca/students/student-success-network/campus-safety/">https://michener.ca/students/student-success-network/campus-safety/</a>
<b>Mohawk College of Applied Arts and Technology</b>	<a href="https://www.mohawkcollege.ca/about-mohawk/security-and-emergency-management/security-services/crime-prevention/sexual-assault">https://www.mohawkcollege.ca/about-mohawk/security-and-emergency-management/security-services/crime-prevention/sexual-assault</a>
<b>Niagara College</b>	<a href="https://www.niagaracollege.ca/consentiskey/policy/">https://www.niagaracollege.ca/consentiskey/policy/</a>
<b>Northern College of Applied Arts and Technology</b>	<a href="https://www.niagaracollege.ca/consentiskey/policy/">https://www.niagaracollege.ca/consentiskey/policy/</a>
<b>St. Clair College of Applied Arts and Technology</b>	<a href="https://www.stclaircollege.ca/svp">https://www.stclaircollege.ca/svp</a>
<b>St. Lawrence College</b>	<a href="https://www.stlawrencecollege.ca/about/college-reports-and-policies/sexual-assault-policy/">https://www.stlawrencecollege.ca/about/college-reports-and-policies/sexual-assault-policy/</a>
<b>Sault College of Applied Arts and Technology</b>	<a href="https://www.saultcollege.ca/AboutUs/PDF/Policies/Sexual%20Assault%20%20Violence%20Policy%20and%20Protocol%20final%20-%20December%2015%202016.pdf">https://www.saultcollege.ca/AboutUs/PDF/Policies/Sexual%20Assault%20%20Violence%20Policy%20and%20Protocol%20final%20-%20December%2015%202016.pdf</a>
<b>Seneca College of Applied Arts and Technology</b>	<a href="https://www.senecacollege.ca/about/policies/sexual-violence-policy.html">https://www.senecacollege.ca/about/policies/sexual-violence-policy.html</a>

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**Sheridan College Institute  
of Technology and  
Advanced Learning**

[https://caps.sheridancollege.ca/products/  
SOCI70009\\_\\_SexualViolence.aspx](https://caps.sheridancollege.ca/products/SOCI70009__SexualViolence.aspx)

## Quebec

### UNIVERSITIES

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**Bishop's University**

[https://www.ubishops.ca/future-current-  
students/student-campus-life/student-  
services/health-wellness/sexual-assault/](https://www.ubishops.ca/future-current-students/student-campus-life/student-services/health-wellness/sexual-assault/)

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**Concordia University**

[https://www.concordia.ca/conduct/sexual-  
violence.html](https://www.concordia.ca/conduct/sexual-violence.html)

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**École de technologie  
supérieure**

[https://www.etsmtl.ca/docs/ets/gouvernance/  
secretariat-general/cadre-reglementaire/  
documents/politique-prevenir-violence-sexuel](https://www.etsmtl.ca/docs/ets/gouvernance/secretariat-general/cadre-reglementaire/documents/politique-prevenir-violence-sexuel)

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**École nationale  
d'administration publique**

[http://www.enap.ca/enap/246/Politiques\\_et\\_  
reglements.enap%20\(](http://www.enap.ca/enap/246/Politiques_et_reglements.enap%20)

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**École Polytechnique de  
Montréal**

[https://www.polymtl.ca/renseignements-  
generaux/documents-officiels/2-securite-des-  
biens-et-des-personnes](https://www.polymtl.ca/renseignements-generaux/documents-officiels/2-securite-des-biens-et-des-personnes)

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**HEC Montréal**

[https://www.hec.ca/a-propos/gouvernance/  
reglements-et-politiques/index.html](https://www.hec.ca/a-propos/gouvernance/reglements-et-politiques/index.html)

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**Institut national de la  
recherche scientifique**

[https://inrs.ca/sites/default/files/inrs/  
politiques\\_procedures\\_reglements/POL-  
Violences-caractere-sexuel-ANG-VFP.pdf](https://inrs.ca/sites/default/files/inrs/politiques_procedures_reglements/POL-Violences-caractere-sexuel-ANG-VFP.pdf)

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**McGill University**

[https://www.mcgill.ca/secretariat/policies-and-  
regulations](https://www.mcgill.ca/secretariat/policies-and-regulations)

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<b>TÉLUQ</b>	<a href="https://www.google.com/url?client=internal-element-cse&amp;cx=017856137496271779884:rkyfqd1ofyg&amp;q=https://www.telug.ca/site/documents/universite/civilite-et-prevention-violence-discrimination-harcelement-au-travail.pdf&amp;sa=U&amp;ved=2ahUKEwi_md3M1aTxAhX-FlkFHUfVBTsQFjAGegQICRAB&amp;usg=AOvVaw3mqOtBoleLhlvJXP4n2yno">https://www.google.com/url?client=internal-element-cse&amp;cx=017856137496271779884:rkyfqd1ofyg&amp;q=https://www.telug.ca/site/documents/universite/civilite-et-prevention-violence-discrimination-harcelement-au-travail.pdf&amp;sa=U&amp;ved=2ahUKEwi_md3M1aTxAhX-FlkFHUfVBTsQFjAGegQICRAB&amp;usg=AOvVaw3mqOtBoleLhlvJXP4n2yno</a>
<b>Université de Montréal</b>	<a href="https://secretariatgeneral.umontreal.ca/documents-officiels/reglements-et-politiques/">https://secretariatgeneral.umontreal.ca/documents-officiels/reglements-et-politiques/</a>
<b>Université de Sherbrooke</b>	<a href="https://www.usherbrooke.ca/a-propos/direction-et-gouvernance/documents-officiels/politiques/">https://www.usherbrooke.ca/a-propos/direction-et-gouvernance/documents-officiels/politiques/</a>
<b>Université de Québec</b>	x
<b>Université du Québec à Chicoutimi (UQAC)</b>	<a href="https://www.uqac.ca/mgestion/chapitre-5/reglement-relatif-au-milieu-de-vie-et-a-la-securite/politique-visant-a-prevenir-et-a-combattre-les-violences-a-caractere-sexuel/">https://www.uqac.ca/mgestion/chapitre-5/reglement-relatif-au-milieu-de-vie-et-a-la-securite/politique-visant-a-prevenir-et-a-combattre-les-violences-a-caractere-sexuel/</a>
<b>Université du Québec à Montréal (UQAM)</b>	<a href="https://instances.uqam.ca/reglements-politiques-et-autres-documents/politiques">https://instances.uqam.ca/reglements-politiques-et-autres-documents/politiques</a>
<b>Université du Québec à Rimouski (UQAR)</b>	<a href="https://www.uqar.ca/universite/a-propos-de-l-uqar/politiques-et-reglements/universite-du-quebec-a-rimouski/politiques">https://www.uqar.ca/universite/a-propos-de-l-uqar/politiques-et-reglements/universite-du-quebec-a-rimouski/politiques</a>
<b>Université du Québec à Trois-Rivières (UQTR)</b>	<a href="https://oraprdnt.uqtr.quebec.ca/vrsg/Reglementation/184.pdf">https://oraprdnt.uqtr.quebec.ca/vrsg/Reglementation/184.pdf</a>
<b>Université du Québec en Abitibi-Témiscamingue (UQAT)</b>	<a href="http://www.uquebec.ca/resolutions/uqat/resolutions/CA/2018/399-S-CA-4422.pdf">http://www.uquebec.ca/resolutions/uqat/resolutions/CA/2018/399-S-CA-4422.pdf</a>
<b>Université du Québec en Outaouais</b>	<a href="https://uqo.ca/secretariat-general/codes-politiques-regimes-des-etudes-reglements-et-autres-textes-reglementaires">https://uqo.ca/secretariat-general/codes-politiques-regimes-des-etudes-reglements-et-autres-textes-reglementaires</a>



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**Université de Laval**

<https://www.ulaval.ca/notre-universite/documents-officiels.html>

**COLLEGES**

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**Cégep de l'Abitibi-Témiscamingue**

<https://www.cegepat.qc.ca/grand-public/a-propos-du-cegep/politiques-et-reglements>

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**Collège Ahuntsic**

<https://www.collegeahuntsic.qc.ca/notre-college/reglements-politiques-et-directives>

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**Collège André-Laurendeau**

<https://www.claurendeau.qc.ca/grand-public/administration/publications/#reglements>

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**Cégep de Baie-Comeau**

<https://cegep-baie-comeau.qc.ca/a-propos/politique-reglements>

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**Cégep Beauce-Appalaches**

<https://cegepba.qc.ca/le-cegep/corporatif/politiques>

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**Collège de Bois-de-Boulogne**

<https://www.bdeb.qc.ca/services-aux-etudiants/services-daide/violences-sexuelles/>

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**Champlain Regional College**

<https://www.crc-sher.qc.ca/wp-content/uploads/20190412%20Sexual%20Violence%20Policy%20vBG%20approved%2020190412.pdf>

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**Cégep de Chicoutimi**

<https://cchic.ca/politiques>

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**Dawson College**

<https://www.dawsoncollege.qc.ca/wp-content/external-cludes/spdocs/documents/bog-dg-04-policy-on-sexual-violence.pdf>

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**Cégep de Drummondville**

<https://www.cegepdummond.ca/documents-officiels>

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**Cégep Édouard-Montpetit**

<https://www.cegepmontpetit.ca/cegep/a-propos-du-cegep/reglements-et-politiques#administration>

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<b>Collège François-Xavier-Garneau</b>	<a href="https://www.cegepgarneau.ca/cegep/documents-institutionnels">https://www.cegepgarneau.ca/cegep/documents-institutionnels</a>
<b>Cégep de la Gaspésie et des Îles</b>	<a href="https://cegepgim.ca/outils-contre-les-violences-sexuelles">https://cegepgim.ca/outils-contre-les-violences-sexuelles</a>
<b>Collège Gérald-Godin</b>	<a href="https://www.cgodin.qc.ca/mon-cegep/documentation-en-ligne">https://www.cgodin.qc.ca/mon-cegep/documentation-en-ligne</a>
<b>Cégep de Granby-Haute-Yamaska</b>	<a href="https://cegepgranby.ca/le-cegep/reglements-et-politiques/">https://cegepgranby.ca/le-cegep/reglements-et-politiques/</a>
<b>Heritage College</b>	<a href="https://www.cegep-heritage.qc.ca/Institution/About_Heritage_College/PoliciesRegulations.php">https://www.cegep-heritage.qc.ca/Institution/About_Heritage_College/PoliciesRegulations.php</a>
<b>John Abbott College</b>	<a href="http://www.johnabbott.qc.ca/about-jac/official-documents/">http://www.johnabbott.qc.ca/about-jac/official-documents/</a>
<b>Cégep de Jonquière</b>	<a href="https://www.cegepjonquiere.ca/media/tinymce/Menu%20de%20gauche/Politiques%20et%20reglements/Politique%20pour%20opr%C3%A9venir%20et%20contrer%20les%20violences%20%C3%A0%20caract%C3%A8re%20sexuel.pdf">https://www.cegepjonquiere.ca/media/tinymce/Menu%20de%20gauche/Politiques%20et%20reglements/Politique%20pour%20opr%C3%A9venir%20et%20contrer%20les%20violences%20%C3%A0%20caract%C3%A8re%20sexuel.pdf</a>
<b>Cégep de La Pocatière</b>	<a href="https://www.cegeplapocatiere.qc.ca/le-cegep/a-propos/documents-institutionnels">https://www.cegeplapocatiere.qc.ca/le-cegep/a-propos/documents-institutionnels</a>
<b>Cégep régional de Lanaudière</b>	<a href="https://www.cegep-lanaudiere.qc.ca/services-regionaux/nos-documents-officiels/politiques">https://www.cegep-lanaudiere.qc.ca/services-regionaux/nos-documents-officiels/politiques</a>
<b>Cégep de Lévis-Lauzon</b>	<a href="http://cll.qc.ca/cegep/politiques-et-reglements">http://cll.qc.ca/cegep/politiques-et-reglements</a>
<b>Cégep Limoilou</b>	<a href="https://www.cegeplimoilou.ca/le-cegep/politiques-et-reglements/?section=16265">https://www.cegeplimoilou.ca/le-cegep/politiques-et-reglements/?section=16265</a>
<b>Collège Lionel-Groulx</b>	<a href="http://www.clg.qc.ca/publications-et-documents-publics/reglements-politiques-directives-et-protocoles/">http://www.clg.qc.ca/publications-et-documents-publics/reglements-politiques-directives-et-protocoles/</a>

<b>Collège de Maisonneuve</b>	<a href="https://www.cmaisonneuve.qc.ca/a-propos/politiques-reglements/">https://www.cmaisonneuve.qc.ca/a-propos/politiques-reglements/</a>
<b>Cégep Marie-Victorin</b>	<a href="https://www.collegemv.qc.ca/sn_uploads/fck/a_propos_du_cegep/documents_officiels/politiques_et_reglements/Politique-no-47_m.pdf">https://www.collegemv.qc.ca/sn_uploads/fck/a_propos_du_cegep/documents_officiels/politiques_et_reglements/Politique-no-47_m.pdf</a>
<b>Cégep de Matane</b>	<a href="http://www.cegep-matane.qc.ca/cegep/politiques-reglements/">http://www.cegep-matane.qc.ca/cegep/politiques-reglements/</a>
<b>Collège Montmorency</b>	<a href="https://www.cmontmorency.qc.ca/wp-content/uploads/images/college/regles-et-reglements/politiques_institutionnelles/Politique-Violences-a-caractere-sexuel-VF.pdf">https://www.cmontmorency.qc.ca/wp-content/uploads/images/college/regles-et-reglements/politiques_institutionnelles/Politique-Violences-a-caractere-sexuel-VF.pdf</a>
<b>Cégep de l'Outaouais</b>	<a href="http://www.cegepoutaouais.qc.ca/index.php/documents-institutionnels">http://www.cegepoutaouais.qc.ca/index.php/documents-institutionnels</a>
<b>Cégep de Rimouski</b>	<a href="https://www.cegep-rimouski.qc.ca/b-generaux">https://www.cegep-rimouski.qc.ca/b-generaux</a>
<b>Collège de Rosemont</b>	<a href="https://www.crosemont.qc.ca/le-college/politiques-reglements">https://www.crosemont.qc.ca/le-college/politiques-reglements</a>
<b>Cégep de Saint-Félicien</b>	<a href="http://www.cegepstfe.ca/fr/page/documents-institutionnels-">http://www.cegepstfe.ca/fr/page/documents-institutionnels-</a>
<b>Cégep de Saint-Hyacinthe</b>	<a href="https://www.cegepsth.qc.ca/wp-content/uploads/2020/06/Politique_Prevention_Violences_Caractere_Sexuel_Et_Guide_Application_Traitement_Plaintes-15.pdf">https://www.cegepsth.qc.ca/wp-content/uploads/2020/06/Politique_Prevention_Violences_Caractere_Sexuel_Et_Guide_Application_Traitement_Plaintes-15.pdf</a>
<b>Cégep de Saint-Jean-sur-Richelieu</b>	<a href="https://www.cstjean.qc.ca/sites/cstjean.qc.ca/files/inline-files/Politique_visant_a_prevenir_et_a_combattre_les_violences_a_caractere_sexuel_2019-CA03-14_vf.pdf">https://www.cstjean.qc.ca/sites/cstjean.qc.ca/files/inline-files/Politique_visant_a_prevenir_et_a_combattre_les_violences_a_caractere_sexuel_2019-CA03-14_vf.pdf</a>
<b>Cégep de Saint-Jérôme</b>	<a href="https://www.cstj.qc.ca/a-propos-du-college-2-3-2/documents-officiels/politiques-reglements-procedures-et-guides/politiques/">https://www.cstj.qc.ca/a-propos-du-college-2-3-2/documents-officiels/politiques-reglements-procedures-et-guides/politiques/</a>
<b>Cégep de Saint-Laurent</b>	<a href="https://www.cegepsl.qc.ca/cegep/documents-administratifs">https://www.cegepsl.qc.ca/cegep/documents-administratifs</a>

<b>Cégep de Sainte-Foy</b>	<a href="https://www.cegep-ste-foy.qc.ca/notre-cegep/politiques-et-reglements/politiques-et-reglements/">https://www.cegep-ste-foy.qc.ca/notre-cegep/politiques-et-reglements/politiques-et-reglements/</a>
<b>Cégep de Sept-Îles</b>	<a href="https://www.cegep-sept-iles.qc.ca/le-cegep/documentation">https://www.cegep-sept-iles.qc.ca/le-cegep/documentation</a>
<b>Collège Shawinigan</b>	<a href="https://www.collegeshawinigan.ca/le-college/publications/politiques-et-reglements">https://www.collegeshawinigan.ca/le-college/publications/politiques-et-reglements</a>
<b>Cégep de Sherbrooke</b>	<a href="https://www.cegepsherbrooke.qc.ca/sites/default/files/politique_violence_vca_site.pdf">https://www.cegepsherbrooke.qc.ca/sites/default/files/politique_violence_vca_site.pdf</a>
<b>Cégep de Sorel-Tracy</b>	<a href="http://www.cegepst.qc.ca/cegep-sorel-tracy/politiques-reglements">http://www.cegepst.qc.ca/cegep-sorel-tracy/politiques-reglements</a>
<b>Cégep de Thetford</b>	<a href="https://www.cegepthetford.ca/wp-content/uploads/2019/06/Politique-visant-%C3%A0-pr%C3%A9venir-et-%C3%A0-combattre-les-violences-%C3%A0-caract%C3%A8re-sexuel-12-juin-19.pdf">https://www.cegepthetford.ca/wp-content/uploads/2019/06/Politique-visant-%C3%A0-pr%C3%A9venir-et-%C3%A0-combattre-les-violences-%C3%A0-caract%C3%A8re-sexuel-12-juin-19.pdf</a>
<b>Cégep de Trois-Rivières</b>	<a href="https://www.cegeptr.qc.ca/politiques-reglements-procedures">https://www.cegeptr.qc.ca/politiques-reglements-procedures</a>
<b>Collège de Valleyfield</b>	<a href="https://www.colval.qc.ca/index.php/notre-cegep-accueil/documents/politiques">https://www.colval.qc.ca/index.php/notre-cegep-accueil/documents/politiques</a>
<b>Vanier College</b>	<a href="https://www.vaniercollege.qc.ca/bylaws-policies-procedures/files/2018/11/Sexual-Violence-Prevention-Response-Official-Policy-Procedural-Documents-Approved-November-20-18.pdf">https://www.vaniercollege.qc.ca/bylaws-policies-procedures/files/2018/11/Sexual-Violence-Prevention-Response-Official-Policy-Procedural-Documents-Approved-November-20-18.pdf</a>
<b>Cégep de Victoriaville</b>	<a href="https://www.cegepvicto.ca/cegep/documents-officiels/politique">https://www.cegepvicto.ca/cegep/documents-officiels/politique</a>
<b>Cégep du Vieux Montréal</b>	<a href="http://www.cvm.qc.ca/cegep/reglespolitiques/Pages/index.aspx">http://www.cvm.qc.ca/cegep/reglespolitiques/Pages/index.aspx</a>
<b>Collège Bart</b>	<a href="https://bart.ca/vcs/">https://bart.ca/vcs/</a>
<b>Collège Jean-de-Brébeuf</b>	<a href="https://www.brebeuf.qc.ca/collegial/vie-etudiante/violences-caractere-sexuel/">https://www.brebeuf.qc.ca/collegial/vie-etudiante/violences-caractere-sexuel/</a>



<b>Collège Laflèche</b>	<a href="https://www.clafleche.qc.ca/conseil-dadministration-adopte-politique-visant-a-prevenir-a-combattre-violences-a-caractere-sexuel/">https://www.clafleche.qc.ca/conseil-dadministration-adopte-politique-visant-a-prevenir-a-combattre-violences-a-caractere-sexuel/</a>
<b>LaSalle College</b>	x
<b>Marianopolis College</b>	<a href="http://www.marianopolis.edu/about/policies/">http://www.marianopolis.edu/about/policies/</a>
<b>Collège International Marie de France</b>	x
<b>Collège Mérici</b>	<a href="https://www.merici.ca/services/violences-a-caractere-sexuel-guichet-unique/">https://www.merici.ca/services/violences-a-caractere-sexuel-guichet-unique/</a>
<b>O'Sullivan College of Montreal</b>	x
<b>Collège O'Sullivan de Québec</b>	x
<b>Collège Stanislas</b>	<a href="http://www.stanislas.qc.ca/montreal/medias/pdf/2021_Plan_de_lutte_intimidation.pdf">http://www.stanislas.qc.ca/montreal/medias/pdf/2021_Plan_de_lutte_intimidation.pdf</a>
<b>École de musique Vincent d'Indy</b>	x
<b>National Circus School</b>	<a href="https://www.ecolenationaledecirque.ca/sites/default/files/content-image/politique_lutte_contre_la_violence_a_caractere_sexuel_enc_clean.pdf?_gl=1*Iseogf2*_ga*MjAxMzI4MjgwNC4xNjloMTQwMTMo*_ga_8QY8oWNM92*MTYyNDEoMDEzMy4xLjEuMTYyNDEoMDE3MS4w">https://www.ecolenationaledecirque.ca/sites/default/files/content-image/politique_lutte_contre_la_violence_a_caractere_sexuel_enc_clean.pdf?_gl=1*Iseogf2*_ga*MjAxMzI4MjgwNC4xNjloMTQwMTMo*_ga_8QY8oWNM92*MTYyNDEoMDEzMy4xLjEuMTYyNDEoMDE3MS4w</a>
<b>Séminaire de Sherbrooke</b>	x
<b>Trebas Institute</b>	x

# New Brunswick

## UNIVERSITIES

### Mount Allison University

[https://www.mta.ca/Community/Governance\\_and\\_admin/Policies\\_and\\_procedures/Section\\_1000/Policy\\_1006/Policy\\_1006/#:~:text=Mount%20Allison%20University%20%7C%20Policy%201006&text=Sexual%20Violence%20is%20unacceptable%20and,is%20free%20from%20sexual%20violence.&text=This%20policy%20applies%20to%20all%20members%20of%20the%20Mount%20Allison%20community.](https://www.mta.ca/Community/Governance_and_admin/Policies_and_procedures/Section_1000/Policy_1006/Policy_1006/#:~:text=Mount%20Allison%20University%20%7C%20Policy%201006&text=Sexual%20Violence%20is%20unacceptable%20and,is%20free%20from%20sexual%20violence.&text=This%20policy%20applies%20to%20all%20members%20of%20the%20Mount%20Allison%20community.)

### St. Thomas University

<https://www.stu.ca/media/stu/site-content/current-students/registrarx27s-office/academic-calendar/2017-2018/Policy-on-Sexual-Violence-2017.pdf>

### Université de Moncton

[https://www.umoncton.ca/umce-saee/files/umce-saee/wf/wf/pdf/umoncton\\_politique\\_portant\\_sur\\_la\\_violence\\_a\\_caractere\\_sexuel\\_decembre\\_2017.pdf](https://www.umoncton.ca/umce-saee/files/umce-saee/wf/wf/pdf/umoncton_politique_portant_sur_la_violence_a_caractere_sexuel_decembre_2017.pdf)

### University of New Brunswick

[https://www.unb.ca/fredericton/\\_assets/documents/vp/sexualassaultpolicy.pdf](https://www.unb.ca/fredericton/_assets/documents/vp/sexualassaultpolicy.pdf)

## COLLEGES

### New Brunswick College of Craft and Design

x

### New Brunswick Community College

[https://nbcc.ca/docs/default-source/policies/sexual-violence.pdf?sfvrsn=4ed95454\\_8](https://nbcc.ca/docs/default-source/policies/sexual-violence.pdf?sfvrsn=4ed95454_8)

### Maritime College of Forest Technology

x

## Nova Scotia

*Each university and college shall adopt a sexual violence policy within six months of the coming into force of this Act.*

### UNIVERSITIES

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**Acadia University**

[https://counsel.acadiau.ca/tl\\_files/sites/counsel/resources/PDF/Sexual%20Violence%20Policy.pdf](https://counsel.acadiau.ca/tl_files/sites/counsel/resources/PDF/Sexual%20Violence%20Policy.pdf)

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**Cape Breton University**

<https://www.cbu.ca/wp-content/uploads/2018/09/Sexual-Violence-Policy-Guidelines-5.pdf>

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**Dalhousie University**

[https://cdn.dal.ca/content/dam/dalhousie/pdf/dept/university\\_secretariat/policy-repository/Sexualized%20Violence%20Policy%20APPROVED.pdf](https://cdn.dal.ca/content/dam/dalhousie/pdf/dept/university_secretariat/policy-repository/Sexualized%20Violence%20Policy%20APPROVED.pdf)

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**Mount Saint Vincent University**

[http://www2.msvu.ca/DocumentCentral/Documents/Sexual%20Assault%20\(Policy%20Against\).pdf](http://www2.msvu.ca/DocumentCentral/Documents/Sexual%20Assault%20(Policy%20Against).pdf)

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**NSCAD University**

<https://navigator.nscad.ca/wordpress/wp-content/uploads/2018/12/5.8-Sexualized-Violence-Policy-5.pdf>

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**Saint Mary's University**

<https://smu.ca/webfiles/SexualAssaultPolicyandProcedures.pdf>

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**St. Francis Xavier University**

<https://www.stfx.ca/sites/default/files/Sexual%20Violence%20Policy.pdf>

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**Université Sainte-Anne**

<https://www.usaintanne.ca/images/documents/ressources-humaines/politiques/Politique-violence-sexuelle-04-02-2017.pdf>

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**University of King's College**

<http://policies.ukings.ca/wp-content/uploads/2019/03/20190328UKCSVP.pdf>

**COLLEGES****Canadian Coast Guard College**

x

**Gaelic College**

x

**Kingston Bible College**

x

**Nova Scotia Community College**

<https://www.nsc.ca/docs/about-nsc/policies-procedures/sexual-violence-policy.pdf>

**P. E. I.****UNIVERSITIES****University of Prince Edward Island**

[https://files.upei.ca/policy/sexual\\_violence\\_policy\\_govbrdgnl0019.pdf](https://files.upei.ca/policy/sexual_violence_policy_govbrdgnl0019.pdf)

**COLLEGES****Holland College**

[https://www.hollandcollege.com/search\\_results.html?q=sexual+policy&cx=017090960449374259949%3Aa897ffoi9ek&cof=FORID%3AII&sa=Submit#gsc.tab=0&gsc.q=sexual%20policy&gsc.page=1](https://www.hollandcollege.com/search_results.html?q=sexual+policy&cx=017090960449374259949%3Aa897ffoi9ek&cof=FORID%3AII&sa=Submit#gsc.tab=0&gsc.q=sexual%20policy&gsc.page=1)

**Maritime Christian College**

x



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**Collège Acadie Î.-P.-É.**

x

## Newfoundland and Labrador

### UNIVERSITIES

**Memorial University of  
Newfoundland**

<https://www.mun.ca/policy/browse/policies/view.php?policy=321>

### COLLEGES

**College of the North  
Atlantic**

[https://www.cna.nl.ca/About/pdfs/policies-and-procedures/President's%20Office/Harrassment/1Policy/PO-005\\_Harrassment.pdf](https://www.cna.nl.ca/About/pdfs/policies-and-procedures/President's%20Office/Harrassment/1Policy/PO-005_Harrassment.pdf)

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**Marine Institute**

<https://www.mi.mun.ca/calendar/current/studentinformation/harassmentdiscrimination/>

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**Centre for Nursing Studies**

x

## Yukon

### COLLEGES

**Yukon College**

<https://www.yukonu.ca/news/201809/yukon-college-adopts-new-sexualized-violence-prevention-and-response-policy>

## Northwest Territories

### COLLEGES

<b>Aurora College</b>	x
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<b>Academy of Learning College</b>	x
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## Nunavut

### COLLEGES

<b>Nunavut Arctic College</b>	<a href="https://static1.squarespace.com/static/5b1954d75cfd798b94327249/t/5bcf3d6341920254ff7ea72d/1540308325808/E.OI-2012.pdf">https://static1.squarespace.com/static/5b1954d75cfd798b94327249/t/5bcf3d6341920254ff7ea72d/1540308325808/E.OI-2012.pdf</a>
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# **Links to Union GBV Resources**

## CUPE

- ▶ [CUPE Search](#)
- ▶ [Stop Workplace Sexual Violence - A Guide for CUPE Locals](#)
- ▶ [Post-secondary gender-based violence strategy must include workers](#)
- ▶ [Post-secondary sector](#)

## PSAC

- ▶ [Anti-Harassment: The Union - PSAC Policy 23B](#)

## UNIFOR

- ▶ [Workplace Harassment Model Language](#)
- ▶ [Unifor Policy Against Harassment in the Workplace](#)

## ST MICHAEL'S COLLEGE - UOFT

- ▶ [Human Resources](#)

## UOFT

- ▶ [Sexual Violence and Sexual Harassment, Policy ON](#)

## YORK UNIVERSITY

- ▶ [Sexual Harassment: A Guide for Students, Faculty, and Staff](#)

## UNIVERSITÉ STE- BONIFACE

- ▶ [Ressources humaines](#)



**ALGONQUIN  
COLLEGE**

- ▶ [Sexual Harassment at Work](#)

**DURHAM  
COLLEGE**

- ▶ [Durham College Policy and Procedure, Harassment, Workplace Sexual Harassment and Discrimination](#)

**UBC**

- ▶ [Personal Safety on Campus](#)
- ▶ [UBC Sexual Assault Policy and Resources](#)

**UNIVERSITÉ  
DE  
MONTRÉAL**

- ▶ [Politique Visant À Prévenir Et À Combattre Les Inconduites Et Les Violences À Caractère Sexuel](#)

**UQAM**

- ▶ [https://instances.uqam.ca/wp-content/uploads/sites/47/2019/04/Politique\\_no\\_16\\_2.pdf](https://instances.uqam.ca/wp-content/uploads/sites/47/2019/04/Politique_no_16_2.pdf)
- ▶ [Bureau d'intervention et de prévention en matière de harcèlement](#)

**UPEI**

- ▶ [UPEI Sexual Violence Policy](#)
- ▶ [Contact the SV-PRO](#)

**UNIVERSITY  
OF  
MANITOBA**

- ▶ [Office of Human Rights and Conflict Management-Sexual Harassment](#)

# **The Impact of Trauma on Adult Sexual Assault Victims**

2019

Report Submitted to: Justice Canada

by

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## Executive Summary

Sexual assault is a widespread and serious problem in our society. Yet instead of delivering justice the criminal justice system is too often a source of further distress for victims of sexual assault.

It is well known that many victims choose not to report the crimes of sexual violence committed against them. For those who choose to report and go through the trial process, sexual assault complainants have frequently experienced the criminal justice system as a place that re-traumatizes and even harms them.

Sexual assault is very often an experience of trauma. Trauma has a neurobiological impact – it affects our brains and our nervous-systems. For this reason, it is imperative that those working within the criminal justice system have a basic appreciation of the effects and impact of trauma in relation to victims of sexual assault. This will help criminal justice professionals process sexual assault cases more effectively and to receive evidence in these cases in a more fair and impartial manner.

There has been an important and significant paradigm shift in our understanding about victim reactions to traumatic events like sexual assault, including the impact of trauma on memory. This understanding has deepened knowledge and led to improved practices, both of which assist with developing more effective criminal justice system responses to sexual assault cases. Insights from the neurobiology of trauma has assisted professionals working in a wide range of fields to better understand the psychological and physiological responses of crimes such as sexual assault, and how these affect victim response. This in turn, has facilitated more trauma-informed service delivery and more appropriate and effective interventions, from first responders like police through to advocates and legal professionals in courtrooms.

The focus of this report is on outlining some of the key findings from the body of knowledge of neuroscience, and applying them to the issue of sexual assault and its impacts on victims. More specifically, we review and highlight some of the significant developments, which have emerged from the field of the neurobiology of trauma as they relate to the unique crime of sexual assault. We apply their relevance to the many challenges surrounding the criminal processing of sexual assault cases.

Victim reactions to sexual assaults are still not well understood in society and “rape myths” are still common. These misunderstandings, unfortunately, continue to persist in the justice system. In fact, they contribute to ongoing deficiencies in criminal justice system processing of sexual assault cases, leading to imperfect justice for victims and survivors. This has been described as the “justice gap” for sexual assault cases. We argue that this justice gap can, in part, be closed by moving towards a more trauma-informed criminal justice system. This will lead to more just outcomes for sexual assault complainants and also allow for the fuller realization of the impartiality and fairness that criminal trials can and should provide for all participants.

## PART I – The Traumatic Impact of Sexual Assault on Victims

### Introduction

All professionals working in the criminal justice system – Crown attorneys, judges, police officers, and defence lawyers – want to see justice done and do their work as effectively as possible without harming anyone. Both their professional duties and ethics require this of them. Yet it is well known and well documented that sexual assault complainants have too often experienced the criminal justice system as a place that retraumatizes and even harms them. (Lonsway & Archambault, 2012; Temkin & Krahé, 2008) How can this problem be remedied?

Law reform and policy changes have brought about some necessary improvements to the way the criminal justice system processes sexual assault cases. However, much work remains to be done. Recently, a significant paradigm shift in knowledge about victims' reactions to traumatic events like sexual assault has led to a deeper understanding of the neurobiological impacts on the brain's defence circuitry and on memory encoding and recall. This has allowed for improved sensitivity to the range and diversity of victim trauma responses. It has already generated some improved police practices and has the potential to assist with developing further effective criminal justice system responses for processing sexual assault cases.

Society at large still does not understand victims' reactions to sexual assaults. Unfortunately, these misunderstandings also continue to persist in the legal system and contribute to serious ongoing deficiencies in how the criminal justice system processes sexual assault cases. These deficiencies have been most starkly felt by Indigenous women in Canada, who experience disproportionately high rates of sexual victimization and who have also experienced the most tragic gaps in police and criminal justice system responses.<sup>1</sup> Other groups of racialized women, disabled women, young women, women who have used alcohol or drugs, are impoverished or homeless, or have other circumstances of marginality, are particularly vulnerable to sexual assault as well as decreased access to justice.<sup>2</sup>

This leads to imperfect justice for victims and survivors, also described as the “justice gap” for sexual assault cases. We argue that this justice gap can, in part, be closed by moving towards a more trauma-informed criminal justice system, that is, one based on a neurobiological understanding of how the brain processes trauma. This will lead to more just outcomes for sexual assault complainants. It will also move us towards the fuller realization of the impartiality and fairness that criminal trials should provide all participants, including the victims of sexual assault.

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<sup>1</sup> Research by Statistics Canada reveals that Indigenous women are subject to violent victimization at a rate 2.7 times that of non-Indigenous women, including violent attacks of varying types. For sexual assault specifically, Indigenous women have rates 3 times higher than that of non-Indigenous women.

Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia Canada*, (Human Rights Watch: 2013), online: [http://www.hrw.org/sites/default/files/reports/canada0213webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/canada0213webwcover_0.pdf); See also, Craig, E. (2016) Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside 60:1 McGill Law Journal.

<sup>2</sup> See for example Conroy, S., & Cotter, A. (2017). *Self-Reported Sexual Assault in Canada, 2014* (Statistics Canada). Ottawa, ON. See also, Benoit, C. et al (2015). *Issue Brief: Sexual Violence Against Women in Canada* (Statistics Canada), Ottawa, ON.

This report outlines highlights from this body of knowledge, and applies them to the issue of sexual assault and its impacts on victims. The report also reviews and highlights some of the key findings about the neurobiology of trauma that are relevant to the unique crime of sexual assault. We apply these findings to the many challenges surrounding the criminal processing of sexual assault cases.<sup>3, 4</sup>

### How Myths and Misunderstandings about Sexual Assault Affect How Victim Testimony is Heard

Sexual assaults are both pervasive and unique crimes. As Justice Peter Cory of the Supreme Court of Canada has noted, a sexual assault is “an assault upon human dignity and constitutes a denial of any concept of equality for women.” (*R. v. Osolin*, 1994, para. 165) Sexual assault is overwhelmingly a gendered crime and women’s responses to sexual assault are deeply shaped by gender socialization. Sexual assault is also an intensely private crime that is caught up in and reflects social expectations about gender roles and sexuality. For all these reasons, sexual assault is highly challenging to prosecute. (see, for example, Cameron, 2003)

Because the victim-witness in a sexual assault trial is, in the overwhelming majority of cases, the primary or even exclusive source of evidence, her testimony is of crucial importance. Yet it is precisely in how this testimony is heard, received, and understood, including *misunderstood*, that many of the difficulties in how the criminal justice system processes sexual assault cases arise. This is because many of the misunderstandings continue to arise from still commonly held rape myths, failures to understand common trauma reactions, and mistaken assumptions about small and apparent inconsistencies in recall about upsetting and traumatic events. These lead to the mistaken belief that victim-witness testimony lacks credibility or reliability.

There are a number of rape myths about women and sexual violence that have been formally rejected by the Supreme Court of Canada and by important law reform<sup>5</sup>. Yet these rape myths still persist. These are the mistaken and pernicious ideas that a woman who is “promiscuous” or of so-called “unchaste” character is untrustworthy and more likely to have consented to the sexual acts in question (which are the subject of the sexual assault charge); these are the “twin myths” the Supreme Court repudiated in enacting s. 276 of the *Criminal Code*, otherwise known as Canada’s “rape shield law”. Another persistent rape myth is the baseless idea that women who do not promptly disclose or report sexual assaults are lying, or the mistaken idea that women who do not want to engage in sex will physically fight back and/or attempt to escape the situation to “prove” they really did not consent. Many still cling to the erroneous idea that women who use drugs or alcohol are responsible for sexual assaults perpetrated against them, or

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<sup>3</sup> We use various terms to refer those who have been sexually assaulted, including using victim and survivor interchangeably. We use “complainant” specifically in the context of a criminal trial. It is also important to note that the terms “rape” and “sexual assault” are both used throughout the report, though the term rape is used mostly to reference rape myths. The term “sexual assault” is most often used as this is the broader and general legal term which captures a wide range of sexual contact without consent.

<sup>4</sup> As research has documented and the Supreme Court of Canada has recognized, sexual assault is a gendered crime, with most victims female and most perpetrators male. As such, in this report, we typically refer to sexual assault victims as female, given that the vast majority of sexual assault victims are women, though we recognize that sexual assaults can also be perpetrated against men.

<sup>5</sup> See for example, *R v G(A)*, SCC (2000) and *R v Ewanchuk*, SCC (1999).



mistakenly believe that consent is continuous in intimate relationships and does not need to be explicitly given, even between partners.

Research literature extensively documents that women who are sexually assaulted are still subject to social pressures to respond in particular ways to “prove” that they are “real” and “credible” victims. (see for example, Busby, 1999; Randall, 2010) While the justice system recognizes that there is no single “ideal victim” of sexual assault, social attitudes are nevertheless slow to change. Women who deviate from expected scripts are still treated by police and the courts with suspicion and skepticism – about whether or not they were really sexually assaulted, or whether or not they were to blame for what happened to them.

Social expectations to conform to the stereotype of what real or “ideal” victims (Randall, 2010) look like mean that women who are sexually assaulted are expected to do the following:

- offer physical and/ or verbal resistance to unwanted sex;
- express clear and explicit non-consent to unwanted sexual contact;
- discontinue contact with the person who has been inappropriate sexually or who has assaulted them; and
- demonstrate perfect or near perfect recall, including a consistent and linear narrative of “what happened.”

These are, of course, unrealistic expectations. They do not represent how most women who are sexually assaulted actually cope and respond. As a result, these myths, biases, assumptions, and expectations interfere with how victims’ testimony about their experiences is heard and understood in sexual assault trials, and with how legal actors in the criminal justice system assess their credibility.

### **Traumatic Impacts of Sexual Assault Experiences**

Sexual assault is an experience of trauma, and trauma has a neurobiological impact – that is, it affects our brains and our nervous systems. For this reason, it is imperative that those working within the criminal justice system understand the impact of trauma on victims of sexual assault so they can process sexual assault cases more effectively and hear evidence in these cases fairly and impartially.

The impact of the sexual assault depends on many factors. These include (but are not limited to) (Boyd, 2011; Daane, 2005):

- the nature of the assault itself,
- how long it lasted,
- the extent of the physical harm,
- the victim’s relationship to the perpetrator,
- whether the victim has had an earlier childhood history of abuse or neglect, and
- how family, friends and others respond to what the victim says about the assault.

Victims may experience the impact of a sexual assault physically and psychologically over both the short and long term. (Chivers-Wilson, 2006):

These impacts can include (Littleton, Axsom, Breitkopf & Berenson, 2006):

- shock and anger,
- fear and anxiety,
- hyper-alertness and hypervigilance,
- irritability and anger,
- disrupted sleep, nightmares,
- rumination and other reliving responses,
- increased need for control,
- tendency to minimize or deny the experience as a way of coping,
- tendency to isolate oneself,
- feelings of detachment,
- emotional constriction,
- feelings of betrayal, and
- a sense of shame.

The sexualized nature of the violation of sexual assault adds a particularly traumatic aspect to the experience. In fact, being sexually assaulted or raped can be one of the most traumatizing experiences a woman can go through. When the victim knows the offender (Conroy and Cotter, 2017), especially a person the woman believes should be trustworthy and safe, and who she never believed would violate her, her sense of betrayal is a profound element of the harm and the trauma she experiences. This only compounds her sense of shame and self-blame, along with her reluctance to disclose what happened, all of which increase trauma.

Some studies have suggested that victims of sexual assault often fear that while they are being sexually violated they will be seriously physically harmed or even killed. This fear of death or severe physical injury is correlated with similar or more severe post-traumatic harm, like that in prolonged military combat. (Dunmore, Clark & Ehlers, 2001) Even when a sexual assault occurred without a weapon, almost half of all victims in one study stated that they feared serious injury or death during the assault. (Koss, 1993; Tjaden & Thoennes, 2006)

### What Is Still Misunderstood about Victim Responses to Sexual Assault

Why are victims' responses to sexual assault often so difficult to understand? Many of the most common rape myths in our society reflect a failure to grasp the realities of the dynamics of sexual violence. Moreover, these rape myths reinforce unreasonable expectations of how victims *should* respond to sexual assaults – specifically that victims should react to experiences of sexual violation, which are often unnerving, humiliating, and destabilizing, with calm, strategic planning, and decision making. These misunderstandings may be held by members of the public, by professionals within the criminal justice system, including triers of fact, and by women who are themselves victims of sexual assault about some of their own reactions.

Though it is important to recognize that there is no uniform or predictable victim response to sexual assault, there are common reactions. These are well documented in the research literature, and they are important for triers of fact in the criminal justice system to understand and recognize. (Campbell, Sefl, Barnes, Ahrens, Wasco & Zaragoza-Diesfeld, 1999; Herman, 1992;

Koss, Goodman, Browne, Fitzgerald, Keita & Russo, 1994; Koss, Figueredo & Prince, 2002; Koss & Figueredo, 2004)

Some of the most common ways that victims react to sexual assault are precisely what people often have difficulty understanding. Women who experience sexual violence may not always be able to make decisions to protect themselves. In fact, they might:

- freeze,
- not report or delay reporting,
- not remember aspects of the event,
- have blanks in memory,
- have inconsistencies in memory,
- struggle with decision making,
- not say no clearly to unwanted sexual contact,
- exhibit no physical evidence of injury from a sexual assault,
- be unable to identify the perpetrator to police,
- exhibit no apparent emotional expression following a sexual assault,
- provide what might appear to be inconsistent statements at different points in time,
- blame themselves for the assault,
- have a relationship with the perpetrator after the assault,
- deny or minimize the assault,
- recant the experience.

In the aftermath of trauma, victims may make statements that appear to be incomplete or inconsistent. They may also seek to hide or minimize behaviors they used to survive, such as appeasement, or flattery, out of fear that they will not be believed or that they will be blamed for their assault.

But what might appear to be an “inconsistency” in the way a victim reacts, or tells her story, may actually be a typical, predictable, and normal way of responding to life-threatening events and coping with traumatic experiences. Many responses that seem inexplicable to those who are unfamiliar with normal trauma responses can be appreciated by understanding the brain’s way of coping with and processing overwhelming psychological events.

These reactions to sexual assault have been characterized as “counterintuitive” in some of the literature aimed at enhancing the understanding of those working within the criminal justice system. (Gentile Long, 2005)

A significant number of sexual assault victims experience post-traumatic stress disorder (PTSD). In fact, research suggests that sexual assault is by far the most frequent cause of PTSD in women. (National Center for Post-Traumatic Stress Disorder, 2005)

### **Social Context of Sexual Assault and Increased Trauma**

Women who have been sexually assaulted are more than twice as likely as men victims of sexual assault to develop PTSD, with PTSD symptoms lasting up to four times longer even when

controlling for the extent of trauma exposure and type of trauma experienced. (Blain, Galovski, & Robinson, 2010; Kessler, 2000; Tolin & Foa, 2006) Women also report greater degrees of emotional numbing, less range of feeling, and avoidance responses, and experience higher levels of psychological reactivity to traumatic stimuli. (Litz, Orsillo, Kaloupek, & Weathers, 2000; Orsillo, Batten, Plumb, Luterek, & Roessner, 2004; Spahic-Mihajlovic, Crayton, & Neafsey, 2005)

Shame, blame, and the attendant experience of social isolation that sexual assault victims feel create a significant barrier to receiving much needed social support. In some cases, that isolation and the negative emotional responses a victim receives increase the feeling of threat and lack of safety. A social context of victim blaming, therefore, has a neurophysiological consequence for the victim of sexual assault, by keeping her in a protracted state of anxiety and fear.

The most compelling explanation for this significant difference in PTSD is that women victims of sexual assault experience lower levels of social support. More importantly, in a society that continues to blame sexual assault victims for their conduct it is not surprising that so many women are reluctant to disclose or report. Victims often feel a great deal of shame and this can hinder access efforts to support and can increase negative reactions such as rejection and blame. These have been linked to increases in the number of PTSD symptoms that survivors experienced. (Brewin, Andrews, & Valentine, 2000)

Judith Herman (1992) explains that trauma enhances the need for protective relationships, but that one of the harms of trauma is that it also violates human connection. This can make such relationships difficult to establish or maintain. (Herman, 1992)

Neurobiological theories of trauma now predominate the trauma literature. They offer considerable insight into both potential trauma responses as well as the critical role and necessity of sensitive and well informed understanding of these complex responses in delivering services to victims. (Fosha, Siegal, & Solomon, 2009; Levine, 1997; Ogden, Minton, & Pain, 2006; van der Kolk, 1994, 2006)



## PART II – The Neurobiological Impact of Trauma on the Brain

### What is Trauma?

A traumatic event is one in which a person experiences something that is frightening, and overwhelming, and that entails a sense of loss of control. In experiences of extreme threat, such as a rape or torture, it can feel like a threat to one's ability to survive. Because events are viewed subjectively, this expansive trauma definition is more of a guideline. Everyone processes a traumatic event differently because we all endure them through the lens of earlier experiences in our lives.

In her paradigm-shifting book, *Trauma and Recovery: The Aftermath of Violence--From Domestic Abuse to Political Terror*, Judith Herman (1992) explains trauma in the following way:

Traumatic events overwhelm the ordinary systems of care that give people a sense of control, connection and meaning. Traumatic events are extraordinary, not because they occur rarely, but because they overwhelm the ordinary human adaptations to life . . . They confront human beings with the extremities of helplessness and terror and evoke the responses of catastrophe. (p. 65)

Traumatic events are not necessarily violent, though they violate a person's sense of self and security. (Kammerer & Mazelis, 2006) Trauma is subjective; what is traumatic to one person might not be to another.

It is helpful for those in the criminal justice system to understand the defence circuitry and the neurobiology of trauma in order to understand the range of reactions victims might exhibit in threatening circumstances, such as being sexually violated or attacked. We have all heard victims say things like, "I just froze," or "I was just lying there until it ended," or "I didn't know what to do, I didn't feel like I could do anything."

To understand the effects of trauma, it is necessary to grasp the fundamentals of the brain's defence circuitry – how it protects itself – and the crucial role this circuitry plays in shaping victim responses to, and coping with, traumatic events, both at the time they occur, and in recalling and narrating them later. It is to these issues that the next sections now turn.

### How the Brain's Defence Circuitry Takes Control When Under Threat

In the face of fear and threat we react *automatically*. These reflexive reactions include the well-known fight, flight, or freeze responses. Most people are familiar with these responses. They register at two levels: conscious cognitive levels and unconscious physiological levels.

The field of neuroscience is moving towards understanding this two-system framework: one set of networks generates conscious feelings of fear and anxiety; a second set controls behavioural and physiological responses to threats. (Ledoux & Pine, 2016) The second operates largely unconsciously because the network is subcortical. (Ledoux & Pine, 2016) In other words, it is deep in the brain and disconnected from conscious awareness or language.

This distinction is important, since threats can present themselves below the threshold of consciousness and can thus trigger the defence circuitry without the person consciously

recognizing feelings of fear. (Ledoux & Pine, 2016) Our nervous system is also continuously evaluating risk and safety in the environment, monitoring whether there is any danger or threat.

When any of our five senses detects a serious threat, the brain's defence circuitry is activated and a cascade of stress chemicals are released. When a threat to physical survival is imminent, the human brain, unless specifically trained to do otherwise, will switch to subcortical dominance and the defence responses of fight, flight, or freeze. The defence circuitry *dominates brain functioning once activated*. (Mobbs et al., 2009)

### How the Brain Responds to Traumatic Threat: Hormones and the HPA Axis

When the human brain senses a life-threatening event, some sensory information bypasses the cortex and goes directly to the defence circuitry. This includes the amygdala, part of the brain's limbic system, which predicts dangerous stimuli and triggers the appropriate physiological responses to danger and threat. This is *automatic* and often largely unconscious. Under these circumstances, the amygdala can be informed about something fearful or threatening before the cortex even knows what's going on. (Sapolsky, 2017) "The amygdala is not itself responsible for the experience of fear. Its job can be more appropriately viewed as detecting and responding to present or imminent threats." (Ledoux & Pine, 2016, p. 1086)

The amygdala sends a message to another part of the brain called the hypothalamus which sends a message further down in the brain to the pituitary gland which then sends a message to the adrenal glands. This is called the Hypothalamic Pituitary Adrenal axis or the HPA axis. When the signal reaches the adrenal glands they release two types of hormones: adrenaline and cortisol. Adrenaline bolsters the 'fight or flight' response by constricting blood vessels and making the heart pump faster to rush blood to the body and brain. Cortisol is the other stress hormone which is released by the adrenal glands in times of stress – this suppresses the body from doing anything which isn't necessary, such as digestion or higher cognitive processing. This allows the brain and body to focus all of its' resources into dealing with the threat at hand. The defence circuitry rapidly takes control of brain functioning, activating a multitude of brain body responses.

The activation of the defence circuitry is a key moment because—from then on— brain, body, attention, thinking, behavior, and memory processes are all dramatically altered in particular ways. (Hopper, 2018) The first brain-based reflex response is to *freeze*. Freezing occurs when the amygdala detects a threat and signals the brainstem to inhibit movement. This can happen in less than a second; it is automatic and beyond conscious control. This response shifts a person into a state of vigilance for incoming attacks as the brain scans the environment to assess for danger while seeking out possibilities for escape.

To this extent, then, it is a misconception to think that people make a calculated or rational assessment when they are in a moment of threat or terror about what to do – should they "freeze," or should they take "flight" or "fight"? The process is much faster and more automatic than that. It happens almost *beneath* or under our consciousness. When under threat, our capacity for rational and conscious calculation, which would occur under ordinary circumstances, is minimized or impaired.

## Defence Circuitry Activation Impairs the Prefrontal Cortex Function

The prefrontal cortex is the center of executive functions in the brain. It is involved in managing complex processes like reason, logic, problem solving, planning and memory. Stress hormones flooding the brain can cause a rapid and dramatic loss of prefrontal cognitive abilities, limiting our ability to think, plan and reason in the face of threat. (Arnsten, 2009)

When an individual is under threat and their stress response is activated, and people temporarily lose executive functioning. This impairs not only planning and decision making but also affects the brain's capacity to organize experience into logical sequences. What this means is that when people are in the midst of a serious threat or assault, brain regions are activated to help them survive the experience, increasing intense responses such as hyperarousal and altered attentional focus, while decreasing activity of brain structures involved in planning and strategizing. These neurological changes are why pilots, mountain climbers, paramedics and hospital emergency personnel practice emergency procedures over and over again, and they also carefully review checklists of what to do in a crisis. It needs to become automatic for them how to handle a crisis situation.

These alterations in decision making and strategizing capacities help explain why asking a victim to account for the decisions she made around a traumatic sexual assault is not a reasonable request; it can be perceived and experienced as victim blaming. Most people who have experienced a traumatic, overwhelming event are not knowledgeable about the complex brain and body alterations that they experienced. They may not be able to explain even to themselves their own often confusing and counterintuitive behaviours at the time of the event or immediately afterwards.

For example, a woman reported to the police a sexual assault by a male roommate who had been out drinking and returned to their apartment intoxicated but forgot his door key, and pounded on the door, demanding to be let in. When she was later interviewed by a detective, this woman acknowledged unlocking the door to this roommate who she reported she feared, and who had previously assaulted her. During the preliminary hearing she was asked by defence counsel why, if she was so afraid of this person, she had answered the door to him, rather than simply calling 911. The woman answered that she didn't know why she had opened the door. This response was mocked and challenged by defence counsel and used to undermine her credibility.

The problem, of course, was that the victim would not be able to explain that her brain was flooded with stress hormones and she was unable to effectively choose the best course of action. If the victim had been interviewed by a trauma-informed detective she may have been asked questions that would have made her neurobiological alterations explicit and as a result it would have helped explain this counterintuitive response.

To ask sexual assault victims to account and explain their behaviors can result in undermining their credibility because they may try to offer explanations for their behavior that when challenged by defence, can expose feelings of shame and vulnerability, exacerbated in a victim blaming social context. Or they may make what appear to be inconsistent statements about what they think they were doing. These kinds of evidentiary difficulties can be avoided by trauma-informed police interviewing and prosecutions.

### Altered Brain Functioning and the Shift to Reflexes and Habits

Following the immediate and initial brain based freeze response, the person must quickly assess other ways to respond to the threat. Again, this assessment is not a cool, collected rational assessment such as one would make when carefully weighing all the relevant factors in a normal life choice or set of circumstances. Instead, what happens is a split-second reaction following quickly on the heels of the freeze; the person selects the response from among the range of other typical, habit-based responses to extreme circumstances.

### Why Sexual Assault Victims Rarely take Flight or Fight

These habit-based reflex reactions, including “flight” or “fight,” are the ones most sexual assault victims are least likely to have. Most women are not trained to effectively fight. Most sexual violence prevention information is cognitively based and fails to offer repetitive practice on how to physically defend themselves. Without this training, highly stressed brains will default to habitual behavior. Police forces and the military know the importance of sustained, repetitive training to prevent police officers and soldiers from freezing in the face of threat and to promote the ability to take carefully planned steps to respond effectively.

An additional barrier to effective, strategic resistance or defence for most women is the fact that the offenders are often men they know (Conroy and Cotter, 2017), persons who are supposed to be trusted. As a result, the experience is not only alarming and threatening, it is also simultaneously profoundly confusing and destabilizing. In these circumstances, women often report a diverse range of intense emotional and psychological responses, particularly in situations where they are sexually assaulted by men known to them.

Understanding these complex yet common psychological and neurologically based responses to traumatic and threatening experiences such as sexual assault helps to explain why some sexual assault victims don’t exhibit “fighting back,” “yelling,” “escaping,” or taking some other kind of expected action for which they are later judged or blamed.

### Extreme Survival Responses: How Women Cope When There’s No (Perceived) Escape

What happens to a sexual assault victim when her passive habitual response of making an excuse, or attempting to appease doesn't work? In these circumstances, she is not consenting to the escalating sexual intrusiveness and she is unable to offer resistance because she is afraid and overwhelmed. These moments of sustained stress reactions have flooded her brain further with stress hormones and her functional prefrontal cortex is impaired so she is unable to strategize or plan an escape. When the escape seems impossible and the outcome of an assault unavoidable, then extreme survival reflexes will take over (Hopper, 2017)

These extreme responses include dissociation, tonic immobility (temporary paralysis) and collapsed immobility (e.g., fainting). These common survival responses to traumatic threat, which are triggered after the initial freeze, are explored below.

### Dissociation

Dissociation describes the process of the brain protecting itself from overwhelming stimulus by splitting some aspect of the experience away from consciousness. This may include memory loss



of certain time periods, events, people and personal physical responses (both physical and emotional). Dissociated people report a sense of being detached from themselves and their emotions. They often have the perception of things as unreal and report being unable to make sense of what is going on. Dissociation can be automatic for people who were traumatized earlier in life. Victims describe their experience as feeling like being on autopilot. Others report trance states, feeling in a fog or in a dream, and that they don't feel their bodies.

### Tonic Immobility

A person in a state of tonic immobility is in a state of involuntary paralysis and is unable to move or speak. Women describe feeling cold, and as having rigid muscles. Despite being paralyzed, the individual is fully aware of what is happening to her. Humans cannot control this defense mechanism. A recent Scandinavian study reported the sexual assault victims who experienced extreme tonic immobility were twice as likely to suffer PTSD and three times more likely to suffer severe depression following the assault. (Moller, Sondergaard & Helstrom, 2017) This response often leaves victims expressing distress that they were not able to move or to call out for help. Also, some victims can quickly go into and out of this state, paralyzed one moment and able to move the next. (Kozłowska et al., 2015)

### Collapsed Immobility

A person in a state of collapsed immobility experiences a sudden and drastic drop in heart rate and blood pressure to the point that she may faint or pass out. She often loses muscle tone and may describe feeling limp.

In conclusion, dissociation, tonic immobility and collapsed immobility all can result from extreme fear and perception of defeat. Yet, in the context of a sexual assault it may appear to an uninformed observer that the victim who experienced tonic or collapsed immobility did not resist the assault at all. While it is true that the victim might not have resisted, it may well be because she was incapable of taking action due to the extreme constriction of thought, movement or action. Victims who respond with these extreme responses often feel shame and confusion and blame themselves for "failing" to resist.

### Affirmative Consent Helps Address the Most Enduring Rape Myth

A woman does not need to fight back or resist in order to prove that she did not consent to unwanted sex. Canadian sexual assault law does not require proof of resistance to demonstrate a lack of consent. Nevertheless, in the popular imagination, women are often expected to resist in order to prove that they really were "real" victims of sexual assault. This is one of the enduring rape myths, that is, that a "true" victim of sexual assault will fight back or scream and yell, and if she didn't she must have consented to the sex. This mistaken idea simply fails to understand typical responses to sexual threat, coercion, intrusion and/or fear.

Too often, sexual assault victims are asked, "Why didn't you just fight back, or scream, or struggle, or run away?" Sexual assault victims who had a freeze response during an assault may also experience much higher levels of self-blame (i.e., "Why did I just lie there?"). These apparently passive responses of some victims of sexual assault may be perplexing to those who don't understand the neurobiology of trauma or gender socialization. In fact, the brain's defence

circuitry often causes human beings to freeze initially in the face of danger. This is a normal response to threat. It's the brain's way of priming us for the next steps in reflexive action.

We have all been caught off guard by an unsettling and disturbing situation with someone. Now imagine that same experience with a person of greater power, a situation that also instills fear and danger and a sense of a looming threat combined with a sense of your own vulnerability and powerlessness.

People who are used to a sense of self-efficacy and personal power and agency find it difficult to imagine such circumstances. But women in intimate situations with men who they believe are trustworthy – exactly the situations where research<sup>6</sup> has documented that most sexual assaults take place – may feel disempowered because they are destabilized by the unexpected betrayal, or cognitively constricted because of altered thinking capacity or physically restricted due to neurobiological responses. These complex reactions are often a hallmark of the context.

### Conclusion: A Need for Specialized Education to Understand the Neurobiology of Trauma

The general public, the criminal justice system, even victims themselves often misunderstand neurobiological based responses to threat and to traumatic events. Victims cannot explain many of the responses they experienced, nor do they understand their own coping and reflexes. Sexual assault victims often find these reactions extremely frightening and confusing and they often blame themselves for these responses.

The self-blame and lack of information about these natural brain-based responses keeps many victims from coming forward to report their sexual assault experiences to police or to get support services. Many police also do not understand these responses and they may respond verbally or non-verbally (for example, through body language) in a manner that communicates disbelief, as a result undermining their investigation. In court, victims' credibility is often undermined when lawyers inaccurately characterize, question, and challenge these seemingly counterintuitive behaviours. (Craig, 2018)

It is essential that members of the entire criminal justice system receive specialized education to understand the neurobiology of trauma, the defence circuitry, and the types of habits and reflex behaviours that victims of sexual assault often exhibit. Exposing triers of fact to this information will then allow them to determine the facts more impartially and make more informed decisions.

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<sup>6</sup> For example, according to Statistics Canada (Rotenburg, 2017), in cases of sexual assault, “the female victim knew the accused as a casual acquaintance (25%), a family member other than a spouse (23%), or an intimate partner (21%).”

## PART III – How Trauma Affects Memory and Recall

People often assume and expect that we will be able to recollect major events in our lives with clear and unwavering accuracy and that this determines the “truth” of what happened.

“One of the most critical contributors to achieving just outcomes in [sexual assault] cases is eliciting the most complete and accurate information from the primary source of evidence – the complainant.” (Westera, Zydervelt, Kaladelfos, & Zajac, 2017, p. 15)

However, traumatic events such as sexual assaults, are encoded (converted) differently than more routine, everyday experiences in life. It is well known within the scientific and psychological communities that human memory and recall do not function like a tape recorder, faithfully recording events later to be recalled on command. Our memories are fallible and have gaps and inconsistencies. As a result, we recall and narrate traumatic events differently than routine events.

### Memory and Recall: Some General Points

Memory is essentially the capacity for storing and retrieving information. Three processes are involved in memory: encoding, storage, and recall.

First we receive the information (e.g., from what we see, hear, and understand). Then we convert the information so it can be stored in various parts of the brain. There are three main ways in which information can be encoded: visual, acoustic and semantic. When encoding an event, we focus more attention on aspects that our brain appraises as important and less on those deemed insignificant.

This differential focus is what memory scientists refer to as central versus peripheral details. Memory retrieval refers to “the access, selection, reactivation, or reconstruction of stored internal representations”. (Dudai, 2002) Additionally, over time memory works to edit information, and we lose memories, forget some details of memories we do retain, and modify aspects of other memories as the result of repeated retrievals.

Our brain-based memory systems have been sculpted to function adaptively. Memories of trauma are like normal memories in these respects, but they have important characteristics that make them much different from normal, everyday memories.

However, after being traumatized certain central events may be remembered forever and this is an adaptive outcome. The brain has learned “this is important, remember this because it could later save your life.” To understand this more fully it is necessary to look at two key brain structures, the hippocampus and the amygdala.

### The Hippocampus and the Amygdala: Encoding and Consolidating Memory

The hippocampus and the amygdala are two brain structures that encode memory. The hippocampus is responsible for putting experience into chronological order and into perspective; it is necessary for forming new explicit memories. Explicit memory is what we usually think of

as memory. It is a “cognitive memory,” a memory we can remember in our thinking brain, or prefrontal cortex.

For explicit memory, we need the hippocampus. This part of the brain is responsible for integrating the raw sensory data into a coherent picture, putting a time tag on it, and transferring it into long-term episodic memory, where it can be retrieved later. Over time, when memory is consolidated, its long-term storage is distributed in different parts of the neocortex.

The amygdala, part of the limbic system, catalogues past sensory experiences (threats, anger) as implicit memories, memories that are unconscious but can affect thoughts and behaviours. These memories are associated with intense arousal making them readily primed in order to quickly associate them with future situations that are stressful or threatening. This is a critical survival feature of implicit memory, enabling an instant response to danger.

Memory consolidation signifies the stabilization process of a newly formed long-term memory. McGaugh (2002) explains, that initially, unconsolidated memory is in a fragile state and can be disrupted by several types of interference, including behavioral, pharmacological, and electrical. Over time, the memory becomes resilient to these forms of interference through the process known as consolidation (McGaugh, 2000).

Scientific information on the stabilization of memory through consolidation has significant implications for the timing of police interviews. A victim interviewed shortly after an assault, or while still very stressed or traumatized, will not be able to retrieve everything that’s been encoded into her brain. Two full sleep cycles may be necessary for the episodic memory circuitry to consolidate information that was encoded at the time of a trauma such as sexual assault. Researchers have found that processes occurring during both rapid eye movement (REM) and non-rapid eye movement (NREM) sleep also play critical roles in the consolidation of memories. During memory consolidation, the brain reorganizes and integrates initially fragile memory traces into long-term storage. (McGaugh, 2000)

In many police services in the US and now in Canada, trauma informed police officers understand that it is best practice for a sexual assault investigator to conduct only a brief initial interview when a victim first reports a sexual assault. This should be followed by a fuller interview several days later when the victim has had time to sleep and consolidate her memories of the traumatic experience. In fact, some police services maintain this same practice, of allowing for memory consolidation after two full sleep cycles before interviewing police officers who have been involved in a shooting.

### How Threat and Highly Stressful Events Affect Memory

Normally, the amygdala neurons encode fear memory traces (or fragments) while the hippocampus learns about the context of the fear. But when faced with threatening experiences, this emotionally arousing information increases amygdala activity. That activity correlates with more deeply remembered memory traces in the amygdala.

Stress and fear heighten activation of the amygdala. This reinforces and intensifies traumatic memories while at the same time impairing hippocampal function, which is involved in episodic



or explicit memory. Victims whose memories are not integrated into their hippocampus and cortical circuitry have implicit or limbic memory traces (or fragments). This happens because the amygdala activates the HPA axis, resulting in a flood of neurohormones that interfere with hippocampal learning. This is why, after a stressful situation, people have trouble remembering some specific details, and say things like, “It was all a blur.”

Implicit memory, also called procedural or sensorimotor memory, refers to behavioral knowledge of an experience without conscious recall. It is not a memory we can reflect on or think about. These memories are impossible to verbalize. They are often fragmented in time, and for the most part consist of primary sensory information (images, smells, sounds) that are linked to physiological fear symptoms. (Brewin, 2011)

### Trauma and Memory

Cognitive models highlight the nature of the traumatic memory: fragmented, associated with intense arousal, readily primed and triggered, and poorly contextualized into memory. (Ehlers & Clark, 2000) As a result, memories of traumatic events such as a sexual assault can be fragmentary. It can be difficult for victims to recall many details of a sexual assault in a complete or linear way.

### Intensified Traumatic Memories: Flashbulb Memories and the Hippocampus in Overdrive<sup>7</sup>

The effect of fear, threat or states of intense stress on memory can result in intensified memory recollection, or it can result in fragmented or impaired memories. Both are the result of the stress hormones released (the HPA axis) when the defence circuitry is activated.

Some elements of traumatic memories are more acutely remembered. The adrenal glands release adrenaline, which has been shown to help encode memories to the hippocampus more intensely.

A burst of adrenaline is thought to enhance memory storage of the events closer to the onset of a traumatic or highly stressful event. This strengthens memory pathways and creates what are referred to as “flashbulb memories.” (McGaugh, 2000)

It is not unusual for victims of sexual assault to have some full and vivid memories about the beginning of a sexual assault when the defence circuitry was first triggered and the initial burst of stress hormones were released. As well, central details or aspects of the experience that were of most significance may be intensely remembered.

Experiences with emotional significance are more likely to be consolidated into episodic memory and made available for intentional, conscious recollection than those with little or no emotional significance. The brain encodes what it pays attention to. During a threatening event, the brain focuses on what is central to survival so it does not focus on insignificant and peripheral details, so it does not encode them.

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<sup>7</sup> See Wilson, Lonsway & Archambault, 2016, for the idea of hippocampus being in “overdrive” to explain the way in which the flashbulb memories are encoded in the initial stages of a traumatic event.

### From Intensified to Fragmented Memories

When high levels of the stress hormone cortisol are secreted, along with adrenaline, the hippocampus super-encodes these intense early moments of the event. Following this, if the threat or fear continues, the hippocampus continues to be flooded with stress hormones and it is temporarily impaired and there may be minimal encoding. That is how the hippocampus goes from flashbulb mode to fragmentary mode.

For example, if during the 9/11 terrorist attacks an individual whose family member was working in an office at the world trade center turned on their television and witnessed the plane hitting the tower where their loved one worked, they would have a flashbulb or intensified memory of that terrible moment. But as events unfolded and they realized their loved one was not going to be able to escape, their brain would continue to be flooded with stress hormones and the events for the hours following the initial hit by the plane into the tower would be described as a blur.

When the hippocampus is in this fragmented mode, it encodes (converts) fragments of sensory memory without contextual details. As a result, a sexual assault victim might not recall the layout of the room where the rape happened. The hippocampus might not encode time-sequencing information because its functioning is altered during a traumatic event.

Not only can the hippocampus not integrate various systems of attention and memory, it also disrupts the storage of information. The hippocampus can disrupt memory encoding for conscious explicit memory when it is blocked or damaged by stress hormones or inhibited by intense amygdala activation. (Cozolino, 2017)

The amygdala is critically involved in calculating the emotional significance of events. When it perceives a threat, it creates emotional arousal. This is intended to alert us to pay attention and be ready to respond. The amygdala also has a selective effect on the particular stimuli we notice and encode. Fear focuses one's attention on a few details at the expense of a lot of others. As a result, a victim of a sexual assault may not remember some of the details of the assault, for example, what colour of clothing the offender was wearing. Conversely, the central details of an assault or the parts of the experience that were the most disturbing are often well encoded and consolidated.

During states of fear (high arousal), the hippocampal and amygdala networks can become dissociated, resulting in a disconnection between the emotional memories of the amygdala and explicit hippocampal processing. Sensation, emotion, behaviour, and conscious awareness, which are usually integrated with one another, can be disconnected from their context in time and space. (Cozolino, 2017) As a result, few peripheral details, little or no context or time-sequence information, and no words or narrative surrounding the memory may be recalled.

### How Attention and Memory Affect Recall of Traumatic Events like Sexual Assault

Much of what is remembered of a traumatic or threatening event functions as if existing in separate islands of memory.

Information encoding and storage are impaired for aspects of the experiences that are not considered essential for survival or are of little emotional importance. This includes the sequence of events as well as peripheral details. This often results in a disorganized and incomplete narrative memory.

This is immensely important for how victims of trauma are interviewed. The primary emphasis of the sexual assault police interview should therefore be on the sensory, emotional memories that the victim has encoded and remembered rather than expecting the victim to give a narrative with a chronology.

### Enhanced Traumatic Memory Coexists with Incomplete Memory

Some elements of traumatic memories are actually more acutely remembered than others. These are called enhanced memories. They are etched more deeply in our memories precisely because they are traumatic and overwhelming to us.

Victims often focus on some specific sensory details from the assault. For example, they often remember specific smells (the smell of body odour), but very few details of other aspects of what happened, for example, how long the assault lasted or the specific order in which some things happened. These are normal limitations of memory. They are caused by the stress and fear of the traumatic events and how the brain's defence circuitry affects attention and memory consolidation. (Schwabe, 2016)

Some fragments of a traumatic experience, then, can seem like they are “burned into” memory. This is how they are recalled. This is normal and typical for how humans recall virtually any traumatic or terrifying event. For example, a person may claim that, “I’ll never forget!” a certain powerful memory of an experience, in reference to some particular aspect of it, which seems indelibly etched upon them. Yet they may have no memory of other peripheral details that were irrelevant to their survival at the time of the experience.

This is, in fact, what we all witnessed in the very high profile media attention surrounding Dr. Blasey Ford’s testimony at Brett Kavanaugh’s United States’ Senate hearing pertaining to his appointment to the Supreme Court in that country. Dr. Blasey Ford had some gaps in her memory of the night she describes being sexually assaulted by Kavanaugh. She was able to recall central details of what she experienced that night but was unable to recall some of the peripheral details, including how she got home from the party that night. These gaps in her memory became the subject of high profile attacks on her credibility, including by Republican Senators in a memo rife with inaccuracies written by prosecutor Rachel Mitchell, as well as attacks by others. However, these critics fail to understand that lack of recall of these kinds of peripheral details does not impugn the veracity of Dr. Ford’s account, or indeed the account of other sexual assault victims; instead it is consistent with the way in which traumatic memories are encoded.<sup>8</sup>

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<sup>8</sup> See Hopper, J. *Why Can't Christine Blasey Ford Remember How She Got Home? Time-dependent effects of stress on the hippocampus and memory—and why they matter*. Scientific American, blog, October 5, 2018. <https://blogs.scientificamerican.com/observations/why-cant-christine-blasey-ford-remember-how-she-got-home/> for an excellent discussion of this.

These kinds of normal inconsistencies have been seized upon by defence lawyers, amplified to intersect with dominant and pernicious rape myths in our society, and used to undermine victims' credibility in sexual assault trials. These are impermissible lines of reasoning in the Canadian criminal justice system.

### Conclusion: Putting Advances in Understanding How Trauma and Memory Function to Work in the Criminal Justice System

Advances in cognitive neuroscience and neuroimaging have facilitated a much greater and deeper understanding of the neuroanatomy and neurophysiology of trauma and its impact on how we encode, and then later recall, traumatic events.

The science of memory and psychological trauma must be applied to interview approaches and techniques. The belief that inconsistent statements mean the victim is lying has created a focus on techniques that focus on lie detection. These approaches further stress the victim and often inhibit what memory the victim is able to recall.

This knowledge is of critical importance to sexual assault investigations: if a victim is interviewed in a stressful way – for example, if they are not treated with compassion, if their narrative is interrupted, if they receive only expressions of doubt about what they are reporting – they will not be able to recall potentially crucial information that is stored in the brain.

Memories that are consolidated are more stable and more resistant to interference (McGaugh, 2002). This means that consolidated memories would be more reliable and more consistently remembered and hence more useful for detailed victim statements taken by police.

These memories are not recalled in the same ways as other, more typical, life events.<sup>9</sup> In fact, memories associated with a traumatic experience are encoded in the brain differently than “normal” and more everyday memories. This is crucial information for the prosecution of sexual assault cases in the criminal justice system because sexual assaults are not normal events but ones that typically have profound neurobiological effects on brain, body and behaviour.

It is neither realistic, nor rational, to expect victims of sexual assault to recall all aspects of their traumatic experiences with detailed accuracy from start to finish. That is not how the brain works when the defence circuitry has kicked in. Understanding this is part of what a trauma-informed criminal justice system requires if justice is to be done and fair trials are to be conducted for the accused *and* for victims.

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<sup>9</sup> This is also true of other violent crimes and violent or catastrophic events; however the focus of this analysis is on sexual assault.



## PART IV – Promising Practices: Why We Need a Trauma-Informed Criminal Justice System

This section discusses why a trauma-informed criminal justice system enhances the processing of sexual assault cases. This section also outlines promising practices that criminal justice professionals can put into place for trauma-informed investigations and prosecutions of sexual assault cases.

### Victims Have Low Expectations of Police When They Report Sexual Assault

The overwhelming majority of sexual assaults in Canada are never reported to the police. Findings from the 2014 General Social Survey (GSS) reveal that more than eight in ten (83 percent) of sexual assault incidents were not reported to the police. (Conroy & Cotter, 2017) This finding is consistent with the 2004 GSS, which showed that 88 percent of sexual assaults went unreported to the police. (Gannon and Mihorean, 2005)

However, there is a social expectation that “ideal,” “real,” and “credible” victims of sexual assault should report their experiences of sexual assault to the police and follow through the criminal justice system. This is an unrealistic and unreasonable expectation for multiple reasons: the victim’s sense of shame and stigma, compounded by a victim-blaming society, along with fear of what might happen to the perpetrator if the assailant is someone they know.

One of the major reasons for the extremely low reporting rate of sexual assault is victims’ lack of confidence in the police and the criminal justice system. (Conroy & Cotter, 2017) Taking a trauma-informed approach to the investigation and prosecution of sexual assault in the criminal justice system might reduce these difficulties.

### Victim Disclosure

It is important for police officers to recognize that disclosure is a process, not a one-time event. It is also important for police to recognize that disclosing sexual assault incidents, which victims often experience as humiliating and disempowering, is particularly difficult. This is especially true in a society where rape myths still exist.

One of the rape myths identified by the Supreme Court of Canada is that some women are “less worthy of belief” (*R. v Seaboyer*, 1991). Another dominant rape myth is that women and children are prone to “lie” about experiences of sexual assault and sexual abuse. These kinds of harmful beliefs and rape myths create a context of suspicion and doubt, making it particularly difficult for victims to report experiences of sexual assault. The fear of not being believed creates a profound barrier to disclosure for sexual assault victims.

Victims’ experiences of disclosing sexual assault to police or others is key to the investigation as well as to their recovery. As such, it is essential that police receive disclosures respectfully and patiently, in a way that empowers the victim. Professionals in the criminal justice system must receive specialized trauma-informed training in this area.

## Promoting a Victim-Centred Approach to How the Criminal Justice System Processes Sexual Assault Cases

Taking a victim-centred approach to how the criminal justice system processes a sexual assault case means treating victim-witnesses with care and respect and recognizing the particular difficulties and needs facing those who have experienced this unique crime and the social stigma surrounding it. It means making a victim-centred approach a central priority in processing, clearing, and closing sexual assault cases.

According to many experts, the attitude conveyed by law enforcement is “the single most important factor in determining the success of the victim interview, and therefore the entire investigation.” (Archambault & Lonsway, 2007, p. 6) Effective sexual assault investigations require impartial, skilled, empathic, well-trained, and experienced investigators, who carefully document all the details of the crime and properly collect all available evidence. (International Association of Chiefs of Police, 2005) As one police captain observed about sexual assault investigations, “If you want justice, it is helpful to care for the victim.” (Human Rights Watch, 2013)

## Why Standard Interrogation Practices Don’t Work with Sexual Assault Victims

We are in the midst of a sea change in the way police are conducting sexual assault interviews. This comes from the new knowledge and insights from the neurobiology of trauma and the best practices emerging from the field. It also comes from learning from the mistakes made in traditional interrogation practices, which should not be applied to *victims* of crime as they were developed to interrogate criminal *offenders/suspects*.

These standard interrogation practices emphasize establishing a timeline and key facts as soon as possible when it is believed that memory is “freshest” and most complete. Furthermore, in sexual assault cases, victim interviews with police often start with police skepticism, with a view to establishing whether or not the complainant is telling the truth.<sup>10</sup>

This skepticism, however, does not reflect a position of neutrality but rather a position of doubt and suspicion. Standard interrogation practices therefore actually interfere with interviews, and can close down the flow of information necessary to investigate the assault. Examples of typical and problematic police approaches to testing victims during traditional approaches to sexual assault reports have included:

- asking sexual assault victims to repeat their narrative from different points in the sequence, for example, asking a victim to start the story from the end and tell it backwards;
- asking victims questions designed to confuse or test their narrative (as a way to assess its validity).

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<sup>10</sup> This is why a national campaign by End Violence Against Women International (EVAWI), “Start by Believing,” was rolled out in the United States, to counter the tendency to disbelieve victim reports of sexual assault and break down the blame and shame which prevents them from disclosing and getting help they need. See: <http://www.startbybelieving.org/home>.

The effect of the police investigator's attitude towards a victim, especially a sexual assault victim, is a very significant variable in a first encounter (and indeed any encounter). Victims often feel intimidated, ashamed, or afraid when police respond to them with detachment, harshness, disbelief, or dismissal.

Research (Holmberg, 2004) has demonstrated that sexual assault victims acknowledged omitting significantly more information during interviews with police officers they perceived as:

- rushed,
- aggressive,
- brusque,
- impatient, and/or
- unfriendly.

Insufficiently trained police can contribute to assaulted women experiencing secondary victimization. If victims feel unsafe when questioned they may not be able to use their prefrontal cortex to understand the questions and retrieve certain memories. If victims feel traumatized by the questioning, it may trigger the retrieval of fragmentary sensations and emotions that are nearly as intense as those they experienced during the assault itself. Also, poor memory retrieval is associated with high levels of stress and high arousal, which in turn is associated with the prefrontal cortex being threatened.

### **Traditional Police Approaches to Sexual Assault Interviews Can Retraumatize Victims**

Domestic violence and sexual assault victims frequently encounter police services that mirror the unequal power and control experienced in the abusive relationships that caused past trauma. This retraumatizes victims and is to be assiduously avoided. Instead, police should focus on making it easier for victims to recall and disclose the assault. This can include allowing the victim to make a delayed disclosure several days or weeks after the assault.

Too often, traditional police interviews involve too many interruptions when victims are giving statements about their sexual assault experiences. One study found that the average police interview had 3 open-ended questions and 26 close-ended questions with an average of only 1 second pauses between each question. (Fisher, 1995) Most detectives interrupted responses to open-ended questions after 7.5 seconds, with an average of 4 interruptions per response. Victims were not allowed to complete an interrupted response in any of the interviews studied. (Fisher, 1995) Interruptions are a fatal flaw in investigative approach and impede memory retrieval.

This has an extremely deleterious effect not only on victim well-being and willingness to disclose, but also on the quality of evidence and data available for criminal justice system processing of the sexual assault case.

Often traditional police approaches to victim interviews in sexual assault cases have focused on peripheral details, which are not easily recalled and may not even be relevant. Instead, police need to focus on central details which victims more often and more easily recall.

Sexual assault investigations and prosecutions require victims to cooperate fully. This, in turn, requires that victims trust that the criminal justice system will treat them with fairness and respect. Moving towards a trauma-informed criminal justice system approach to sexual assault investigations and prosecutions will help accomplish this. It will also help remedy the historical and contemporary difficulties and gender biases that have plagued sexual assault prosecutions, all part of the ongoing problem of under-reporting sexual assaults. Furthermore, trauma-informed interview approaches can teach police officers (as well as others in the criminal justice system) that victims' difficulties talking about aspects of the experience, and perceived gaps or inconsistencies in their story, may actually be a combination of inappropriate investigation and questioning methods, along with a failure to understand the ways in which trauma affects how victims remember the sequence of events and their reactions to them.

Offering more support to victims and responding to them patiently and with respect increases their ability to retell what happened to them. This speaks to the importance of trauma-informed interviewing approaches by police officers, and trauma-informed questioning by lawyers in their roles as Crowns and defence counsel. It requires specialized training, which should also be made available to the judiciary. This kind of knowledge is not taught in law schools, which often don't adequately cover the basics of sexual assault law and the fundamentals of affirmative consent law.

This leads to the conclusion that standard interrogation methods do not work well with trauma victims. This is empirically evident in the high rates of unfounded cases documented in Canada. (See Doolittle, 2017a) Fortunately, many police forces in Canada are working to rectify this problem by adopting improved and more collaborative approaches to sexual assault investigations and case reviews involving the participation of victim services and women's groups. (See Chartrand, 2011; Doolittle, 2017b, 2017c)

## Best Practices for Trauma-Informed Police-Victim Interviews

### Basic Listening Skills

Most people, including police, Crowns, or judges working in the criminal justice system, find it difficult to hear about traumatic events such as a rape, sexual assault, or other experiences of sexual violation or abuse. In a trauma-informed criminal justice system, it is important to develop this capacity and it is one that can be learned.

### Emotional Competency and Empathy

Empathy is the capacity to understand the experience of another. Being empathic is an important skill when listening to the experience of a victim of sexual assault.

Listening with empathy does not make one biased. Connecting with the victim-witness depends on empathy and compassion for the sexual assault victim. It is possible to be both neutral and impartial, and to be compassionate and empathic.

Emotional competency requires developing essential social skills to recognize, interpret, and respond constructively to emotions in yourself and others. This means developing the ability to interview victims in ways that empower and calm them, so they are able to provide more accurate, coherent, consistent and persuasive narratives.



When victims of sexual assault feel:

- that someone is listening to them;
- that the listener can tolerate what they have to say;
- that the listener understands what they have to say; and
- that the listener can imagine their story to be true

they will feel more comfortable disclosing their experience and feel more comfortable providing information about it.

When speaking of the sexual assault, police should not refer to the “alleged” crime, or the “reported” crime. This conveys an attitude of doubt and suspicion. Instead, police must convey respect.

Empathy is not a skill that is typically taught in law schools or during police training. But it should be. It is a skill that can be learned and refined. Not only is it essential to effective work with sexual assault victims, it can also be widely applied to many other spheres of legal and police work.

The stance of the global “Start by Believing” campaign should guide our responses to sexual assault. This campaign was launched by End Violence Against Women International (EVAWI) to transform the way institutions like the criminal justice system respond to sexual assault.<sup>11</sup> Of course, police still carry out a thorough investigation.

#### Brief Initial Police Interview: Setting the Tone

The best practice for a trauma-informed approach to the initial contact is for the sexual assault victim to have a brief, respectful, and empathic first contact with a police officer, who should take only a limited amount of information for the initial report. It is important for police to determine what is needed immediately, and what can wait.

By being empathetic, patient, and respectful, [the police officer] can contribute to the immediate and long term recovery of the victim and lay the foundation for mutual cooperation and respect on which the successful interview, investigation, and prosecution is built. (International Association of Chiefs of Police, 2017)

#### Taking the Report

The first officer who takes a report from a sexual assault victim “should address any safety or medical concerns, collect just enough information to establish the elements of the crime, identify potential witnesses and suspect(s), and identify and secure evidence.” (Human Rights Watch, 2013; International Association of Chiefs of Police, 2005) At a slightly later date, the officer can fill in more details during a more in-depth interview.

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<sup>11</sup> See, <http://www.startbybelieving.org/home>; Start by Believing is a philosophical stance that should guide our responses to sexual assault. It “flips the script” on the message victims have historically received from professionals and support people, which is: “How do I know you’re not lying?”.

It is important at this initial stage to help the victim get connected to a victim advocate or other support services. It is also important to provide her with information about next steps and about how the process will unfold, to make it as predictable as possible.

### Delaying Taking Detailed Follow-up Statement

It is important to interview sexual assault victims in a way that is consistent with how memory works. Memory transfer to the cortex during sleep allows the episodic memory to retrieve information that was stored at the time of a sexual assault. Sexual assault victims thus ideally require two full nights of sleep to allow their memories to consolidate and transfer the information about the assault before they can relate detailed narratives about “what happened.” Unless there are exceptional circumstances that require an accused to be immediately arrested, the best practice for conducting sexual assault investigations should be delayed follow-up interviewing. Delayed disclosure is a very typical pattern for many survivors (average of 25 days for sexual assaults, see Rotenburg, 2017).

This translates into a delay for police in taking detailed victim statements.

The initial victim statement is typically taken upon first contact with the victim. Taking this initial *verbal* statement from the victim is an opportunity for law enforcement to obtain basic information and establish the location and elements of the crime. It is **not** an opportunity to conduct a comprehensive interview. The initial statement is used to assess safety and health needs, ascertain jurisdiction, identify and preserve sources of evidence and determine next steps. (Governor's Commission on Domestic Violence and Sexual Assault, 2017, p. 18)

### Trauma-Informed Interviewing for Sexual Assault Victims

In a trauma-informed approach to sexual assault investigations,

the interview is a way to allow the victim to express what their experience was rather than just what they remember or do not remember. Capturing the trauma and the sensory and peripheral details of the event is compelling evidence. (International Association of Chiefs of Police, 2017, slide 15)

During a traumatic event, people can dissociate as a way of coping with an overwhelming response to what is happening. This can often result in them not being able to remember the event later. They can divide their attention so that when they are being attacked they instead, for example, focus on some other aspect not central to the experience. Victims who dissociate may not be able to tell you what they felt because they were disconnected from their bodies. They may, however, vividly remember some specific aspect on which they focused, such as the colour of the carpet or some other detail of the experience (while not recalling other peripheral details at all).

Because the hippocampus does not remain focused on the present or attend to explicit details and time sequencing, the encoding for the details of the assault is impaired. However, sensory memories (i.e., what was actually being done to the person when they were assaulted) are encoded as implicit memories.

Knowing about dissociation explains why asking victims questions about what happened next, or other questions about peripheral details, often does not elicit useful information. Instead, it is more important to ask victims what they did focus on and what, if any, sensory memories they can recall (colour, smell, etc.). This type of dissociation is called dissociative PTSD and is associated with early childhood and cumulative trauma. (Lanius, 2015) It has recently been recognized as a subtype of PTSD in the DSM-5. (American Psychiatric Association, 2013)

### A Paradigm Shift: The Forensic Experiential Trauma Interview (FETI)

FETI is a science-based methodology developed by Russell Strand that uses brain-based cues to facilitate collection of psychophysiological evidence. Strand integrates current forensic psychophysiological knowledge and practices, to develop a new approach for how to conduct law enforcement interviews with victims of trauma. Using the forensic experiential trauma interview approach, Strand argues that we can gather the best possible evidence by using brain based cues.

It is important to allow for an uninterrupted narrative, articulated by the victim, so that she can tell you what happened in her own words. The interview questions should be open-ended to focus on eliciting raw information, such as the victim's sensory experiences of sights, smells, and sounds. Police should also practice active listening and avoid victim-blaming language/questions and assumptions, such as "Why did you...?".

Opening questions in taking a sexual assault report should be probing and open-ended. These can include:

- What are you able to tell me about your experience?
- Where would you like to begin?
- What was the most difficult part of this experience for you?
- What can't you forget?

Other open-ended questions and probes can include:

- "Tell me more about ..." "What was your thought process during this experience?"
- "What are you able to remember (with your six senses)?"
- "Do you recall hearing anything? What do you recall hearing?"
- "Do you recall smelling anything? What do you recall smelling?"
- "What were your reactions to this experience?"
- "What do you remember feeling physically?"
- "What do you remember feeling emotionally?"
- "What was the most difficult part of this experience for you?"
- "What can't you forget?"

An open-ended approach that elicits sensory details and allows a victim to describe the assault in her own words is recommended. Unblocked memories can lead to identifying more memories. Asking about these details is a way of delicately gathering evidence, and making it possible to collect further information that may corroborate the victim's account.

### How Victims Might Respond to Questioning

Victims will often recall many micro details about the sexual assault experience. Listen for them. Such details can actually support the victim's account, so look for ways to corroborate them to support the evidentiary record.

Although some of the sensory questions may be difficult for some victims to answer, many victims, including highly traumatized victims, report experiencing a catharsis when they are interviewed sensitively, skillfully and effectively.

Victims who have experienced a freeze response during a sexual assault may experience much higher levels of self-blame about what happened to them. These are complicated responses that may not make sense to triers of fact. They require some skill and information to explain their context, particularly in light of defence tactics which may seize on victim freeze responses and deploy them to suggest that they actually signaled consent to the sexual contact even though this is an error in law, which should be challenged by the Crown and corrected by the judge. The affirmative consent standard in law does not allow this yet defence counsel nevertheless continue to perpetuate this rape myth. (Craig, 2018)

### The Important Role of Victim Advocates

Victim advocates are professionals trained to support victims of crime, such as women who have been sexually assaulted. They may be community hospital based (for example, a sexual assault nurse examiner), work in a rape crisis centre, or work in a victim-witness program. The presence and support of victim advocates for sexual assault complainants is an important best practice to improve how the criminal justice system processes sexual assault cases. Victim advocates from the community, the academy, and the women's movement have played a key role over many decades in developing service delivery, positive policy developments, and law reform to improve responses to sexual assault in Canada. (Gotell, 2010; Roberts & Mohr, 1994)

Advocates can play a range of roles throughout the victim's encounter with the criminal justice system. They can offer victims information and emotional support, and may assist with finding resources, provide counselling, and also attend court with the victim.

Best practices for victim advocates also allow for a support worker "to be present during the [police] interview, if the victim so desires. The role of the crisis centre advocate is to provide support to the victim, *not* to participate in the actual interview process." (Campbell & Martin, 2001, p. 231) In an interview, or in the court room, victims who become overwhelmed or triggered

may not be able to ground themselves in the present and recognize that [they are in] a safe environment ... This is one of the many reasons why it is important to include victim advocates in the interview process. In this case, it would be best to take a break to give the victim time to talk to the victim advocate in hopes that the situation can be de-escalated. It's always a good rule for investigators to do whatever they can to prevent additional harm to the victim. (Wilson, Lonsway & Archambault, 2016)

This last point bears particular emphasis. Victim advocates play a crucial role in assisting and



protecting victim-witnesses as they navigate a system that was not designed with their interests or needs in mind. Put differently,

[t]hroughout all aspects of their work, rape victim advocates are trying to prevent 'the second rape'—insensitive, victim-blaming treatment from community system personnel ... The job of rape victim advocates, therefore, is not only to provide direct services to survivors but also to prevent secondary victimization. (Campbell & Martin, 2001, p. 231)

The crucially important role of the victim advocate, therefore, “is to provide emotional support and information, to listen, believe, and work to empower the victim while honoring the choices they make.” (Governor’s Commission on Domestic Violence and Sexual Assault, 2017, p. 36) The presence of a support person can be not only beneficial to the sexual assault victim throughout the investigative process and criminal justice system procedures but can also help the victim engage with the system, and can enhance how satisfied they are with the experience. (Human Rights Watch, 2013) A victim advocate is also consistent with a victim-centred and trauma-informed approach to processing sexual assault cases throughout the criminal justice system.

### **On the Stand: Preparing the Victim-Witness of a Sexual Assault in a Criminal Trial**

Adequately preparing sexual assault victims for the rigours and challenges of the trial process is essential to a trauma-informed approach. Many Crown attorneys do not have adequate time for this preparatory work with victims in the currently backlogged, and often significantly under-resourced, court system. This presents a systemic challenge, and requires a remedy if the criminal justice system is seriously going to move towards becoming trauma-informed and more supportive of sexual assault victims.

Many aspects of the court process are disempowering for victim-witnesses. For example, where victim-witnesses are positioned in the courtroom can make them feel intimidated and vulnerable when they are giving testimony in a sexual assault trial. This physical positioning can be, as one legal scholar has observed, “compounded by the inferior position of the complainant relative to other trial participants such as the lawyers and judges.” (Craig, 2016a, p. 224) This vulnerability is quite literally demarcated by the heightened role of the judge in the court room, as “judges typically sit behind an elevated bench at the front and center of the courtroom, thereby allowing the judge to physically ‘look down’ upon the witness as he sits in judgement.” (Craig, 2016a, p. 218)

Throughout the process of narrating her sexual assault and her reactions to it, the victim-witness, who has typically been isolated and without support, by herself in the witness box, must, under persistent and challenging questioning, lay bare her experience of being violated. All the while she is both under intense scrutiny from the various courtroom players, and also aware that she must mentally prepare for the adversarial and often hostile attack of defence questioning, after she has provided the evidence in chief. The Crown thus has a particular responsibility to prepare the victim-witness thoroughly and sensitively, and to lead the examination-in-chief in a trauma-informed manner.

Recent changes to the *Criminal Code* allow a number of measures to be invoked in cases such as sexual assault. These can increase the ability of a witness in a criminal proceeding to provide evidence. Having a support person present while a victim-witness testifies is one such testimonial aid. This is allowed by section 486.1(2).<sup>12</sup>

Two other measures can also help witnesses. The excesses of the difficult experience of testifying in a sexual assault trial may be blunted with a successful s. 486.2(2) application. That would allow a witness to testify outside the courtroom by closed-circuit television or behind a screen to avoid seeing the accused.<sup>13</sup> A s. 486(1) application would allow the public to be excluded from the courtroom to allow the victim to have privacy.<sup>14</sup> These, however, are not guaranteed because they depend upon the judge's decision.<sup>15</sup>

Other changes at the trial, such as carefully pacing questioning and taking cues from the complainant (victim-witness) about her need for breaks, can assist the process.

These difficulties for victims testifying in court heighten the need for trauma-informed approaches to criminal justice system processes and trauma-informed questioning to reduce these issues for victim-witnesses whenever possible.

### Social Expectations of Victim-Witnesses' Testimony in a Sexual Assault Trial

Speaking about traumatic life events such as sexual assaults is inherently difficult. They are intensely personal and private, and require discussing the private zones of the body, involve disclosures of sexual acts surrounded by social taboos, and they are also associated with victim-blaming and often shame.

Speaking about this kind of experience with a stranger, like a police officer or lawyer, let alone speaking about it in public courtroom, only increases these difficulties. Yet somehow there is a

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<sup>12</sup> *Criminal Code*, RSC 1985, c C-46, s 486.1(2). The 2015 amendments changed the standard under s. 486.1(2) for a support person from being "necessary to obtain a full and candid account from the witness of the acts complained of" to simply requiring that the support person "would facilitate" full and candid account of evidence. The relevant provision reads: "In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice."

<sup>13</sup> *Criminal Code*, RSC 1985, c C-46, s 486.2 (2) reads "in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice."

<sup>14</sup> *Criminal Code*, RSC 1985, c C-46, s 486 (1) reads "any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security."

<sup>15</sup> Courts are also increasingly seeing the use of support dogs to assist vulnerable victim-witnesses, but again, this is contingent upon availability and judicial discretion.

social expectation that sexual assault victims should relay information about their sexual assault experiences in a calm, linear, and straightforward manner, as if they were speaking about any other routine matter, rather than one that is privatized, stigmatized, or sexualized and involves being violated and humiliated. Not only is this entirely unrealistic and unreasonable, it is at odds with basic knowledge about human psychology or about how trauma affects memory and recall. It is neither trauma-informed, nor trauma-aware.

Trauma is often shrouded in secrecy and denial. The Crown attorney should thus try to understand the victim's history, because it may help explain her unique reactions to the assault and how she is processing the associated trauma. It is important for the Crown attorney to know about this information before the trial: first, to prevent or minimize retraumatizing the victim; and second, to elicit testimony about victim behaviour and trauma from an expert so that triers of fact have the proper context through which to process the victim's testimony. (Kristiansson & Whitman, 2015)

### Best Practices: Trauma-Informed Training and Education for All Criminal Justice System Professionals

One of the key recommended best practices, given the complexities of victim responses, is the need for criminal justice professionals to have specialized in-depth training and education across all sectors of the system on the neurobiology of trauma, violence, and abuse, and the social contexts of victim responses.

Another best practice in the field is partnerships across sectors and close and ongoing collaborations between criminal justice system players to improve service delivery and responses. This should include police, community and women's organizations, health care providers, victim-witness support workers and advocates, lawyers, and government policy makers working in the area of sexual assault. This education will enhance judicial knowledge about a complex subject area and assist in neutralizing biases.

### Conclusion: Why We Need a Trauma-Informed Criminal Justice System for Sexual Assault Cases

In recent years there has been much public and media attention on the subject of sexual assault and sexual violence. As a result of a number of high profile trials, the #Metoo movement and outpourings of disclosures in Canada and beyond, the scale and pervasiveness of sexual assault and sexual misconduct in Canadian society has been revealed. Sexual assaults and their social, health, economic, and legal costs pose a major problem for equality in Canadian society.

The criminal justice system remains in need of significant reform to achieve better outcomes for victims of this crime and an improved version of justice. A trauma-informed approach is a fundamental and necessary step in this direction.

Criminal justice professionals, including prosecutors, law enforcement and victim services, need to apply trauma-informed practices as a case progresses through the justice system. (Kristiansson & Whitman, 2015) This requires a basic knowledge of the neurobiology of trauma and its impact on victims who have lived through sexual assault and its harms. As such, improved efforts should be made to increase the availability and delivery of specialized trainings and educational

workshops to all criminal justice professionals, as well as continued support for on-going and/or new partnerships between criminal justice and other system sectors. These efforts will enhance access to justice for victims of sexual assault, as well as contribute to the ever-growing professional and public awareness about the impact of trauma.





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# WORKSHOP

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# Activision Investors Join Chorus Demanding Tech Culture Change

By Maeve Allsup

Aug. 6, 2021, 1:45 AM

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- Securities suit says company hid California investigation
  - Future shareholder litigation could spur workplace changes
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Activist shareholders, who have used litigation to force businesses to address issues of workplace discrimination and harassment, are eyeing a new target: the video game industry.

A federal securities fraud claim from an Activision Blizzard Inc. shareholder claiming the company kept investors in the dark about a California state investigation into its alleged “frat boy” culture is the latest challenge to the video-game giant.

While the Aug. 3 suit is focused on compensating investors for a stock price drop, it could be followed by shareholder derivative suits that seek changes to internal policies and practices. Lawyers and industry watchers said such lawsuits could be an effective tool to address persistent questions about workplace culture at Activision and in the broader gaming world, as investors take notice of the financial and public relations fallout from toxic employment practices.

Other companies including Alphabet Inc., Pinterest Inc., and Victoria’s Secret parent L Brands Inc., have faced lawsuits filed by shareholders over workplace culture and claims of harassment or bias.

“These shareholder suits are the ones that are really starting to change things in corporate America,” said San Diego attorney Frank Bottini. “They can have incredibly important, concrete results and really be a catalyst for change at a company or in an industry.”

Shareholder advocacy and engagement is “exploding these days,” according to Michael Connor, executive director of the Open Media and Information Companies Initiative, a group focused on shareholder engagement and corporate accountability.

“There are much larger numbers of investors who are willing to both engage with the companies directly and certainly support shareholder proposals,” he said.

**Activision Lawsuit**

The complaint from the Activision investor alleges that after a lawsuit from the California Department of Fair Employment and Housing detailing claims of workplace harassment came to light on July 21, the company's stock price plunged, leading to a "precipitous decline in the market value."

The California DFEH lawsuit, which followed an investigation that lasted over two years, sparked employee action, with Activision workers staging a walkout and over 2,000 current and former employees signing a petition supporting the agency suit.

Video game industry workers, similar to those in other industries, are often restricted from litigation and public statements by mandatory arbitration and non-disclosure agreements.

Former Activision Blizzard employees told Bloomberg Law those agreements, combined with a culture of secrecy around releasing new games, prevented employees from speaking out about alleged harassment.

That makes shareholder litigation important, Bottini said. Investors don't sign the same arbitration agreements or gag orders, and can step up and file lawsuits when employees can't, he added. But he cautioned that change through litigation can come slowly.

The investor suit was filed the same day the company held its latest earnings call. Analysts questioned the company over the suits and the impact they would have on the company's productivity, product pipeline, and worker morale.

Jen ONeal, who was named one of the company's new "coleaders" after Blizzard President J. Allen Brack announced he was leaving the company, said she was seeing "great progress."

"There's a lot of work ahead of us but the passion and productivity are already here," said ONeal.

The company also hired law firm Wilmer Cutler Pickering Hale and Dorr to investigate its culture. Activision CEO Bobby Kotick told employees in a July 28 statement that the review would "ensure that we have and maintain best practices to promote a respectful and inclusive workplace."

An Activision Blizzard spokesperson did not comment on the investor suit but said the company engages with shareholders and works to be responsive to their "interests and concerns with respect to our executive compensation, corporate governance practices, human capital management, and any other matters of importance."

### **Shareholder Pressure**

Molly Bowen, an attorney at Cohen Milstein, said there are two primary tracks investors looking to force change can pursue in court. Securities fraud claims, such as the suit against Blizzard, are ultimately aimed at recovering harm caused to investors by alleged misconduct, while shareholder derivative suits have the goal of remedying harm caused by leadership for the benefit of the company.

The derivative suit against Google parent Alphabet, which alleged executives failed to prevent sexual harassment, ended in a \$310 million settlement and pledges by the company to address diversity and gender equality issues.

Such suits could be on the horizon for Activision, lawyers predicted.

Bottini said his firm, Bottini & Bottini, is investigating a derivative case against Activision Blizzard, but it could be months before such a suit is filed.

Courts have a high bar for such suits, Bottini said, requiring plaintiffs' lawyers to conduct a thorough investigation to be able to allege that company officers breached their duties. That process could involve requests for non-public company documents, such as emails or minutes from board of directors meetings, and can often include side litigation to force companies to comply with those requests.

"If you file a derivative case without getting those documents and doing an investigation, it's likely the case would be dismissed," Bottini said.

### **New Precedent**

Shareholder lawsuits seeking remedies related to workplace discrimination and harassment are relatively new, and the law in this area has moved quickly, Bowen said.

"Shareholders have a really important role to play in remedying these wrongs, but I don't know if that's how people thought about it even just eight years ago," she said.

Attorney Louise Renne, who has represented shareholders in similar litigation, called lawsuits focused on equity and diversity issues in the workplace a fairly new phenomenon, citing Alphabet's July 2020 settlement as a landmark moment.

Shareholders seeking changes in other companies should use that settlement as a template, Renne said.

As part of the settlement, Alphabet pledged to expand diversity efforts, and created an independent audit board to oversee issues of harassment.

Alphabet didn't respond to Bloomberg Law's request for comment.

In the case of L Brands, the company has a pending settlement to end shareholder lawsuits alleging a culture of sexual harassment. The settlement would see the company spend \$90 million on workplace changes, including ending the use of non-disclosure agreements.

Pinterest is also facing shareholder derivative lawsuits that allege a culture of discrimination and bias against female executives.

Connor at Open MIC said shareholder suits could bring changes to workplace culture in the gaming industry.

"I don't think there's any question that there's more litigation coming," he said.

—With assistance from Paige Smith

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## Documents

### Complaint

[Proposed Shareholder Class Action](#)

### Complaint

[California DFEH Complaint](#)



In the  
United States Court of Appeals  
For the Seventh Circuit

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No. 20-2244

SEAFARERS PENSION PLAN,  
derivatively on behalf of The Boeing Company,  
*Plaintiff-Appellant,*

*v.*

ROBERT A. BRADWAY, *et al.*,  
*Defendants-Appellees,*

*and*

THE BOEING COMPANY,  
*Nominal Defendant-Appellee.*

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Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division.  
No. 1:19-CV-08095 — **Harry D. Leinenweber**, *Judge.*

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ARGUED NOVEMBER 30, 2020 — DECIDED JANUARY 7, 2022

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Before EASTERBROOK, WOOD, and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* On October 29, 2018, a Boeing 737 MAX airliner crashed in the sea near Indonesia, killing

everyone on board. A few months later, on March 10, 2019, a second 737 MAX crashed in Ethiopia, again killing everyone on board. Within days of the second crash, all 737 MAX airliners around the world were grounded. The United States Federal Aviation Administration kept the planes grounded until November 18, 2020, when it was satisfied that serious problems with the planes' flight control systems had been corrected.

In December 2019, plaintiff Seafarers Pension Plan, a shareholder of the Boeing Company, filed this derivative suit on behalf of Boeing under Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a)(1). The suit alleges that Boeing officers and board members made materially false and misleading public statements about the development and operation of the 737 MAX in Boeing's 2017, 2018, and 2019 proxy materials. The district court dismissed the suit without addressing the merits, applying a Boeing bylaw that gives the company the right to insist that any derivative actions be filed in the Delaware Court of Chancery. We reverse. Because the federal Exchange Act gives federal courts exclusive jurisdiction over actions under it, applying the bylaw to this case would mean that plaintiff's derivative Section 14(a) action may not be heard in any forum. That result would be contrary to Delaware corporation law, which respects the non-waiver provision in Section 29(a) of the federal Exchange Act, 15 U.S.C. § 78cc(a).

### *I. Factual and Procedural Background*

The Boeing Company is an international aerospace company headquartered in Illinois and incorporated under Delaware law. Plaintiff Seafarers Pension Plan is a Boeing shareholder. In addition to the loss of 346 lives, the 737 MAX

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accidents and the subsequent grounding of all 737 MAX planes and ensuing investigations and litigation will end up costing Boeing billions of dollars. This case is a part of that larger picture, but it presents issues that do not call upon us to address the merits of plaintiff's claims or their role in the larger aftermath of the 737 MAX crashes.

The Seafarers Plan filed this derivative suit under Section 14(a) of the Securities Exchange Act of 1934 alleging that Boeing's current and former officers and directors disseminated materially false and misleading proxy statements from 2017 through 2019. See 15 U.S.C. § 78n(a)(1); 17 C.F.R. § 240.14a-9. The Exchange Act gives federal courts exclusive jurisdiction over suits filed under the Act. 15 U.S.C. § 78aa. The Seafarers Plan therefore filed its complaint in the Northern District of Illinois, where Boeing is headquartered.

The defendants moved to dismiss based on the doctrine of forum non conveniens, invoking a Boeing bylaw that provides in relevant part:

With respect to any action arising out of any act or omission occurring after the adoption of this By-Law, unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for ... any derivative action or proceeding brought on behalf of the Corporation ... .

The defendants conceded that enforcement of the forum bylaw would foreclose the Seafarers Plan's federal derivative suit entirely. They argued, however, that Delaware law offered a sufficient substitute that would allow the Seafarers

Plan to vindicate its substantive rights under the Exchange Act of 1934. The district court agreed with defendants and dismissed the suit. *Seafarers Pension Plan v. Bradway*, 2020 WL 3246326, at \*4 (N.D. Ill. June 8, 2020).<sup>1</sup>

Applying the forum bylaw to this case is contrary to Delaware corporation law and federal securities law. In Part III, we explain that the forum bylaw is unenforceable as applied to this case because its application would violate Section 115 of the Delaware General Corporation Law. Delaware corporation law gives corporations considerable leeway in writing bylaws, including bylaws with choice-of-forum provisions, but it respects federal securities law and does not empower corporations to use such techniques to opt out of the Exchange Act. In Part IV, we address the cases the district court relied upon to grant dismissal. Before we discuss the merits, however, we address in Part II the appropriate standard of review.

## II. *Standard of Review*

The Seafarers Plan argues that we should decide de novo the legal question whether the forum bylaw is enforceable. Defendants argue that dismissal on forum non conveniens grounds should be reviewed more deferentially, only for an abuse of discretion. We have often said that forum non conveniens calls for a trial court to exercise its sound discretion and that we review such dismissals or denials of

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<sup>1</sup> Along with its federal claims, the Seafarers Plan initially alleged claims under Delaware law for breaches of fiduciary duty and unjust enrichment. Once the defendants invoked the forum bylaw, the parties agreed to dismiss the state-law claims without prejudice to allow refile in state court in Delaware.



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dismissals for abuse of discretion. E.g., *Mueller v. Apple Leisure Corp.*, 880 F.3d 890, 893–94 (7th Cir. 2018), quoting *Deb v. SIRVA, Inc.*, 832 F.3d 800, 805 (7th Cir. 2016); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 261 (1981) (finding no abuse of discretion in granting dismissal in tort case in U.S. court arising from aircraft crash in Scotland). If we were dealing with an ordinary choice-of-forum clause in a contract, that standard would apply.

The specific problem here is different, calling for what amounts to de novo review. Boeing’s forum bylaw presents only questions of law, which we ordinarily review de novo. The district court explained that it dismissed this case because it concluded, as a matter of law, that the Boeing forum bylaw was enforceable in this case. *Seafarers Pension Plan*, 2020 WL 3246326, at \*4. In a wide range of contexts, we have explained that if a district court exercises its discretion based on an erroneous view of the law, it will necessarily abuse its discretion. See, e.g., *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021), quoting *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6, 13 (7th Cir. 1992) (in deciding preliminary injunction motion, “district court ‘abuses its discretion when it commits ... an error of law’”); *Schleicher v. Wendt*, 618 F.3d 679, 688 (7th Cir. 2010) (holding “district court did not commit a legal error, or abuse its discretion” in deciding that plaintiffs offered sufficient evidence to invoke fraud-on-the-market theory to prove reliance prong of Rule 10b-5 claim). In this context, it is well-settled that the enforceability of a contract’s forum-selection clause is a question of law that we review de novo. E.g., *Bonny v. Society of Lloyd’s*, 3 F.3d 156, 159 (7th Cir. 1993); see also *Continental Ins. Co. v. M/V ORSULA*, 354 F.3d 603, 607 (7th Cir. 2003); *Hugel v. Corp. of Lloyd’s*, 999 F.2d 206, 207 (7th Cir. 1993); *Northwestern Nat’l Ins. Co. v. Donovan*, 916 F.2d 372,

375 (7th Cir. 1990). Because the district court based its decision on its view of legal issues, de novo review of the governing questions of law is appropriate here.

### III. *Applying Delaware Corporation Law*

The most straightforward resolution of this appeal is under Delaware corporation law, which we read as barring application of the Boeing forum bylaw to this case invoking non-waivable rights under the federal Exchange Act. We first address in Part III-A the nature of plaintiff's derivative Exchange Act claim and then in Part III-B the relevant Delaware statutes and case law on such forum-selection bylaws.

#### A. *Plaintiff's Derivative Claims Under the Exchange Act of 1934*

Plaintiff's derivative suit under Section 14(a) is straightforward. Section 14(a) and its implementing regulation, SEC Rule 14a-9, prohibit material misstatements or omissions in a proxy statement. 15 U.S.C. § 78n(a)(1); 17 C.F.R. § 240.14a-9(a). To state a claim under Section 14(a), a plaintiff must allege that (i) the proxy statement contained a material misstatement or omission, which (ii) caused plaintiff's injury, and (iii) that the proxy solicitation itself, rather than the particular defect in the solicitation, was an essential link in the accomplishment of the transaction. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 384–85 (1970). As noted, the Exchange Act provides that only federal courts may exercise jurisdiction over claims that arise under the Act. 15 U.S.C. § 78aa. Section 14(a) may be enforced in private actions by shareholders asserting their own rights and in derivative actions asserting rights of a corporation harmed by a violation. *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964).

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In a derivative suit under Section 14(a), the theory “is that a corporation’s board has been so faithless to investors’ interests that investors must be allowed to pursue a claim in the corporation’s name.” *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 316–17 (7th Cir. 2012). A derivative suit is considered “an asset of the corporation” and permits “an individual shareholder to bring ‘suit to enforce a *corporate* cause of action against officers, directors, and third parties.’” *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 95 (1991), quoting *Ross v. Bernhard*, 396 U.S. 531, 534 (1970); *Lefkowitz v. Wagner*, 395 F.3d 773, 776 (7th Cir. 2005), quoting *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 589 (7th Cir. 2003).

Here, plaintiff alleges that the false and misleading proxy statements caused harm to Boeing by enabling the improper re-election of directors who had for years tolerated poor oversight of passenger safety, regulatory compliance, and risk management during the development of the 737 MAX airliner. Plaintiff further alleges that the proxy statements provided misleading recommendations to shareholders and caused shareholders to vote down a shareholder proposal calling for bifurcation of the CEO and chairman positions.

Regardless of the ultimate merits of the claims, plaintiff’s chosen forum in the federal district where Boeing is headquartered seems appropriate for the case. To avoid that chosen forum and defeat the claims entirely, defendants invoked Boeing’s forum bylaw. If it can be applied to this case, the bylaw will force plaintiff to raise its claims in a Delaware state court, which is not authorized to exercise jurisdiction over Exchange Act claims. 15 U.S.C. § 78aa; *Cottrell v. Duke*, 737 F.3d 1238, 1247–48 (8th Cir. 2013). If that’s correct, checkmate for defendants. That result would be difficult to reconcile with

Section 29(a) of the Exchange Act, which deems void contractual waivers of compliance with the requirements of the Act. 15 U.S.C. § 78cc(a).

*B. Delaware Corporation Law on Forum-Selection Bylaws*

We read Delaware corporation law as rejecting Boeing's use of its forum bylaw to foreclose entirely plaintiff's derivative action under Section 14(a). Section 115 of the Delaware General Corporation Law addresses specifically bylaws that impose choices of forums for litigation involving corporate affairs. Section 115 provides in relevant part that "bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State." 8 Del. C. § 115. Section 115 defines "internal corporate claims" to include derivative claims like this one: "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity ... ." 8 Del. C. § 115.

For present purposes, the two key phrases in Section 115 are "consistent with applicable jurisdictional requirements" and "courts *in* this State." As applied here, Boeing's forum bylaw violates Section 115 because it is inconsistent with the jurisdictional requirements of the Exchange Act of 1934, 15 U.S.C. § 78cc(a). Further, federal courts in Delaware are courts "*in*" that State, as distinct from courts "*of*" that State. The statutory language shows that Section 115 does not authorize application of Boeing's forum bylaw to close all courthouse doors to this derivative action.



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First, regarding the “jurisdictional requirements” phrase, guidance from the Delaware General Assembly supports this reading of Section 115. The synopsis accompanying the 2015 Amendments to the Delaware General Corporation Law anticipated the question posed in this case. It cautioned that the new Section 115 was “not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.” S.B. 75, 148th Gen. Assemb., Reg. Sess. (Del. 2015) (synopsis). By eliminating federal jurisdiction over the Seafarers Plan’s exclusively federal derivative claims, Boeing’s forum bylaw forecloses suit in a federal court based on federal jurisdiction. That’s exactly what Section 115 was “not intended to authorize.”<sup>2</sup>

Second, while we might hesitate to place decisive weight solely on a choice of preposition in the statute, we must also note that the choice is consistent with the Delaware Supreme Court’s and our understanding of the Delaware statute. The United States District Court and Bankruptcy Court for the District of Delaware are certainly, in the statute’s words, “courts *in* this State” of Delaware. In *Salzberg v. Sciabacucchi*, 227 A.3d 102, 119 (Del. 2020), the Delaware Supreme Court addressed Section 115 and said it presumed that the reference

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<sup>2</sup> Delaware law holds that a bill synopsis is a proper source from which to glean legislative intent where the statutory language seems ambiguous. *Board of Adjustment of Sussex Cty. v. Verleysen*, 36 A.3d 326, 332 (Del. 2012); *Carper v. New Castle Cty. Bd. of Ed.*, 432 A.2d 1202, 1205 (Del. 1981). Section 115 as enacted was not materially different from the language described in the synopsis.

to “courts in this State” included federal courts located in the state.

If the statute had said “courts of this State,” the statutory language might have given defendants a better toehold. Most circuits treat forum-selection clause references to courts “of” a state as not including federal courts in the state, but references to courts “in” a state as including both state and federal courts located in the state. See, e.g., *New Jersey v. Merrill Lynch & Co.*, 640 F.3d 545, 549 (3d Cir. 2011) (collecting cases, including *FindWhere Holdings, Inc. v. Sys. Env’t Optimization, LLC*, 626 F.3d 752, 755 (4th Cir. 2010), and *Dixon v. TSE Int’l Inc.*, 330 F.3d 396, 398 (5th Cir. 2003)); cf. *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 195–96 (6th Cir. 1990) (construing contractual clause consenting to “jurisdiction of the Michigan Courts” as not clearly waiving statutory right to remove case from state courts to a federal court in Michigan). Similarly, for example, the federal Tax Injunction Act bars federal district courts from enjoining state tax collections when “a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341 (emphasis added). That statutory language means that such cases must ordinarily be heard in state courts, as distinct from language designating courts “in” a state as suitable forums. See *City of Fishers v. DirecTV*, 5 F.4th 750, 753 (7th Cir. 2021) (discussing Tax Injunction Act).

From these signals in the statutory text and Delaware case law, we conclude that Section 115 does not authorize use of a forum-selection bylaw to avoid what should be exclusive federal jurisdiction over a case, particularly under the Exchange Act.

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Defendants counter that Section 115 does not matter because the Boeing bylaw is authorized under Section 109(b), which provides broadly that a corporation's "bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its right or powers or the rights or powers of its stockholders, directors, officers or employees." 8 Del. C. § 109(b). We are not persuaded that Section 109(b) saves this bylaw in this case.

We start with the general principle, which Delaware law adopts, that more specific statutory provisions, like Section 115 for bylaws with forum-selection clauses, ordinarily take precedence over more general provisions like Section 109. E.g., *Turnbull v. Fink*, 668 A.2d 1370, 1377 (Del. 1995) ("Where possible, a court will attempt to harmonize two potentially conflicting statutes dealing with the same subject. If they cannot be reconciled, however, the specific statute must prevail over the general.") (citations omitted). Section 109 includes the limit "not inconsistent with law," which does not invite corporations to avoid non-waiver provisions like Section 29(a) of the Exchange Act.

Defendants counter that principle, however, by arguing that in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), the Delaware Supreme Court held that the more general Section 109 actually provides broader authorizations than Section 115. Defendants read too much into *Salzberg*, which does not allow enforcement of Boeing's forum bylaw in this case. In *Salzberg*, several Delaware corporations wrote charters with provisions requiring that any actions arising under the Securities Act of 1933 be filed in federal courts. *Id.* at 109. Unlike the Exchange Act of 1934, the Securities Act of 1933 allows

plaintiffs to file suit in state *or* federal court and, significantly, bars removal from state to federal court. 15 U.S.C. § 77v(a); *Cyan, Inc. v. Beaver County Emps. Ret. Fund*, 138 S. Ct. 1061, 1078–79 (2018).

A shareholder brought a facial challenge to those federal forum clauses. The Court of Chancery held them invalid. The Delaware Supreme Court reversed, but on narrow grounds. *Salzberg* held only that the challenged provisions were facially valid under Section 102(b)(1) of the Delaware General Corporation Law, which broadly defines what corporate charters and bylaws may contain. 8 Del. C. § 102(b)(1); *Salzberg*, 227 A.3d at 109, 113–14.

Accordingly, *Salzberg* neither applies to claims brought under the Exchange Act of 1934 nor bars securities plaintiffs from bringing as-applied challenges to federal forum provisions. Nothing in *Salzberg* suggests it would extend Section 109 (or Section 102(b)(1), for that matter) to allow application of the forum bylaw to a case like this one, where it would effectively bar plaintiff from bringing its derivative claims under the 1934 Act in *any* forum. To the contrary, the Delaware court stressed the harmony between Delaware corporation law and federal securities law: “This Court has viewed the overlap of federal and state law in the disclosure area as ‘historic,’ ‘compatible,’ and ‘complimentary.’” 227 A.3d at 114, quoting *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998). Even more to the point here, as noted above, *Salzberg* expressly presumed that the reference to “courts *in* this State” in the bylaws authorized by the new Section 115 included federal courts, 227 A.3d at 119, which the Boeing forum bylaw does not.

Defendants also contend that in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), the



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Delaware Court of Chancery held that Section 109(b) authorized a forum selection bylaw identical to the Boeing forum bylaw. Not quite, for there were critical differences. In *Boilermakers Fund*, the boards of two Delaware corporations, Chevron and FedEx, had adopted bylaws designating the Delaware Court of Chancery as the exclusive forum for four types of suits: derivative suits, fiduciary duty suits, suits under Delaware corporation law, and internal affairs suits. *Id.* at 942–43.

Plaintiffs were shareholders of Chevron and FedEx who alleged that the boards lacked statutory authority to adopt the bylaws. They sought a declaration that the bylaws were facially invalid and amounted to breaches of fiduciary duty. The Court of Chancery rejected the facial challenges, emphasizing that plaintiffs were required to show that the bylaws could not “operate lawfully or equitably *under any circumstances.*” *Id.* at 948.

In so holding, the court offered important observations about the purpose of Section 109(b), the nature of forum-selection bylaws, and hypothetical as-applied challenges—like this case—based on the enforcement of a forum-selection bylaw to eliminate federal jurisdiction. These observations make clear that Section 109(b) and *Boilermakers Fund* do not authorize enforcement of a forum-selection provision like the Boeing forum bylaw in a case like this one.

First, the Court of Chancery noted that Section 109(b) “has long been understood to allow the corporation to set ‘self-imposed rules and regulations [that are] deemed expedient for its convenient functioning.’” 73 A.3d at 951, quoting *Gow v. Consolidated Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933). Generally speaking, the court continued, forum bylaws fit that description because they are “procedural” and

“process-oriented” rather than substantive. *Boilermakers Fund*, 73 A.3d at 951, quoting *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 236–37 (Del. 2008). The court determined that the challenged forum-selection bylaws—directing shareholders to file their internal affairs claims in the state of Delaware (Chevron) and in the Delaware Court of Chancery (FedEx)—also fit that description: they regulated “*where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation.” *Boilermakers Fund*, 73 A.3d at 952; see also *Salzberg*, 227 A.3d at 115 n.51 (reiterating *Boilermakers Fund* point that forum bylaws may regulate where—not whether—shareholders may file suit).

The *Boilermakers Fund* court then provided important guidance for this case. The court addressed the plaintiffs’ attempts to identify hypothetical situations where the challenged bylaws would operate unreasonably by precluding plaintiffs from bringing claims—such as derivative claims under the Exchange Act of 1934—that must be brought in federal court. *Boilermakers Fund*, 73 A.3d at 961–62. The court explained that facially, “neither of the forum selection bylaws purports in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government.” *Id.* at 962. In fact, the Chevron bylaw had been amended to avoid the problem we face here by expressly allowing cases to be filed in *federal* court in the state of Delaware. *Id.* at 961.

The plaintiffs asked a hypothetical question. Suppose the board of FedEx sought to enforce the forum bylaw to foreclose a plaintiff from bringing a claim within the exclusive jurisdiction of the federal courts? That’s this case. The Delaware

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Court of Chancery explained that in such a case, the board “would have trouble” for two reasons:

First, a claim by a stockholder under federal law for falsely soliciting proxies does not fit within any category of claim enumerated in FedEx’s forum selection bylaw. Thus FedEx’s bylaw is consistent with what has been written about similar forum selection clauses addressing internal affairs cases: “[Forum selection] provisions do not purport to regulate a stockholder’s ability to bring a securities fraud claim or any other claim that is not an intra-corporate matter.” Second, the plaintiff could argue that if the board took the position that the bylaw waived the stockholder’s rights under the Securities Exchange Act, such a waiver would be inconsistent with the antiwaiver provisions of that Act, codified at 15 U.S.C. § 78cc.

*Id.* at 962 (footnotes omitted). The first reason would not apply to plaintiff’s derivative action here, but the second reason applies directly to it. While the Court of Chancery declined to “wade deeper into imagined situations” so as not to risk issuing an advisory opinion, its brief foray into how a hypothetical plaintiff might protect her not-so-hypothetical rights under the federal securities laws signals clearly enough that Delaware law would not look kindly on defendants’ effort to apply the Boeing bylaw here.

In future cases, Delaware courts may address broader questions such as whether Section 109(b) would authorize a bylaw that violates Section 115, but it is sufficient for our purposes that the reasoning of *Boilermakers Fund* does not

authorize application of the Boeing forum bylaw to this case, where it would effectively foreclose a claim under federal securities law. The Court of Chancery made clear that enforcement of a forum bylaw to foreclose a plaintiff from exercising her rights under the Exchange Act of 1934 would be inconsistent with the anti-waiver provision of that Act. 73 A.3d at 962. No Delaware law, at least to our knowledge, authorizes such an inconsistency. To the contrary, *Salzberg, Boilermakers Fund*, and the new Section 115 codifying that decision signal clearly that Delaware is not inclined to enable corporations to close the courthouse doors entirely on derivative actions asserting federal claims subject to exclusive federal jurisdiction.

#### IV. *Distinguishing Bremen and Bonny*

To avoid this result, defendants also argue that they seek only routine enforcement of a routine forum-selection clause in a contract, citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993). The district court looked carefully at both cases and ultimately concluded that *Bonny* supported dismissal based on Boeing's forum bylaw. We explained above why we conclude that Boeing's forum bylaw, as applied to this case, simply is not enforceable under Delaware law. It may be useful, however, to explain why we also do not find *Bremen* or *Bonny* a sufficient basis for enforcing the forum bylaw here.

We begin with *Bremen*. Zapata, a company based in Texas, contracted with plaintiff Unterweser, a German corporation, to tow Zapata's drilling rig (the *Bremen*) from Louisiana to Italy. *M/S Bremen*, 407 U.S. at 2. The towing contract provided that any dispute arising from the contract must be brought before the London Court of Justice. The rig was damaged in a storm in international waters in the Gulf of Mexico. Zapata



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directed Unterweser to tow the damaged rig to Tampa, Florida, the nearest port of refuge. A week later, Zapata—ignoring the terms of the contract—filed suit in federal court in Tampa for negligent towing and breach of contract. Unterweser invoked the forum-selection provision and moved to dismiss for forum non conveniens. The district court denied Unterweser’s motion and concluded that Zapata’s choice of forum should not be disturbed. The Fifth Circuit affirmed.

The Supreme Court reversed, teaching that such forum-selection provisions in contracts are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” 407 U.S. at 10. The Court explained that there were “compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power” should be fully enforced. *Id.* at 12.

In the *Bremen* opinion itself, the Court emphasized the international character of the transaction, where choice-of-forum and choice-of-law agreements may be especially helpful in case of disputes. Later cases show, however, that *Bremen* stands for the broader proposition that contractually valid choice-of-forum clauses will ordinarily be enforced. See, e.g., *Atlantic Marine Constr. Co. v. U.S. District Court*, 571 U.S. 49, 62–64 (2013); *Mueller*, 880 F.3d at 894, quoting *Atlantic Marine*, 571 U.S. at 64 (“forum-selection clauses should control except in unusual cases”).

*Bremen* differs from this case most importantly in that it involved a purely private contractual dispute. It did not involve any claim under a federal statute, let alone a federal statute with a non-waiver provision like Section 29(a) of the Exchange Act. While the Supreme Court has generally been

receptive to enforcing contractually valid forum-selection clauses, neither *Bremen* nor other decisions have endorsed such clauses as paths to avoid otherwise applicable federal statutes. Instead, the Court has warned against such uses.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp.*, 473 U.S. 614 (1985), Chrysler asserted claims against Mitsubishi, including an antitrust claim under United States law. The parties' contract required arbitration of disputes in Japan. The Supreme Court enforced the clause and ordered the parties to resolve their disputes in arbitration rather than in a court. The Court did so, however, only after being assured that the arbitration panel would apply United States antitrust law, and only after issuing a pointed warning against using an arbitration clause to avoid an otherwise-applicable federal statute, even one without an anti-waiver provision like the 1934 Exchange Act's Section 29(a). *Id.* at 636–38, 637 n.19.

The agreement between Mitsubishi and Chrysler also said it would be governed by Swiss law. *Id.* at 637 n.19. In an amicus brief, the United States had raised the possibility that the arbitral panel might read this choice-of-law provision as governing not only the terms of the contract but also as displacing United States law, including the Sherman Act, where it would otherwise apply. Mitsubishi had told the Court in oral argument that it was not trying to avoid application of the Sherman Act by that device. Despite that assurance, the Court still went out of its way to warn against that possibility: "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* (citations omitted).

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That considered warning carries even more force in this case under the Exchange Act of 1934, with its anti-waiver provision. In short, neither *Bremen* nor the more general policy in favor of enforcing contractual forum-selection clauses supports application of Boeing's forum bylaw to foreclose entirely plaintiff's derivative Section 14(a) claims.

Turning to this court's decision in *Bonny v. Society of Lloyd's*, defendants emphasize that we enforced choice-of-law and forum-selection provisions that had the effect of foreclosing plaintiffs' claims under federal securities law. We did so after being satisfied that English law would provide sufficient protection and remedies. 3 F.3d at 161–62. Defendants contend the same reasoning should apply to remedies under state law in this case, and the district court agreed. We disagree because of a critical difference between *Bonny* and this case that limits its reasoning.

The plaintiffs in *Bonny* were United States citizens who had invested in the English insurer, Lloyd's of London. The investment agreements provided that any disputes arising out plaintiffs' investments with Lloyd's would be governed by English law and that the courts of England would have exclusive jurisdiction over such disputes. After sustaining heavy losses, plaintiffs sued Lloyd's in the Northern District of Illinois alleging claims under Section 12 of the Securities Act of 1933 and Section 10(b) of the Exchange Act of 1934. The district court dismissed the suit based on the forum-selection clause. *Id.* at 157. We affirmed, reasoning that the choice-of-law and forum-selection provisions did not violate United States public policy and were therefore enforceable despite plaintiffs' reliance on the anti-waiver provisions of the 1933 and 1934 Acts.

The lack of a true conflict between English law and applicable United States law was central to our decision. 3 F.3d at 161–62. First, citing *Bremen*, we noted that choice-of-law and forum-selection provisions in agreements between domestic and foreign businesses are “valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.” *Id.* at 159, quoting *Bremen*, 407 U.S. at 10. The plaintiffs in *Bonny*, much like the plaintiffs in *Bremen*, had failed to demonstrate that the provisions at issue were unreasonable. *Bonny*, 3 F.3d at 160. Further, echoing the Supreme Court’s language in *Bremen*, *Mitsubishi Motors*, and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), we explained that the presumptive validity of such provisions offered valuable predictability in international business transactions. *Bonny*, 3 F.3d at 159–60, discussing *Mitsubishi Motors*, 473 U.S. at 629, and *Scherk*, 417 U.S. at 516.

Even so, we harbored “serious concerns that Lloyd’s clauses operate[d] as a prospective waiver of statutory remedies for securities violations,” but in the end we were “satisfied that several remedies in England vindicate[d] plaintiffs’ substantive rights while not subverting” the principles of full and fair disclosure protected by the Securities Act of 1933. *Bonny*, 3 F.3d at 160–61.<sup>3</sup> The international nature of the transactions and the availability of adequate remedies under British law convinced us that the forum-selection and choice-of-

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<sup>3</sup> In *Bonny*, the record showed that English law afforded plaintiffs a cause of action similar to their claims under Section 10(b) of the Exchange Act of 1934 and Rule 10b-5. 3 F.3d at 161. There were no English rights and remedies similar to those under Sections 12(1) and 12(2) of the Securities Act of 1933. *Id.* at 162.

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law provisions were enforceable despite the anti-waiver provisions in the 1933 and 1934 Acts. *Id.* at 162.<sup>4</sup>

Defendants argue that we should extend the same analysis—focused on the sufficiency of remedies under state law—to enforce Boeing’s forum bylaw here. That argument overlooks the decisive role that the international character of the dispute played in *Bonny*. The English remedies were deemed sufficient *only* in light of the international nature of the investment agreements: “Given the international nature of the transactions involved here, and the availability of remedies under British law that do not offend the policies behind the securities laws, the parties’ forum selection and choice of law provisions contained in the agreements should be given effect.” 3 F.3d at 162.

There is no hint in *Bonny* that the same logic and result would apply to a domestic transaction’s forum-selection

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<sup>4</sup> *Bonny* is consistent with decisions in other circuits balancing these competing interests when parties to *international* investments agree on foreign forums and foreign law. For example, in *Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997), the Fifth Circuit reiterated that United States courts should “tread cautiously before expanding the operation of U.S. securities law in the international arena,” particularly “in the case of England, a forum that American courts repeatedly have recognized to be fair and impartial.” *Id.* at 966–67 (footnote omitted). For similar holdings, see *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1294–96 (9th Cir. 1998) (en banc); *Roby v. Corporation of Lloyd’s*, 996 F.2d 1353, 1364–66 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992); *AVC Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 148, 158–59 (2d Cir. 1984) (Section 29(a) did not prevent enforcement of choice of Dutch forum and law). These decisions all seem generally consistent with the Supreme Court’s later decision in *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), which limited extraterritorial application of United States securities laws.



clause that had the effect of waiving federal securities rights and remedies and leaving the investor to only state-law remedies. To the contrary, extending *Bonny* to domestic investments and state-law remedies would undermine the pivotal decisions by Congress in 1933 and 1934 to assume the dominant role in securities regulation after decades of ineffective state regulation. Both federal Acts contain anti-waiver provisions that prevent parties from opting out of the federal laws in favor of state law, no matter how similar or strong the state-law rights and remedies are. See 15 U.S.C. §§ 77n & 78cc(a).

As applied to plaintiff's Section 14(a) claims, Boeing's forum bylaw does not implicate the unique needs of international trade or require us to parse the similarities and differences between foreign and domestic securities laws. The anti-waiver provision of Section 29(a) does not invite a determination of whether state law offers alternative remedies that might be deemed sufficient against an inchoate standard. Non-waiver is woven into the public policy of the federal securities laws because it is the express statutory law. And that law is binding—especially where, as here, there are no countervailing international policy interests at stake. Accord, *Luce v. Edelstein*, 802 F.2d 49, 57 (2d Cir. 1986) (forum-selection clause provided for only state-court jurisdiction; district court correctly dismissed most claims but retained jurisdiction over Exchange Act claims); *KDH Consulting Grp. LLC v. Iterative Capital Mgmt. L.P.*, 2020 WL 7251172, at \*9 (S.D.N.Y. June 29, 2020) (following *Luce*, retaining Exchange Act claims but dismissing other claims).

*Bonny* required a choice between United States law and policy and foreign law and policy. Here, however, we see no comparable tension between federal law and policy and

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Delaware state law and policy. After all, under the Supremacy Clause of the United States Constitution, state courts enforce and apply both state and federal law. See *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) (“The law of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.”), cited in *Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 277 F.3d 936, 942 (7th Cir. 2002) (Illinois courts would recognize claim for retaliatory discharge in violation of Illinois public policy where employer fired employee for objecting to violations of federal anti-fraud law). The Delaware Court of Chancery’s opinion in *Boilermakers Fund* shows no relevant tension between Delaware corporation law and public policy and federal securities law and policy. Instead, as noted, the Court of Chancery said that the defendant corporations would run into trouble under the Exchange Act’s anti-waiver provision in Section 29 if they tried to apply their forum-selection provisions to foreclose entirely claims under the Exchange Act. 73 A.3d at 962.<sup>5</sup>

Finally, our dissenting colleague proposes an entirely different solution for the puzzle at this intersection of state

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<sup>5</sup> For all of these reasons, we respectfully disagree with relevant portions of several district court decisions that have extended the reasoning of *Bonny* beyond its international foundations to enforce forum-selection clauses that had the effect of foreclosing claims under otherwise-applicable federal securities laws and leaving plaintiffs to only state-law remedies. See *Spenta Enterprises, Ltd. v. Coleman*, 574 F. Supp. 2d 851, 857 (N.D. Ill. 2008), followed in *Solid Q Holding, LLC v. Arenal Energy Corp.*, 2017 WL 935891, at \*2 n.17 (D. Utah Mar. 8, 2017), and *Vernon v. Stabach*, 2014 WL 1806861, at \*6 (S.D. Fla. May 7, 2014).

corporation law, federal securities law, and federal jurisdiction and venue rules. The dissent's proposed solution would be to allow a Delaware state court to hear a derivative action under Section 14(a), despite the Exchange Act's provision for exclusive federal jurisdiction in Section 29(a). As a matter of policy, that solution might well be a reasonable outcome, at least under a different set of federal statutes and precedents. That solution, however, is not consistent with our reading of either Delaware law, the Exchange Act's exclusive federal jurisdiction, *Borak*'s recognition of derivative claims under Section 14(a), or the Supreme Court's caution in the *Mitsubishi* case, 473 U.S. at 637 n.19, against using choice-of-forum and choice-of-law clauses to attempt prospective waivers of federal statutory remedies.

Notably, defendants have not advocated for the dissent's novel proposal to send this dispute to state court in Delaware. The defendants have instead argued all along for their preferred Catch-22 result that would bar plaintiff's derivative Section 14(a) claim in *any* forum. Also, the dissent does not cite any precedent adopting its solution for this case. In our view, a state court would have to be bold indeed to adopt that solution and to exercise jurisdiction over this derivative claim despite Section 29(a), the lack of support from either side in this lawsuit, and the Supreme Court's warning in footnote 19 of the *Mitsubishi* case. See also *Cottrell v. Duke*, 737 F.3d 1238, 1247–48 (8th Cir. 2013) (reversing *Colorado River* abstention over shareholder derivative action under Section 14(a) because Delaware state court could not exercise jurisdiction over that claim in parallel derivative action).

It may or may not be true, as the dissent suggests, that Delaware *could* abolish or further restrict derivative claims based

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on federal laws in ways consistent with the dissent's views. We decline to speculate on the point because Delaware has not yet done so or signaled its intention to do so. Unless and until it does, the better course is to hold that Boeing's forum bylaw cannot be applied to this derivative action asserting a claim that is subject to exclusive federal jurisdiction.

The judgment of the district court is REVERSED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

EASTERBROOK, *Circuit Judge*, dissenting. Page 2 of my colleagues' opinion sums up their rationale: "Because the federal Exchange Act gives federal courts exclusive jurisdiction over actions under it, applying the bylaw to this case would mean that plaintiff's derivative Section 14(a) action may not be heard in any forum." They deem that outcome unacceptable. Yet plaintiff retains its right to sue directly under §14(a) in federal court, and jurisdiction to enforce the Exchange Act is not exclusive in the way my colleagues understand it. This means that litigating the proposed derivative suit in state court is not problematic.

Section 14(a), 15 U.S.C. §78n(a), says that it is unlawful for any person to solicit proxies in violation of a rule issued by the SEC. It does not say one word about enforcement, nor does any other part of the Exchange Act. Federal judges created a private right of action—and the action thus created is one that permits investors to sue issuers, not one that permits issuers (the authors of the contested documents) to sue. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). Nothing in Boeing's bylaw strips plaintiff, as a recipient of proxy materials, of the ability to file a direct §14(a) action in federal court. And since plaintiff retains that ability, it is hard to see how it has been deprived of a right to enforce §14(a).

Recall what a derivative action is. An investor who wants a corporation to sue members of its own board or management proceeds in multiple steps. First the investor demands action from the board. If the board says no, the investor sues the directors seeking a judicial order compelling them (or permitting the investor on their behalf) to require the corporation to sue. If a court issues such an order, the corporation



(perhaps represented by the investor as its agent) litigates against the directors. The first two steps, which address the question “Who speaks for the corporation?”, are matters of corporate internal affairs under state law. So *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), holds with respect to derivative suits whose ultimate (third) step would rest on federal law. It is state law, *Kamen* tells us, that determines both when demand is required and when investors can step into a corporation’s shoes. And the third step—in which a corporation, author of the proxy materials, sues its own directors—also rests on state law. Plaintiff’s theory at the third step would be that the directors violated their state-law duty of care by permitting Boeing to do things that exposed it to liability under federal law. Section 14(a) plays a role in such litigation, to be sure, but does not create the claim. Nor is the derivative claim necessary to enforce the federal rule, which is done through investors’ or the SEC’s direct suits.

Suppose Delaware were to abolish derivative suits. Investors still could sue managers for violating the state-law duties of care or loyalty. Investors still could sue companies under statutes such as §14(a). Would abolishing derivative actions violate federal law? I can’t see how. And if states can abolish derivative suits without violating §14(a), they can permit corporations to establish conditions on derivative suits. The federal right is for investors or the SEC to sue directly. Many investors *have* sued Boeing directly about the 737 MAX debacle. A derivative suit adds only a procedural snarl.

*Virginia Bankshares* holds that the existence of a private right of action under §14 cannot be taken for granted. It is not an on/off matter, in which every possible claim in the name of §14 is proper. Instead the judiciary proceeds theory by theory.

The Supreme Court has never held or even intimated that there is a federal right to pursue a derivative claim under §14(a) when the investor can pursue a direct claim. *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), holds that §14 supports a derivative claim when its denial would “be tantamount to a denial of federal relief”; that condition does not hold when the private plaintiff can pursue a direct action in federal court.

*Virginia Bankshares* treats *Borak* as limited to its facts and declines to extend private rights under §14(a) to new theories. In the 30 years since, the Justices have told us that the days of authorizing private actions in common-law fashion are over. See, e.g., *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (describing the Court’s “reluctance to extend judicially created private rights of action”). *Borak* is now a derelict. We should not expand it to a situation in which private rights can be enforced in direct suits.

As for the supposed exclusivity of jurisdiction under the Exchange Act: since per *Kamen* at least the first two steps rest on state law, it is hard to see how federal jurisdiction over derivative litigation could be exclusive. Congress has recognized this. For 61 years the Securities Exchange Act of 1934 did not mention derivative litigation. That changed in 1995, with the Private Securities Litigation Reform Act. One feature of this statute, which amends the 1934 Act, permits issuers to remove suits filed, nominally under state law, when the subject matter comes within the scope of federal law. See generally *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006). But derivative suits can’t be removed. See 15 U.S.C. §77p(f)(2)(B). Congress thus has told us that derivative suits related to securities matters may begin in state court—and, if

they begin there, stay there. That's inconsistent with my colleagues' view that they must be in federal court.

Section 27(a) of the Exchange Act, 15 U.S.C. §78aa(a), provides for exclusive jurisdiction of claims arising under the Exchange Act and the SEC's rules, but a derivative suit arises under state law even if a federal issue may come to the fore eventually. More: *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), treats exclusivity under §27(a) as a right that people may waive. 482 U.S. at 227–38. It added that the anti-waiver clause in §29(a), 15 U.S.C. §78cc(a), is limited to the Act's substantive standards. This meant in *McMahon* that issuers and investors are free to agree to arbitration. *McMahon's* reasoning means that other forum-selection agreements are permissible—after all, the Court deems arbitration a kind of forum-selection agreement, which *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), held to be compatible with the Exchange Act. The provision in Boeing's bylaws is just another forum-selection clause. (Under Delaware law, bylaws are contracts between corporations and investors. See *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014).) The bylaw waives any right to exclusive federal jurisdiction. Delaware will provide whatever substantive relief is appropriate, if its judiciary first holds that plaintiff can litigate on Boeing's behalf.

Any doubt could be resolved by decomposing a derivative claim into its components: the first two steps in state court under state law, and the third (if the state judiciary authorizes plaintiff to represent Boeing) in federal court. That would do minimal damage to Delaware law and Boeing's bylaw. The majority's approach, by contrast, demolishes a sensible state scheme.

I acknowledge that Boeing has not relied on *Kamen*, *McMahon*, or *Virginia Bankshares*. The principle of party presentation normally limits a federal court to resolving the parties' contentions. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). Yet Boeing has vigorously defended the validity of its bylaw, though it has slighted the choice-of-law considerations that I have stressed. A federal court is not bound by litigants' beliefs about the meaning of a jurisdictional provision such as §27(a). We must resolve jurisdictional issues correctly no matter what the parties say or omit. And *Kamen* concerns the appropriate treatment of parties' mistaken assumption that federal procedures govern derivative litigation in which there is a federal substantive issue. Both sides in *Kamen* told this court that federal substance implies federal procedures for derivative litigation; they disagreed only about what those procedures should be. After we devised a federal rule about demand on the board of directors, the Supreme Court reversed us for accepting the parties' mutual assumption. The Justices told us to apply state law to procedural matters in derivative suits, no matter the source of the substantive theory. We should not make the same mistake again.

None of what I have said so far would matter if, as the majority concludes, Boeing's bylaw is unlawful under Delaware law. Yet my colleagues' analysis of that subject is colored by their belief that the bylaw extinguishes a right under federal law. I've shown why that is not so.

Read on its own terms, 8 Del. Code §115 does not prohibit Boeing's bylaw. The statute provides:

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all

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internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. “Internal corporate claims” means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

This does not prohibit bylaws that limit derivative claims to state court. To the contrary, it authorizes such bylaws and prohibits only those that *prevent* litigation in state court. Boeing’s bylaw does not transgress that rule.

Suppose we treat plaintiffs’ derivative suit as something other than an “internal corporate claim[]” —I think that it is one, but suppose otherwise. That would make §115 irrelevant. It would neither authorize nor prohibit the bylaw.

The most authoritative word about the meaning of §115 comes from the Supreme Court of Delaware.

Section 115 merely confirms affirmatively ... that a charter may specify that internal corporate claims must be brought in “the courts in this State” ... while prohibiting provisions that would preclude bringing internal corporate claims “in the courts of this State.” Section 115, read fairly, does not address the propriety of forum-selection provisions applicable to other types of claims. If a forum-selection provision purports to govern intra-corporate litigation of claims that do not fall within the definition of “internal corporate claims,” we must look elsewhere ... to determine whether the provision is permissible.

*Salzberg v. Sciabacucchi*, 227 A.3d 102, 119 (Del. 2020). This tells us that §115 either supports Boeing’s bylaw or is irrelevant to it. My colleagues say that 8 Del. Code §109(b), on which Boeing relies as the “elsewhere,” does not authorize its bylaw because §115, as the more specific law, takes precedence. Yet



*Salzberg* directs courts to look outside §115 unless the bylaw does something that §115 forbids—and §115 forbids only provisions that block litigation in Delaware. Section 109(b) is a general grant of authority to adopt bylaws. Given the understanding of §115 in *Salzberg*, §109(b) is adequate to the task.

I accept my colleagues' observation that federal district courts are courts "in" each state, but this does not have the significance they see in "in". Section 115 says that a bylaw may call for litigation "exclusively in *any or all* of the courts in this State" (emphasis added). Just as a federal district court is "in" Delaware, so is the state's Court of Chancery. The option to choose among "any" of the courts "in" Delaware gives Boeing the right to do exactly what it has done. My colleagues, by contrast, read "any or" out of §115, leaving only "all" as an option.

I end where I began, just as my colleagues have done. Their beginning is a belief that the bylaw coupled with §27(a) strips plaintiff of a federal right to litigate a derivative §14(a) claim. But if there is no such thing as a derivative §14(a) claim divorced from state corporate law, if derivative suits are proper in state courts, and if exclusivity under §27(a) is waivable—indeed, if any one of these three propositions holds—then there is no problem with litigating plaintiff's claim in the courts of Delaware.

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**SENATE COMMITTEE ON  
BANKING AND FINANCIAL INSTITUTIONS**

**Senator Steven Bradford, Chair  
2019 - 2020 Regular**

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<b>Bill No:</b>	AB 979	<b>Hearing Date:</b>	August 13, 2020
<b>Author:</b>	Holden		
<b>Version:</b>	July 28, 2020 Amended		
<b>Urgency:</b>	No	<b>Fiscal:</b>	Yes
<b>Consultant:</b>	Eileen Newhall		

**Subject:** Corporations: boards of directors: underrepresented communities

**SUMMARY** This bill requires publicly held corporations to fill their board seats with a minimum number of directors from underrepresented communities, as specified.

**EXISTING LAW**

- 1) Provides, for purposes of the requirements below, that “female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth, and that “publicly held corporation” means a corporation with outstanding shares listed on a major United States stock exchange (Corporations Code Section 301.3).
- 2) Requires, no later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices are located in California to have a minimum of one female director on its board and clarifies that a corporation may increase the number of directors on its board to comply with this requirement (Corporations Code Section 301.3).
- 3) Requires, no later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices are located in California to comply with the following (Corporations Code Section 301.3):
  - a) If its number of directors is six or more, the corporation is required to have a minimum of three female directors.
  - b) If its number of directors is five, the corporation is required to have a minimum of two female directors.
  - c) If its number of directors is four or fewer, the corporation is required to have a minimum of one female director.
- 4) Requires the Secretary of State (SOS) to publish a report on its website by March 1, 2020, and annually thereafter, regarding all of the following, at a minimum (Corporations Code Section 301.3):

- a) The number of corporations subject to the aforementioned rules that were in compliance with the requirements of the rules during at least one point during the preceding calendar year.
  - b) The number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year.
  - c) The number of publicly held corporations that were subject to the aforementioned rules during the preceding year, but are no longer publicly traded.
- 5) Authorizes the SOS to impose fines on corporations that violate the aforementioned provisions, as specified, and provides that, for purposes of determining whether a violation has occurred, each director seat that required to be held by a female, which is not held by a female during at least a portion of a calendar year, counts as a violation (Corporations Code Section 301.3).
- 6) Applies the aforementioned rules in Corporations Code Section 301.3 to foreign corporations that are publicly held corporations to the exclusion of the laws of the jurisdictions in which those foreign corporations are incorporated (Corporations Code Section 2115.5). Defines a publicly held corporation for purposes of this provision as a foreign corporation with outstanding shares listed on a major United States stock exchange.

**THIS BILL**

- 1) Adds two new sections to the Corporations Code that are virtually identical to Corporations Code Sections 301.3 and 2115.5 and applies these sections to directors from underrepresented communities. Defines a director from an underrepresented community as an individual who self-identifies as Black, African-American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native. Specifically,
- a) Contains findings and declarations regarding the low percentage of African American/Black, Hispanic/Latino(a), and Asian/Pacific Islanders that hold Fortune 500 board seats, the high percentage of chief executives who are white, the low percentage of African-American and Latino computer science and engineering graduates hired by the high-tech sector, and the value of racial and ethnic diversity to corporate earnings.
  - b) Requires, no later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices are located in California to have a minimum of one director from an underrepresented community on its board and clarifies that a corporation may increase the number of directors on its board to comply with this requirement.
  - c) Requires, no later than the close of the 2022 calendar year, a publicly held domestic or foreign corporation whose principal executive offices are located in

California to comply with the following:

- i) If its number of directors is nine or more, the corporation is required to have a minimum of three directors from underrepresented communities.
  - ii) If its number of directors is more than four but fewer than nine, the corporation is required to have a minimum of two directors from underrepresented communities.
  - iii) If its number of directors is four or fewer, the corporation is required to have a minimum of one director from an underrepresented community.
- d) Requires the SOS to publish a report on its website by July 1, 2021, documenting the number of domestic and foreign corporations whose principal executive offices, according to the corporation's SEC 10-K form, are located in California and who have at least one director from an underrepresented community.
- e) Requires the SOS to publish a report on its website by March 1, 2022, and annually thereafter, regarding all of the following, at a minimum:
- i) The number of corporations subject to the aforementioned rules that were in compliance with the requirements of the rules during at least one point during the preceding calendar year.
  - ii) The number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year.
  - iii) The number of publicly held corporations that were subject to the aforementioned rules during the preceding year, but are no longer publicly traded.
- f) Requires the reports described in d) and e), above to be included with the reports required by SB 826 from 2018 (thus, rather than having to issue separate reports regarding women and underrepresented communities, the SOS will be able to issue a single report annually that includes data on both woman and underrepresented communities).
- g) Authorizes the SOS to impose fines on corporations that violate the aforementioned provisions, as specified, and provides that, for purposes of determining whether a violation has occurred, each director seat that required to be held by a director from an underrepresented community, which is not held by a director from an underrepresented community during at least a portion of a calendar year, counts as a violation. Further clarifies that a director from an underrepresented community who holds a seat for at least a portion of the year does not represent a violation.

- 2) Applies all of the aforementioned rules to foreign corporations that are publicly held corporations to the exclusion of the laws of the jurisdictions in which those foreign corporations are incorporated.



**COMMENTS**

- 1) Purpose: This bill is sponsored by the author to help address the ethnic pay gap, facilitate employment and outreach opportunities for underrepresented communities, promote board diversification, establish pipeline creation and upward mobility of diverse technical talent, and facilitate retention of that talent through company culture and development.
- 2) Background: According to the author's office, "since the beginning of recent social unrest, corporations have publicly messaged their support for diversity and Black lives. However, critics have pointed out this public support does not translate to diversity within a company and will not lead to long-term structural change. According to the USC Race and Equity Center, black employees in every industry tend to be concentrated in the lowest paying, least powerful positions... All of this strongly conveys to black professionals that their lives do not matter at work — hence their doubtful reactions to company statements about George Floyd. (<https://www.washingtonpost.com/outlook/2020/06/16/corporations-say-they-support-black-lives-matter-their-employees-doubt-them/>)"

Several reports provided by the author's office identify the relative lack of racial and ethnic diversity on corporate boards and support the value that diverse boards have to corporate performance. For example, the 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards

(<https://corpgov.law.harvard.edu/2019/02/05/missing-pieces-report-the-2018-board-diversity-census-of-women-and-minorities-on-fortune-500-boards/>) found that 80% of the 1,033 available board seats in Fortune 500 companies were filled by white directors. Similarly, out of the 1,222 new board members of Fortune 100 companies, 77% were white.

A report in the Harvard Business Review

(<https://hbr.org/2020/06/how-diverse-is-your-board-really>) concluded that a diverse board can contribute to better decision making, improve company governance, and can respond to market shifts more effectively. The McKinsey & Company Consulting Firm

(<https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters#>) suggests that these benefits are not restricted to the board of directors, but can benefit entire companies; for example, McKinsey found that companies in the top quartile for racial and ethnic diversity are 35% more likely to have financial returns above their respective national industry medians.

- 3) Pending Litigation: The provisions of this bill are based very closely on SB 826 (Jackson), Chapter 954, Statutes of 2018. That measure, which required publicly traded companies to place a minimum number of women on their boards of directors, has been the subject of at least two lawsuits challenging its constitutionality ("This state requires company boards to include women. A new lawsuit says that's unconstitutional," by Kayla Epstein, Washington Post, November 14, 2019 and "California sued over law requiring women on corporate boards," by Levi Sumagaysay, San Jose Mercury News, August 10, 2019).

According to the cited articles, the first lawsuit was filed in August, 2019 by Judicial Watch, a Washington-based conservative activist group, and alleges that spending taxpayer money to enforce the law is illegal under the California Constitution. That case remains pending.

The second lawsuit, filed in November 2019 by the Pacific Legal Foundation, claimed that the state's mandate is unconstitutional and in violation of the equal protection clause of the U.S. Constitution, because it discriminates on the basis of sex. The lawsuit alleges that requiring the plaintiff (shareholder Creighton Meland) to consider gender when voting to add members to OSI System's all-male, seven member board of directors forces him to discriminate. A federal District Court dismissed this case in April, 2020, on the basis that the plaintiff lacked standing to bring the action. The court did not rule on the constitutionality of the provisions of SB 826.

By adding the provisions of this bill to two new code sections rather than amending the existing code sections added by SB 826, this bill's author may avoid legal fallout that could result from court cases filed challenging the constitutionality of SB 826. Under this logic, even if a court were to enjoin enforcement of the provisions of SB 826 or find all or a portion of it unconstitutional, the provisions of AB 979 would remain in force. This protection would not shield AB 979 from future lawsuits or from amendments to existing lawsuits, but could prevent it from being struck down by a ruling specific to the provisions of SB 826.

- 4) Input from Senate Judiciary Committee Staff: Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate policy committees are working under a compressed timeline. This timeline does not allow this bill to be referred to and heard by more than one committee, as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes the following information from Senate Judiciary Committee staff:

This bill implicates the application of two constitutional principles that would ordinarily fall within the purview of the Senate Judiciary Committee: equal protection of the law and the internal affairs doctrine.

a) Equal Protection analysis

This bill requires certain corporations to appoint a certain number of directors who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaskan Native. Both the federal constitution and the California state constitution contain Equal Protection clauses. (U.S. Const., Amend. XIV, § 1 ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."); Cal. Const., art. I, § 7 ("A person may not be... denied equal protection of the laws.")) Under the current, prevailing judicial interpretation of both the federal and California constitutions' Equal Protection clauses, a statute that draws a distinction based upon race or ethnicity in this fashion

– whether remedial or punitive in intent – is suspect and only passes constitutional muster if it can meet the strict scrutiny test: that the statute is narrowly drawn to meet a compelling government interest. (*Fisher v. Univ. of Tex.* (2013) 570 U.S. 297, 307-308; *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 337.) By contrast, this bill would not be subject to the California constitution’s absolute bar on consideration of race in public education, contracting, and employment (Cal. Const., art. I, § 31), even if California voters retain that bar this fall, because the bill only addresses private corporations, not public entities.

Strict scrutiny is a notoriously high bar to meet, but it is not insurmountable. Remedying past discrimination can be a sufficiently compelling government interest to withstand strict scrutiny. However, the existence of general societal discrimination will not ordinarily satisfy the courts. Instead, courts conducting strict scrutiny review typically require some showing of specific discrimination that the statute remedies. (See Chemerinsky, *Constitutional Law Principles and Policies* (2nd ed. 2002), pp. 709-711.) To show that a statute is sufficiently narrowly-tailored to survive strict scrutiny review, the government must prove that the interest in question cannot be achieved through less-discriminatory means. (*Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 280 n. 6.).

SB 826 (Jackson, Ch. 954, Stats. 2018), after which this bill is modelled, presented extensive findings regarding the dearth of women on corporate boards. That bill also set forth information about prior legislative attempts to address the problem of unequal access to the corporate boardroom. The court currently considering the constitutionality of SB 826 will presumably look to those findings when analyzing the bill under the strict scrutiny test. This bill also contains findings and declarations regarding the absence of racial and ethnic diversity in the corporate workforce and in corporate leadership. To further fortify the bill against an equal protection challenge, the author may wish to provide greater detail regarding the specific discrimination that has allowed white people to occupy corporate board seats in percentages that far exceed what would be expected if the opportunity to serve on corporate boards were genuinely available on an equal basis. For similar reasons, the author may wish to include additional information in the findings and declarations about why other approaches to diversifying corporate boards have not been, or would not be, sufficiently effective.

#### b) Internal Affairs Doctrine analysis

This bill would apply to corporations headquartered in California even if they are incorporated under the laws of another state (typically, though not exclusively, Delaware). Some critics of this bill, and of SB 826 (Jackson, Ch. 954, Stats. 2018) on which it is modeled, contend that such attempts by one state to impose board composition requirements on corporations incorporated in another state run afoul of the so-called “internal affairs doctrine” which emanates from the U.S. Constitution’s Commerce Clause. Under that doctrine, only the state of incorporation may dictate how a corporation conducts its internal affairs. Were it otherwise, the U.S. Supreme Court has explained, corporations might be subjected to conflicting rules coming from several different states at once. (*Edgar v. MITE Corp.* (1982) 457 U.S. 624). It

is likely that, if enacted, this bill would, like SB 826, face legal challenges alleging that it violates the internal affairs doctrine. Supporters of SB 826 argued that there are limits to the internal affairs doctrine. They pointed out, among other things, that existing California law, Corporations Code § 2115, already imposes certain requirements on what are arguably the internal affairs of corporations incorporated in other states. Section 2115 was upheld by the California courts against a Commerce Clause challenge (*Wilson v. Louisiana-Pacific Res.* (1982) 138 Cal.App.3d 216, 225), though it should be noted that this ruling preceded the U.S. Supreme Court decision in *Edgar v. MITE Corp.* referenced above.

5) Support:

- a) This bill's author states, "Black and Brown communities have historically faced barriers to education, have been subject to bias in hiring practices, and been excluded from access to start-up capital and small business loans (<https://www.bloomberg.com/news/articles/2018-04-23/4-ways-to-help-close-the-racial-startup-gap>) Without a diverse board it is increasingly difficult to attract diverse talent which then reinforces unconscious biases at the managerial and staff level. Even when staff from underrepresented communities are hired, the turnover rate is high due to feelings of isolation and prevalence of microaggressions. A culture shift in the boardroom cultivates an environment that values different perspectives and is more likely to hire and retain racial and gender minorities.
- b) HP writes that it "has the most diverse Board of Directors in the U.S. technology industry, with 54% minorities, 38% women, and 30% of members from underrepresented communities....While this demonstrates important progress, we also recognize that we have much more to do...At HP, we know that having a diverse board enables us to better serve our customers and position for future success. Even more broadly, fostering a culture of diversity and inclusion across our company enables us to attract, develop, and retain the talent we need to innovate."
- c) Chinese for Affirmative Action echoes the sentiments of several other supporters when it says that the "persistent lack of representation in corporate boardrooms needs continuous focus, oversight, and change. CAA believes AB 979 creates a cultural shift in California's board seats towards that end."

6) Opposition:

- a) Keith Bishop, a corporate law attorney who previously serviced as Commissioner of Corporations, is opposed to the bill on grounds that it is unconstitutional and will adversely impact the participation of male and non-binary persons on the boards of directors of publicly held corporations. Observing that the provisions of AB 979 will layer on top of the provisions of SB 826, Mr. Bishop states, "publicly held corporations will be required to comply with both sets of quotas. Therefore, individuals who self-identify as both female and as African American, Hispanic, or Native American will undoubtedly be preferred as director candidates because

they will satisfy both quotas. The easily predictable result of enactment of AB 979 would be a decrease in the over-all number of directors on publicly held company boards who self-identify as male or non-binary and as being from an underrepresented community.”

Mr. Bishop’s letter of opposition also opines that the bill violates the Equal Protection Clauses of the California and U.S. Constitutions, the First Amendment to the U.S. Constitution, and the Commerce Clause of the U.S. Constitution.

- 7) Amendments: At the request of the SOS, the author plans to present amendments in committee to delete the report due by July 1, 2021, documenting the number of domestic and foreign corporations whose principal executive offices are located in California and who have at least one board director from an underrepresented community (see This Bill 1d on page 3).
- 8) Prior and Related Legislation:
- a) SB 826 (Jackson), Chapter 954, Statutes of 2018 required domestic and foreign publicly traded corporations with their principal executive offices in California to have minimum numbers of women on their boards.
  - b) AB 931 (Boerner-Horvath), Chapter 813, Statutes of 2019 requires, on and after January 1, 2030, cities with populations of 50,000 or more to appoint individuals to local boards and commissions in a manner that ensures gender diversity, as specified.

## **LIST OF REGISTERED SUPPORT/OPPOSITION**

### **Support**

ActiveSGV  
American Civil Liberties Union of California  
Bloom Energy  
California Employment Lawyers Association  
Chinese for Affirmative Action  
Consumer Attorneys of California  
Equal Rights Advocates  
Greater Sacramento Urban League  
HP Inc.  
Insurance Commissioner Ricardo Lara  
League of California Cities Asian Pacific Islander Caucus  
New America Alliance

### **Opposition**

Private individual



**-- END --**

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# Sex, Power, and Corporate Governance

Amelia Miazad\*

*For decades, social scientists have warned us that sexual harassment training and compliance programs are ineffective. To mitigate the risk of sexual harassment, they insist that we must cure its root cause — power imbalances between men and women.*

*Gender-based power imbalances plague start-ups and billion-dollar companies across sectors and industries. These power imbalances start at the top, with the composition of the board and the identity of CEOs and executive management. Pay inequity and boilerplate contractual terms in employment contracts further cement these imbalances.*

*In response to the #MeToo movement, key stakeholders began to shift their focus from compliance to corporate culture. This influential group of stakeholders — which includes investors, employees, regulators, insurance carriers, and board advisors — started asking companies to uproot gender-based power imbalances. In response to mounting pressure, seismic corporate governance reforms are underway. Boards are becoming more gender diverse, companies are beginning to address pay inequity and abandon mandatory arbitration and non-disclosure agreements, and boards are holding CEOs to account for sexual harassment and misconduct.*

*While the “old boys’ club” is still thriving in corporate America, this Article is the first comprehensive account of how the power imbalances on which it depends are shifting.*

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\* Copyright © 2021 Amelia Miazad. Amelia Miazad is the Founding Director and Senior Research Fellow of the Business in Society Institute at the University of California, Berkeley School of Law. This Article benefited from feedback from Afra Afsharipour, Lauren Edelman, Jill Fisch, Stavros Gadinis, Sonia Katyal, Melissa Murray, David Oppenheimer, Frank Partnoy, Elizabeth Pollman, Steven Davidoff-Solomon, the participants at The Worldwide #MeToo Movement: Global Resistance to Sexual Harassment and Violence in 2019, The Berkeley Center for Law and Business Faculty Workshop in 2019, and the participants at National Business Law Scholars Conference in 2021. I am grateful to Harris Mateen, Angeli Patel, Danielle Santos, and Caroline Soussloff for excellent research assistance. I would also like to thank the terrific team of editors at the UC Davis Law Review.

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## INTRODUCTION

The #MeToo movement<sup>1</sup> catalyzed a transformation of corporate governance. Through an exhaustive analysis of key stakeholders’ demands and the inner-workings of companies, this Article is the first to reveal how, in response to the #MeToo movement, companies are addressing the risk of sexual harassment through corporate culture as opposed to compliance. This newfound approach is uprooting the long-

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<sup>1</sup> In 2006, Tarana Burke coined the term “MeToo” in a campaign to empower women of color who were survivors of sexual assault. The term spread as a hashtag after October 16, 2017 when actress Alyssa Milano used it in a tweet in response to the Harvey Weinstein revelations. See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/56YT-TZCP]. Many have attributed the growth of the #MeToo movement to the election of Donald Trump and the energy harnessed by the Women’s March. See, e.g., Ann Pellegrini, *#MeToo: Before and After*, 19 STUD. GENDER & SEXUALITY 262, 263 (2018) (coining the term “facilitative displacement” as a way to understand the impact of Trump’s election on #MeToo). Thus, this Article will use January 21, 2017, the date of the Women’s March, to demarcate the start of the #MeToo movement.

established power imbalances that have existed between men and women in corporate America.<sup>2</sup>

Since 1964, when Title VII was enacted, the corporate community's approach to sexual harassment has been operating in an era of compliance, defined by a myopic focus on legal liability.<sup>3</sup> The prominence of compliance increased after 1998 as a result of two Supreme Court rulings that created an affirmative defense for employers if they made "reasonable efforts" to prevent sexual harassment.<sup>4</sup> Legal scholars saw where this was headed — to avoid liability, companies would proliferate policies and offer trainings without scrutinizing or reforming the underlying corporate culture.<sup>5</sup>

Companies also had the upper hand in avoiding reputational risk. Inside of the company, the ordinariness of sexual harassment prevented it from being registered as a red flag, and women often lacked the leverage to report the misconduct of powerful men.<sup>6</sup> Legal boilerplate also provided employers with cover.<sup>7</sup> By slipping non-disclosure agreements ("NDAs") and mandatory arbitration clauses into employment agreements, companies kept ruinous details of sexual misconduct from slipping out into the public.<sup>8</sup>

For decades, these safeguards protected companies from legal and business risk. That all changed when the pervasive sexual misconduct of high-profile executives of entertainment and technology giants from

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<sup>2</sup> This Article acknowledges that the #MeToo movement is restricted by its singular focus on gender which ignores the intersectional issues of race and gender. For a discussion of this limitation, see generally Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. 105, 111 (2018).

<sup>3</sup> See *infra* Part I.A.

<sup>4</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

<sup>5</sup> See, e.g., LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016) [hereinafter *WORKING LAW*] ("[E]mployers create policies and programs that promise equal opportunity yet often maintain practices that perpetuate the advantages of whites and males."); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 199 (2004) ("If the employer can escape liability for workplace harassment by doing less rather than more, why should it expend the time and energy in developing evaluative mechanisms that actually may expose it to greater liability?").

<sup>6</sup> See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 49 (2018) [hereinafter *Reconceptualizing, Again*] (discussing the majority of sexual harassment is perpetrated by men).

<sup>7</sup> See *infra* Part III.C.

<sup>8</sup> See *infra* Part III.C.



CBS to Google began to fill headlines.<sup>9</sup> The #MeToo movement exposed just how anemic sexual harassment training programs are in practice, and the growing legion of “silence breakers” rendered the once trusted NDAs impotent.<sup>10</sup> This Article examines the crossroads to which the #MeToo movement has brought corporate America. Through an analysis of a wide range of influential stakeholders’ public statements, supplemented by interviews,<sup>11</sup> it uncovers that a paradigm shift from compliance to corporate culture has in fact already occurred.<sup>12</sup>

Many recent examples reinforce this convergence on corporate culture. The second-largest asset manager in the world, State Street, has declared “corporate culture” its chief engagement priority.<sup>13</sup> Shareholder activists like Arjuna Capital and Trillium Asset Management have brought shareholder proposals arguing that Nike’s male-dominated leadership creates a “culture of complicity” and hence

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<sup>9</sup> See, e.g., Rachel Abrams & Edmund Lee, *Les Moonves Obstructed Investigation into Misconduct Claims, Report Says*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/business/media/les-moonves-cbs-report.html> [<https://perma.cc/ZBJ4-KEFE>] (discussing the sexual misconduct allegations against CBS chief executive, Les Moonves); Jennifer Blakely, *My Time at Google and After*, MEDIUM (Aug. 28, 2019), <https://medium.com/@jennifer.blakely/my-time-at-google-and-after-b0af688ec3ab> [<https://perma.cc/8FAS-585V>] (detailing an employee’s experience with sexual misconduct while working at Google); Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct> [<https://perma.cc/6XK4-T4JE>] (“During Moonves’s tenure, men at CBS News who were accused of sexual misconduct were promoted, even as the company paid settlements to women with complaints.”); Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN J. FOWLER BLOG (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber> [<https://perma.cc/ML5C-EC2Z>] (detailing an employee’s experience with sexual harassment while working at Uber); Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the ‘Father of Android,’* N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html> [<https://perma.cc/3ZMW-5LTG>] (discussing allegations of sexual misconduct against the creator of Android mobile software, Andy Rubin).

<sup>10</sup> Jonah Engel Bromwich, *‘The Silence Breakers’ Named Time’s Person of the Year for 2017*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html> [<https://perma.cc/6BDD-7K2N>].

<sup>11</sup> See *infra* Appendix A: Interview Participants.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> Cyrus Taraporevala, *2019 Proxy Letter — Aligning Corporate Culture with Long-Term Strategy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 15, 2019), <https://corpgov.law.harvard.edu/2019/01/15/2019-proxy-letter-aligning-corporate-culture-with-long-term-strategy/> [<https://perma.cc/8KKT-PAXM>].

a business risk.<sup>14</sup> Prominent law firms like Covington & Burling have created practice areas to conduct “cultural audits.”<sup>15</sup> For the first time, shareholder plaintiffs are suing boards for their failure to oversee culture as evidenced by the growing use of terms like, “culture of sexual harassment,” “boys’ club culture,” and “brogrammer culture” in shareholder derivative complaints.<sup>16</sup> In a recent victory for the shareholders of CBS, a federal court agreed that culture has become a business risk, finding that “[t]his behavior and culture created a risk that CBS would lose Moonves, its star executive, should his dirty laundry come to light.”<sup>17</sup> Even insurance underwriters, whose business depends on predicting risk, have begun to assess “corporate culture” in their underwriting process.<sup>18</sup>

While culture can be elusive, these stakeholders demand reforms that seek to uproot power imbalances by changing the gender diversity of the board, achieving gender pay equity, and removing mandatory arbitration and NDAs.<sup>19</sup> The fact that a culture in which men hold power breeds harassment may seem intuitive — if not all too painfully obvious — especially to women. But the link between the risk of sexual harassment and gender inequality was rarely made by corporate stakeholders during the era of compliance. This blind spot appears in the law and finance literature, which has been consumed by a duel over gender diversity and firm value.<sup>20</sup> Other legal scholars reject that

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<sup>14</sup> Complaint at 22, 30, *Stein v. Knight*, No. 18CV38553 (Or. Cir. Ct. Aug. 31, 2018) [hereinafter *Stein Complaint*]; David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/> [https://perma.cc/U9U6-MHY7].

<sup>15</sup> See *Cultural Reviews and Investigations*, COVINGTON, <https://www.cov.com/en/practices-and-industries/practices/litigation-and-investigations/white-collar-defense-and-investigations/cultural-reviews-and-investigations> (last visited Feb. 19, 2020) [https://perma.cc/64WU-XUAB].

<sup>16</sup> See *infra* Appendix B: Textual Analysis of Shareholder Derivative Complaints.

<sup>17</sup> Constr. Laborers Pension Tr. for S. Cal. v. CBS Corp., 433 F. Supp. 3d 515, 530 (S.D.N.Y. 2020).

<sup>18</sup> See *infra* Part IV.E.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> Compare, e.g., VIVIAN HUNT, SARA PRINCE, SUNDIATU DIXON-FYLE & LAREINA YEE, MCKINSEY & CO., *DELIVERING THROUGH DIVERSITY* (2018), [https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity\\_full-report.ashx](https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx) [https://perma.cc/D5SD-W6XN] (reporting on research which showed a correlation between greater proportions of women in leadership positions at large companies and financial performance), and Vijay Eswaran, *The Business Case for Diversity in the Workplace Is Now Overwhelming*, WORLD. ECON. F. (Apr. 29, 2019), <https://www.weforum.org/>

premise altogether and argue that gender diversity is warranted by social justice, irrespective of financial upside.<sup>21</sup> While it has not been fully appreciated by either the law and finance literature, or the business world until recently, social science academics have long argued that power imbalances lead to unethical behavior, including sexual harassment.<sup>22</sup> Given that the newfound reforms are rooted in the social science on the corrupting influence of power, this Article argues that they offer unique promise.

Cynics may disagree and claim that the mounting pressure by stakeholders is not penetrating the boardroom. A review of case studies of high profile #MeToo crises tells a different story.<sup>23</sup> Examples include: Signet Jewelers, which has achieved gender parity on its board and executive management (commonly referred to as the “C-suite”); Alphabet Inc., which has abandoned mandatory arbitration; and Uber, which recently introduced diversity as a metric in executive compensation.<sup>24</sup> These changes are not confined to the few large companies that have attracted media attention for their #MeToo scandals, but are beginning to catch on across the market.<sup>25</sup> The first change, which is the easiest to observe, is the identity of power-holders as boards become more gender diverse.<sup>26</sup> The way that power is

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agenda/2019/04/business-case-for-diversity-in-the-workplace/ [https://perma.cc/6NLV-6X79] (all arguing a business case in favor of gender diversity within the workplace), and Stephen Turban, Dan Wu & Letian (LT) Zhang, *Research: When Gender Diversity Makes Firms More Productive*, HARV. BUS. R. (Feb. 11, 2019), <https://hbr.org/2019/02/research-when-gender-diversity-makes-firms-more-productive> (last visited Feb. 19, 2020) [https://perma.cc/N338-XH7U] (finding that gender diversity related to more productive companies in cultures where gender diversity is believed to be important), with *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE@WHARTON (May 18, 2017), <https://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/> [https://perma.cc/9K2L-78D5] [hereinafter KNOWLEDGE@WHARTON] (“Rigorous, peer-reviewed studies suggest that companies do not perform better when they have women on the board. Nor do they perform worse.”).

<sup>21</sup> See KNOWLEDGE@WHARTON, *supra* note 20 (“Women should be appointed to boards for reasons of gender equality, but not because gender diversity on boards leads to improvements in company performance.”).

<sup>22</sup> See *infra* Part II.

<sup>23</sup> See *infra* Part V.A.

<sup>24</sup> See *infra* Part V.A.

<sup>25</sup> See *infra* Part V.B.

<sup>26</sup> See *infra* Part V.B. While outside the scope of this paper, in 2020 the business and investment community and lawmakers began to focus more on racial diversity as well. For example, in December of 2020 the Nasdaq Stock Market asked the Securities and Exchange Commission (“SEC”) for authority to adopt new listing rules aimed at increasing board gender and racial diversity. Andrew Ross Sorkin, Jason Karaian,

negotiated between the Chief Executive Officer (“CEO”) and the board is also shifting.<sup>27</sup> Boards are signaling their increased scrutiny of CEO misconduct by amending executive compensation agreements to explicitly include sexual harassment as a cause for termination.<sup>28</sup> In addition to these “sticks,” boards are using “carrots” by tying diversity metrics to executive compensation.<sup>29</sup> Board compensation committees are also amending their charters to explicitly address their oversight of corporate culture, which is tethered to diversity and inclusion.<sup>30</sup>

The #MeToo movement has also arrived on the doorstep of the male-dominated world of Mergers and Acquisitions (“M&A”), as evidenced by the addition of contractual innovations such as the “Weinstein Clause” to multi-billion-dollar deals.<sup>31</sup> While more opaque, even the private equity world is increasing its “social due diligence” before funding new ventures.<sup>32</sup> Change is underway in the context of pay equity as well, with more companies conducting equal pay audits and addressing the gender pay gap.<sup>33</sup> Finally, an increasing number of companies are abandoning mandatory arbitration and NDAs, whether voluntarily or through regulation.<sup>34</sup> Taken together, these changes

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Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *Nasdaq Pushes for Diversity in the Boardroom*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/business/dealbook/nasdaq-diversity-boards.html> [<https://perma.cc/U323-LPUE>]. In December of 2020, California became the first state in the nation to require companies listed or headquartered in California to have at least one board member from an underrepresented community on their board. See Jennifer B. Rubin, *California Seeks to Expand Its Board Diversity Mandate*, NAT’L L. REV. (Sept. 9, 2020), <https://www.natlawreview.com/article/california-seeks-to-expand-its-board-diversity-mandate> [<https://perma.cc/FS9K-R8CJ>].

<sup>27</sup> See *infra* Part V.B.

<sup>28</sup> See *infra* Part V.B.

<sup>29</sup> See *infra* Part V.B.

<sup>30</sup> See *infra* Part V.B.

<sup>31</sup> See *infra* Part V.B. See generally Grace Maral Burnett, *Analysis: #MeToo Reps Becoming M&A Market Standard*, BLOOMBERG L. (June 25, 2019, 10:18 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-metoo-reps-becoming-m-a-market-standard> [<https://perma.cc/N8GC-HQVS>] (describing the use of “#MeToo Reps” in the language of M&A contracts).

<sup>32</sup> See *infra* Part V.B; see also Joann S. Lublin, *Sexual-Harassment Scandals Are Reshaping CEO Searches*, WALL ST. J. (Dec. 27, 2017, 5:30 AM ET), <https://www.wsj.com/articles/sexual-harassment-scandals-are-reshaping-ceo-searches-1514370600> [<https://perma.cc/28Q2-DQST>].

<sup>33</sup> See *infra* Part V.B. See generally Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547 (2020) (discussing the history of the gender pay gap and offering a hopeful assessment of new legal reforms).

<sup>34</sup> See *infra* Part V.B.

signal a shift to an era of corporate governance which is rooted in gender equity.

This Article makes several contributions. First, it offers a comprehensive and novel framework for understanding the transformative impact that the #MeToo movement is having on corporate governance. Second, by opening the aperture, this Article is the first to identify that key corporate stakeholders are converging on corporate culture as a way to mitigate the risk of sexual harassment. Third, this Article is the first to demonstrate that the specific reforms that stakeholders are seeking are supported by the social science on power, and thus offer unique promise. Finally, this Article identifies the ways that these stakeholders' demands are beginning to impact corporate governance in crucial ways, while rejecting the claim that these changes are marginal because they are not yet widespread.

This Article proceeds in five parts. Part I describes how corporate boards have traditionally addressed the risk of sexual harassment through compliance. Part II analyzes the theoretical frameworks that support the view that sexual harassment is inextricably tied to structural power imbalances. Part III provides an account of the power imbalances that exist in corporate America today. Part IV reveals the coherence in the demands of key stakeholders, who are asking companies to address the risk of sexual harassment by focusing on corporate culture and addressing power differentials. The Article then turns to analyze whether and how corporate boards are responding. Part V begins this inquiry with case studies of high profile #MeToo incidents and exhibits how companies are reallocating power through corporate governance reforms. It then demonstrates how these changes are appearing across the broader market. The Article then briefly concludes.

## I. THE ERA OF COMPLIANCE — ADDRESSING SEXUAL HARASSMENT THROUGH POLICIES AND TRAINING PROGRAMS

### A. *The Growth of Sexual Harassment Training and Compliance Programs*

The evolution of sexual harassment training and compliance programs has closely tracked the legal evolution of employer liability for sexual harassment. This began in 1964 with the passage of Title VII of the Civil Rights Act, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and



religion.<sup>35</sup> Sexual harassment training first emerged at that time and mirrored civil rights sensitivity training, but it was not widespread because the contours of sex discrimination remained fuzzy.<sup>36</sup>

In the mid-1970s, feminist scholars had begun to define sexual harassment as sex discrimination.<sup>37</sup> In 1979, Catharine A. MacKinnon published the *Sexual Harassment of Working Women*, which influenced The Equal Employment Opportunity Commission's ("EEOC")<sup>38</sup> decision to advise employers to "take all steps necessary to prevent sexual harassment from occurring," which invariably included training programs.<sup>39</sup> As a result, human resources personnel began to rise in stature, and sexual harassment training programs proliferated.

The Supreme Court first recognized sexual harassment as a form of sex discrimination in *Meritor v. Vinson* in 1986.<sup>40</sup> However, the Court failed to address when an employer could be held liable.<sup>41</sup> While the Court in *Meritor* explicitly rejected the employer's argument that its policies and grievance mechanisms should act as a liability shield, it stated in *dicta* that a better policy could have protected the employer.<sup>42</sup> After *Meritor*, companies began to rely on their compliance programs in

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<sup>35</sup> 42 U.S.C. § 2000e-2 (2018).

<sup>36</sup> See Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1211-12 (2007) [hereinafter *How to Stop Harassment*]; see also Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 965 (1998).

<sup>37</sup> See LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 20 (1978) (being the first to define sexual harassment as "[a]ny repeated and unwanted sexual comments, looks, suggestions, or physical contact that you find objectionable or offensive and causes you discomfort on your job"); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 32 (1979) (distinguishing between "quid pro quo" sexual harassment and sexual harassment as a condition of work). For an analysis of the feminist scholarship which argued that sexual harassment constituted sex discrimination under Title VII see Reva B. Siegel, *A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 1, 8-18 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). See also Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1603-10 (2018) (describing Title VII's shortcomings).

<sup>38</sup> The EEOC is the federal agency that protects job applicants and employees from discrimination. See *Employees & Job Applicants*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://www1.eeoc.gov/federal/fed\\_employees/](https://www1.eeoc.gov/federal/fed_employees/) (last visited Jan. 27, 2020) [<https://perma.cc/4LVC-WFNU>].

<sup>39</sup> 29 C.F.R. § 1604.11(e)-(f) (2019).

<sup>40</sup> EDELMAN, *WORKING LAW*, *supra* note 5, at 61; see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-65 (1986).

<sup>41</sup> See *id.* at 76-77.

<sup>42</sup> See *id.* at 72-73; EDELMAN, *WORKING LAW*, *supra* note 5, at 202.

court filings.<sup>43</sup> As a 1986 article aptly summarized, “[c]ompany confusion and concern have spurred a growth industry in training videos, seminars and consultants.”<sup>44</sup> The Civil Rights Act of 1991, which elevated the damages for sex discrimination to those of racial discrimination, further fueled employer reliance on training.<sup>45</sup>

Although training and compliance programs became more prevalent during the 1980s and 1990s, the Supreme Court’s 1998 decision in the companion cases *Faragher v. Boca Raton* and *Burlington v. Ellerth*<sup>46</sup> have been credited for spurring their rapid proliferation.<sup>47</sup> In both cases, the Court found that an employer could be held liable for sexual harassment perpetrated by an employee *unless* the employer could prove that it exercised reasonable care to prevent sexual harassment and that the plaintiff failed to take advantage of any preventive or corrective opportunities.<sup>48</sup> These Supreme Court rulings defined the contours of employer liability and clarified that, to avoid liability for the acts of their employees, employers needed to mount the resources to establish the *Faragher- Ellerth* defense.<sup>49</sup> Offering comfort to employers, an entire industry of sexual harassment training was born, spurred by legal advisors warning that “[t]raining becomes important step to avoid liability.”<sup>50</sup>

#### B. Sexual Harassment Training and Compliance Programs Prove Ineffectual

In addition to lining the pockets of consultants and elevating the stature of human resources professionals, sexual harassment training and compliance programs have largely operated to shield deep

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<sup>43</sup> See EDELMAN, WORKING LAW, *supra* note 5, at 165-66.

<sup>44</sup> Dobbin & Kelley, *How to Stop Harassment*, *supra* note 36, at 1216.

<sup>45</sup> See *id.* at 1220.

<sup>46</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765-66 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>47</sup> See EDELMAN, WORKING LAW, *supra* note 5, at 207.

<sup>48</sup> *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 806-07.

<sup>49</sup> For a discussion of the *Faragher- Ellerth* defense, see EDELMAN, WORKING LAW, *supra* note 5, at 4-5 (arguing that courts began to conflate the existence of compliance policies with actual compliance); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 9-12 (2003) (discussing how the affirmative defense in *Faragher* led to the overreliance by courts on sexual harassment training programs).

<sup>50</sup> See Ellen McLaughlin & Carol Merchasin, *Training Becomes Important Step to Avoid Liability*, NAT’L L.J. (Jan. 29, 2001), [https://www.seyfarth.com/dir\\_docs/publications/AttorneyPubs/McLaughlin.pdf](https://www.seyfarth.com/dir_docs/publications/AttorneyPubs/McLaughlin.pdf) [<https://perma.cc/CZ4R-SDUK>].

corporate pockets from the reach of victims.<sup>51</sup> That courts would give little more than a wink and nod to these compliance programs was perhaps obvious to academics who have argued that law does not operate in a vacuum, but rather, is “shaped by widely accepted ideas within the social arena that law seeks to regulate.”<sup>52</sup> Many scholars in the law and society movement have emphasized the continuous interplay between social norms and how the law is applied by courts and operationalized in institutions.<sup>53</sup> A related and interdisciplinary body of literature reveals how social movements, from the Civil Rights Movement to #MeToo, impact individual behavior in powerful ways, both shaping and eclipsing the impact of the law alone.<sup>54</sup> Corporate

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<sup>51</sup> See EDELMAN, *WORKING LAW*, *supra* note 5, at 98-99; Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July-Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/2ENT-J5ET>]; Lauren B. Edelman, *How HR and Judges Made It Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), <https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court> [<https://perma.cc/UWK9-9458>]. While compliance is particularly ill-suited for addressing the risk of sexual harassment, I have written elsewhere on how internal stakeholders can effectively leverage compliance programs to surface information to the board. See Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2147 (2019).

<sup>52</sup> EDELMAN, *WORKING LAW*, *supra* note 5, at 12.

<sup>53</sup> LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 2-4 (1975); see Lauren B. Edelman & Shaughin A. Talesh, *To Comply or Not to Comply – that Isn’t the Question: How Organizations Construct the Meaning of Compliance*, in *EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION* 103 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); see also Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 833 (2019) (describing how “the #MeToo movement enlists private entities as agents of reform to both challenge — and ultimately replace — extant norms of sexual conduct”). See generally Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 37-39 (2019) (explaining the advantages of #MeToo’s extralegal procedures over traditional legal procedures). On the relationship between the #MeToo movement and the interpretation of current law on sexual harassment, see Catharine A. MacKinnon, *Where #MeToo Came From, and Where It’s Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/> [<https://perma.cc/432W-JYAB>].

<sup>54</sup> See, e.g., Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2751 (2014) (explaining how “demosprudence represents a philosophical commitment to the lawmaking force of meaningful participatory democracy”); Ro’ee Levy & Martin Mattsson, *The Effects of Social Movements: Evidence from #MeToo* 25 (July 22, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3496903](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496903) [<https://perma.cc/V9JB-XSU9>] (an empirical study which shows that “the MeToo movement had a substantial, persistent effect on the propensity to report sexual crimes”).

governance scholars have also recognized how social norms can influence the inner workings of companies.<sup>55</sup> In particular, there has been a resurgence of corporate governance scholarship on the convergence of corporate culture and social culture. These scholars argue that “the dominant sociological account of the corporate culture treats it as part of the much larger fabric of social culture, of which any given corporate culture is but a part.”<sup>56</sup>

While many scholars have explored the impact of social norms on the application of law, Lauren Edelman was among the first to trace this “endogenous” feature of law in the context of workplace discrimination and sexual harassment. As Edelman explains, when anti-discrimination law is applied in a corporate setting, it is “managerialized,”<sup>57</sup> meaning that judges and courts replace legal logic with management logic. In so doing, courts become unwilling conspirators with companies that avoid operationalizing social reform by relying instead on “check the box” compliance and training programs. But as the #MeToo movement has exposed, these policies often coexist with cultures that “maintain practices that perpetuate the advantages of whites and males.”<sup>58</sup> Even the EEOC, which has long championed more training, recently acknowledged that “training programs from the past 30 years clearly have not worked because they focus on preventing legal liability instead of the actual sexual harassment.”<sup>59</sup>

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<sup>55</sup> See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1796-97 (2001); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1292 (1999). See generally Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (focusing on how Delaware courts influence corporate law rules and standards are generated and communicated to officers and directors); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1621 (2001) (examining recent developments in the theory of the firm and on the “law and norms” literature); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001) (exploring social norms and shaming sanctions in the corporate context).

<sup>56</sup> Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and “Privateness” on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 394 (2020); see, e.g., Greg Urban, *Corporations in the Flow of Culture*, 39 SEATTLE U. L. REV. 321, 330 (2016) (discussing the impact that the external culture has on internal corporate actors throughout the corporate hierarchy).

<sup>57</sup> EDELMAN, *WORKING LAW*, *supra* note 5, at 160-61.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at v (2016), [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) [<https://perma.cc/UZQ6-WGA4>].

The #MeToo movement exposed the limitations of harassment training and compliance programs. Ironically, however, it has also revived employers' reliance on them. State legislatures have enacted new laws mandating or expanding sexual harassment training programs, promulgating their growth once again.<sup>60</sup> Start-ups have begun to capitalize on this, parading newly-minted programs that feature more sophisticated technology.<sup>61</sup> And consultants are busy peddling this growing suite of programs, which promise to achieve results through immersive experiences and more focus on bystander intervention.<sup>62</sup> Admittedly, these improved training programs may address certain deficiencies in earlier trainings. But an over-reliance on them will continue to stunt progress towards directly addressing sexual harassment. As the next Part illuminates, these trainings sidestep what social psychologists have identified as the root cause of sexual harassment — a gender-imbalanced culture that encourages men to exploit their power over women.

## II. POWER IMBALANCES AND “SEX SEGREGATION” CREATE A CULTURE THAT INVITES SEXUAL HARASSMENT

This Part introduces leading social science theories on the impact of power on behavior.<sup>63</sup>

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<sup>60</sup> E.g., Substitute S.B. 3, Pub. Act 19-16, 2019 Gen. Assemb., 2019 Sess. (Conn. 2019); S.B. 1111, Pub. Act 19-93, 2019 Gen. Assemb., 2019 Sess. (Conn. 2019) (which together constitute the *Time's Up Act*); H.B. 360, 149th Gen. Assemb., 2019 Sess. (Del. 2019); S.B. 1829, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); S.B. 1343, 2018 Leg., 2018 Sess. (Cal. 2018).

<sup>61</sup> Examples include Vantage Point, which leverages virtual reality technology to “gamify” the experience and Spot, which allows reporting to be anonymous through a “chat-bot.” See SPOT, <https://talktospot.com/> (last visited Jan. 1, 2021) [<https://perma.cc/6TDA-WRK8>]; VANTAGE POINT, <https://www.tryvantagepoint.com/> (last visited Jan. 7, 2021) [<https://perma.cc/U9F9-6EBB>]; see also Gerry Smith, *Demand for Anti-Harassment Training Videos Surges in #MeToo Era*, BLOOMBERG (Mar. 13, 2018, 3:00 AM PDT), <https://www.bloomberg.com/news/articles/2018-03-13/better-call-hr-demand-for-training-videos-surges-in-metoo-era> [<https://perma.cc/R27S-JSL4>].

<sup>62</sup> See Eddie Kim, *The Makers of Sexual Harassment Training Videos Say Business Is Booming After #MeToo*, MEL (Sept. 17, 2018), <https://melmagazine.com/en-us/story/the-makers-of-sexual-harassment-training-videos-say-business-is-booming-after-metoo> [<https://perma.cc/TJ7J-U3QJ>].

<sup>63</sup> There is robust social science and organizational theory literature on the impact of power on behavior, which this Article does not aim to review. See Dacher Keltner, *Sex, Power, and the Systems That Enable Men Like Harvey Weinstein*, HARV. BUS. REV. (Oct. 13, 2017), <https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein> [<https://perma.cc/5YWL-AVBR>].



It is useful to begin with a definition of power, which social psychologists define as having “asymmetric control over valued resources, which in turn affords an individual the ability to control others’ outcomes, experiences, or behaviors.”<sup>64</sup> A number of studies point to a correlation between power and unethical behavior.<sup>65</sup> There are many theories as to why this occurs. Professor of Psychology Dacher Keltner has explained that power inhibits empathy and induces power-holders to exude impulsive behavior, including sexual harassment.<sup>66</sup> As some ethicists have argued, “[t]his inverse power-empathy relationship is often a factor in headline sexual harassment/ assault cases and in more subtle, everyday forms of discrimination, harassment and incivility.”<sup>67</sup>

Another way that power may impact behavior is through “self-serving impulsivity”<sup>68</sup> which “encourages individuals to act on their own whims, desires, and impulses.”<sup>69</sup> According to Keltner, in experiments,

<sup>64</sup> Leigh Plunkett Tost, *When, Why, and How Do Powerholders “Feel the Power”?: Examining the Links Between Structural and Psychological Power and Reviving the Connection Between Power and Responsibility*, 35 RES. ORGANIZATIONAL BEHAV. 29, 30-31 (2015) (citing Eric Dépret & Susan T. Fiske, *Social Cognition and Power: Some Cognitive Consequences of Social Structure as a Source of Control Deprivation*, in CONTROL MOTIVATION AND SOCIAL COGNITION 176 (Gifford Weary et al. eds., 1993)); see, e.g., JOHN W. THIBAUT & HAROLD H. KELLEY, *THE SOCIAL PSYCHOLOGY OF GROUPS* 48 (1959) (noting how individuals are directed toward higher status levels, indicating that association with people of higher status yields certain rewards not available from people of lower status such as greater extrinsic means); Richard M. Emerson, *Power-Dependence Relations*, 27 AM. SOC. REV. 31 (1962) (examining how the power to control or influence others resides in valued things); Susan T. Fiske, *Interpersonal Stratification: Status, Power, and Subordination*, in HANDBOOK OF SOCIAL PSYCHOLOGY 941 (Susan T. Fiske et al. eds., 5th ed. 2010) (describing how “power specifically controls valued resources”); Adam D. Galinsky, Deborah H. Gruenfeld, Katie A. Liljenquist, Joe C. Magee & Jennifer A. Whitson, *Power Reduces the Press of the Situation: Implications for Creativity, Conformity, and Dissonance*, 95 J. PERSONALITY & SOC. PSYCHOL. 1450 (2008) (noting how power is often conceptualized as the capacity to influence others); Dacher Keltner, Deborah H. Gruenfeld & Cameron Anderson, *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265 (2003) (defining power as “an individual’s relative capacity to modify others’ states by providing or withholding resources or administering punishments”).

<sup>65</sup> See Joris Lammers, Adam D. Galinsky, David Dubois & Derek D. Rucker, *Power and Morality*, 6 CURRENT OPINION PSYCHOL. 15, 16 (2015).

<sup>66</sup> See *id.* at 15 (citing Dacher Keltner et al., *supra* note 64).

<sup>67</sup> Mary Bennett, *Loss of Empathy: The “Me” Culture that Leads to the #MeToo Culture*, NAVEX GLOBAL RISK & COMPLIANCE MATTERS BLOG (June 12, 2018), <https://www.navexglobal.com/blog/article/loss-of-empathy-the-me-culture-that-leads-to-the-metoo-culture/> [https://perma.cc/7738-2TVA].

<sup>68</sup> DACHER KELTNER, *THE POWER PARADOX: HOW WE GAIN AND LOSE INFLUENCE* 102 (2016) [hereinafter *THE POWER PARADOX*].

<sup>69</sup> Dacher Keltner, *The Power Paradox*, GREATER GOOD SCI. CTR. (Dec. 1, 2007), [https://greatergood.berkeley.edu/article/item/power\\_paradox](https://greatergood.berkeley.edu/article/item/power_paradox) [https://perma.cc/W864-UL6R].

power-holders are more likely to “physically touch others, flirt in a more direct fashion, [and] to make risky choices” among other self-serving behaviors.<sup>70</sup> Power-holders also tend to display incivility and disrespect.<sup>71</sup> Social psychologists have found that “people who feel powerful think and act fundamentally differently than people who feel less powerful.”<sup>72</sup>

Wielding power also leads to “narratives of exceptionalism,” which makes abuses of power acceptable and even rational to the perpetrators.<sup>73</sup> Psychologists have found that making an individual feel uninhibited in relation to others breeds inappropriate behaviors like harassment.<sup>74</sup> Thus, narratives of exceptionalism may help explain the long history of sexual harassment by those with power, including CEOs. In addition to narratives of exceptionalism, psychologists Jonathan Kunstman and Jon Maner coined a phenomenon known as “sexual overperception”<sup>75</sup> in which powerful individuals are more likely to expect sexual interest, misread social cues, and make unwanted advances towards subordinates.<sup>76</sup>

Other organizational theorists<sup>77</sup> take issue with the claim that sexual harassment is only about sexual desire or is necessarily perpetuated by power-brokers, instead arguing that “harassment is more about

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<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

<sup>72</sup> Lammers et al., *supra* note 65, at 15 (citing Adam D. Galinsky et al., *Power: Past Findings, Present Considerations, and Future Directions*, in 3 *APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY* (Mario Mikulincer & Phillip R. Shaver eds., 2015)).

<sup>73</sup> *See* Tost, *supra* note 64, at 30 (first citing Cameron Anderson & Adam D. Galinsky, *Power, Optimism, and Risk Taking*, 36 *EUR. J. SOC. PSYCHOL.* 511 (2006)); Cameron Anderson et al., *The Personal Sense of Power*, 80 *J. PERSONALITY* 313 (2012).

<sup>74</sup> *See* KELTNER, *THE POWER PARADOX*, *supra* note 68, at 130.

<sup>75</sup> Jonathan W. Kunstman & Jon K. Maner, *Sexual Overperception: Power, Mating Motives, and Biases in Social Judgment*, 100 *J. PERSONALITY & SOC. PSYCHOL.* 1, 2 (2010).

<sup>76</sup> *Id.* at 1-2, 12.

<sup>77</sup> While this Part focuses on organizational theorists, sociocultural theorists view sexual harassment through a different lens and argue that workplace harassment is a reflection of gendered power differentials in society more broadly. *See, e.g.*, Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 *YALE L.J.F.* 85 (2018) (explaining that ignoring roles of gender and power in sexual harassment paves the way for misdirecting responses and indiscriminately targeting sexualized behavior rather than sex-based harassment); Grossman, *supra* note 49, at 35-37 (noting that sexual harassment is a result of those holding positions of authority, usually men, often practicing their power and exploiting their organizational positions). For a discussion of the power imbalances between the employer and employee, see Cynthia Estlund, *Response, Truth, Lies, and Power at Work*, 101 *MINN. L. REV.* 349, 360 (2017).

upholding gendered status and identity than it is about expressing sexual desire or sexuality.”<sup>78</sup> Thus, regardless of the power relationship between the individual victim and perpetrator, sexual harassment is prevalent in organizations where there is “sex segregation” and positions of authority are held by men.<sup>79</sup> As Vicki Schultz explains, “[s]ex segregation of work can be both a cause and consequence of harassment” where “men hold the most powerful or prized jobs, while women hold lower-status positions.”<sup>80</sup> According to Schultz, sex segregation breeds sexism, which creates a hierarchy between men and women.<sup>81</sup> Other theorists agree that sexism depends upon a valuation of masculine norms or characteristics and a devaluation of feminine norms.<sup>82</sup> Thus, “targeting only sexual misconduct without addressing deeper institutional dynamics has serious shortcomings that risk undermining the broader quest for gender equality.”<sup>83</sup>

Consistent with this theory numerous studies have shown that organizational conditions are the most powerful predictors of whether harassment will occur.<sup>84</sup> For example, one study revealed that “the ‘maleness’ of an organization” is positively correlated with an increase

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<sup>78</sup> Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. 17, 19 (2018) [hereinafter *Open Statement*].

<sup>79</sup> See, e.g., CATHARINE A. MACKINNON, *BUTTERFLY POLITICS* 30 (2017) (arguing that “[p]ower’s latest myth in this area is that the problem of inequality between women and men has been solved”); Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN’S L.J. 37, 40 n.10 (1993) (describing Catharine MacKinnon’s structuralist theory of power, which argues that “women are susceptible to harassment because of occupational segregation, a situation in which most women occupy low status, low paying jobs and tend to be supervised by men”); Schultz, *Reconceptualizing, Again*, *supra* note 6, at 49 (discussing the elimination of sex segregation as a necessary step to end harassment).

<sup>80</sup> Schultz, *Reconceptualizing, Again*, *supra* note 6, at 49.

<sup>81</sup> See *id.* at 24.

<sup>82</sup> See Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 648 (2007); Jennifer L. Berdahl, Marianne Cooper, Peter Glick, Robert W. Livingston & Joan C. Williams, *Work as a Masculinity Contest*, 74 J. SOC. ISSUES 422, 424-25 (2018). Sexism may also involve the pressure for men and women to adhere to stereotypical gender roles. See Kathryn Abrams, *New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1209 (1998) (citing Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1043-46 (1987)).

<sup>83</sup> See Schultz, *Open Statement*, *supra* note 78, at 44-45.

<sup>84</sup> See Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 155-56 (2007).

in sexual harassment.<sup>85</sup> Specifically, “women who work in places that are predominantly male report more instances of sexual harassment than women in more gender-balanced workplaces.”<sup>86</sup> A related study demonstrated that workplaces “that are currently or historically dominated by men, in terms of numbers and influence, may propagate cultural norms that support sexual bravado, sexual posturing, and the denigration of feminine behavior.”<sup>87</sup>

In light of these findings, we cannot meaningfully address the risk of harassment in the corporate context without addressing the gender power imbalances which this Article identifies in the next Part.

### III. THE POWER IMBALANCES THAT PERVADE CORPORATE AMERICA

Corporate America is teeming with gendered power imbalances, and they start at the very top, with the composition of the board of directors, the CEO, and executive management. These power-holders reinforce gender imbalances through unequal pay practices and pay secrecy policies. Contractual provisions in employment agreements such as mandatory arbitration agreements and NDAs continue to ferment these imbalances by silencing victims and masking the pervasiveness of sexual harassment. And multi-million-dollar golden parachutes in executive compensation agreements offer plush landings and insulate offenders from accountability. This Part takes account of these power imbalances, laying the groundwork for an exploration of how the landscape is shifting in response to stakeholder pressure.

#### A. *The Identity of Power Holders*

In U.S. companies, men still rule the roost, and that starts with the composition of the board of directors.<sup>88</sup> Despite an enduring debate in corporate law about how much power the board of directors wields vis-

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<sup>85</sup> Tamara Penix Sbraga & William O'Donohue, *Sexual Harassment*, 11 ANN. REV. SEX RES. 258, 265 (2000).

<sup>86</sup> *Id.* (citing Barbara A. Gutek et al., *Predicting Social-Sexual Behavior at Work: A Contact Hypothesis*, 33 ACAD. MGMT. J. 560 (1990)) (defining “maleness” as “numerical dominance in the workforce, male-dominated norms that may stem from a history of numerical or institutional power dominance in a particular workplace, and male-dominated positions of importance”).

<sup>87</sup> *Id.* (citing KAISA KAUPPINEN-TOROPAINEN & JAMES E. GRUBER, *SEXUAL HARASSMENT OF WOMEN IN NON-TRADITIONAL JOBS: RESULTS FROM FIVE COUNTRIES* (1993)).

<sup>88</sup> See KOSMAS PAPADOPOULOS, ISS, U.S. BOARD DIVERSITY TRENDS IN 2019, at 1 (2019), <https://www.issgovernance.com/library/2019-us-board-diversity-trends/> [https://perma.cc/B269-TEUY].

à-vis management and investors, boards have formal oversight of corporate activity under Delaware Law.<sup>89</sup> The board's functions fall broadly under two categories, decision-making and risk monitoring or oversight.<sup>90</sup> Perhaps most importantly, boards hire, fire, and manage the CEO, a function which is magnified in times of crisis.<sup>91</sup> At a minimum, boards command symbolic power at the top of the corporate hierarchy.

When it comes to board gender diversity, the U.S. trails behind most developed economies. In 2017, women accounted for just 16.2% of board directorships among companies in the Russell 3000 Index.<sup>92</sup> Norway leads the world with 42% of directorships held by women.<sup>93</sup> To be fair, Norway's relatively high percentage can be explained by its board diversity quota.<sup>94</sup> Still, the low percentage of women directors in

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<sup>89</sup> See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . ."); see also Melvin Aron Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CALIF. L. REV. 375, 376 (1975); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 383 (2018) (discussing shareholders' limited "ability to constrain board actions"). But see Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0: An Introduction*, 74 BUS. L. 351, 353 (2019) (calling into question the power of the board by arguing that boards today are comprised of "thinly informed, under-resourced, and boundedly motivated" directors).

<sup>90</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (explaining that "[l]egally the board itself [is] required to authorize the most significant corporate acts or transactions: mergers, changes in capital structure, fundamental changes in business, appointment and compensation of the CEO, etc." and in the board's supervisory function, the board monitors those assigned to carry out its decisions); see Frank Partnoy, *Corporations and Human Life*, 40 SEATTLE U. L. REV. 399, 400 n.4 (2017) ("Many corporate law academics and practitioners divide the analysis of corporate law into two separate concepts: board decision-making and oversight.").

<sup>91</sup> See John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191, 1198-1202 (2020) (discussing the increased role of the board in compliance as a result of corporate crises such as Enron and Wells Fargo, but concluding that "compliance is more often overlooked, rather than overseen, by boards").

<sup>92</sup> Amit Batish, *Equilar Gender Diversity Index: Q3 2017*, EQUILAR (Nov. 8, 2017), <https://www.equilar.com/reports/52-gender-diversity-index-q3-2017> [<https://perma.cc/8FZK-WQ3T>] (providing data for the Russell 3000 index).

<sup>93</sup> KOSMAS PAPADOPOULOS, ROBERT KALB, ANGELICA VALDERRAMA & THOMAS BALOG, ISS, U.S. BOARD STUDY: BOARD DIVERSITY REVIEW 5 (2018), <https://www.issgovernance.com/file/publications/us-board-diversity-study.pdf> [<https://perma.cc/B9RA-GYE3>]; see also EGON ZEHNDER, 2020 GLOBAL DIVERSITY TRACKER: WHO'S REALLY ON BOARD? 22 (2020), <https://www.egonzehnder.com/global-board-diversity-tracker> [<https://perma.cc/6PU9-GYCQ>]; Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors—A Global Snapshot*, 37 J. CORP. L. 793, 803 (2012).

<sup>94</sup> AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 3 (2015) (discussing quotas for multiple countries); see



U.S. companies is surprising, particularly given the investment community's persistent claim that board diversity increases firm value.<sup>95</sup> As Part V describes, change is undeniably afoot as board diversity advocates celebrate numerous recent milestones.<sup>96</sup> They are more sanguine, however, when it comes to the gender diversity of CEOs. A mere 5% of Russell 3000 companies have a female CEO and the numbers are stagnant.<sup>97</sup> The next set of power holders in the corporate hierarchy is the C-Suite. Here too, a mere 9% of C-suite positions in the Russell 3000 are held by women.<sup>98</sup> Exacerbating the disparity, these positions are concentrated in Human Resources, the General Counsel, and the Chief Administrative Officer — positions which are rarely a track to becoming a CEO.<sup>99</sup>

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also Cathrine Seierstad & Morten Huse, *Gender Quotas on Corporate Boards in Norway: Ten Years Later and Lessons Learned*, in *GENDER DIVERSITY IN THE BOARDROOM* 11-12 (Cathrine Seierstad et al. eds., 2017).

<sup>95</sup> See *infra* Part V.A; see, e.g., Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 765-66 (2011) (observing how board diversity may positively affect firm performance, but the direction of the causal relationship between board diversity and company performance is unclear); see also Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 383-85 (2014) (reviewing empirical literature); Knowledge@Wharton, *supra* note 20 (notwithstanding the apparent uniformity among the investment community's belief that board diversity leads to economic returns, the empirical research is inconclusive).

<sup>96</sup> See PAPADOPOULOS ET AL., *supra* note 93, at 2; Vanessa Fuhrmans, *Women on Track to Gain Record Number of Board Seats*, WALL ST. J. (June 21, 2018, 1:30 AM), [https://www.wsj.com/articles/women-on-track-to-gain-record-number-of-board-seats-1529573401?mod=hp\\_lead\\_pos8](https://www.wsj.com/articles/women-on-track-to-gain-record-number-of-board-seats-1529573401?mod=hp_lead_pos8) [<https://perma.cc/V3UH-XND3>]. But see Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 150 (2019) (cautioning that “investors and advocates of gender diversity must not only account for the ratio of gender-diverse directors in the boardroom. They must also account for the roles and functions that these directors serve once elected to the board — what in other contexts is often termed as substantive equality”).

<sup>97</sup> This lack of female CEOs is magnified by the increasingly powerful role that CEOs are playing as “moral” or ethical leaders in companies. See David Gelles, *The Moral Voice of Corporate America*, N.Y. TIMES (Aug. 19, 2017), <https://www.nytimes.com/2017/08/19/business/moral-voice-ceos.html> [<https://perma.cc/A59P-BH2Z>]; *Bullhorns for Humanity: The Rise of CEOs as Social Activists*, KNOWLEDGE@WHARTON (June 6, 2019), <https://knowledge.wharton.upenn.edu/article/the-rising-social-activists-ceos-and-their-employees/> [<https://perma.cc/8BVA-DV9J>].

<sup>98</sup> KOSMAS PAPADOPOULOS, ISS, *WOMEN IN THE C-SUITE: THE NEXT FRONTIER IN GENDER* (2018), <https://www.issgovernance.com/library/women-in-the-c-suite-the-next-frontier-in-gender-diversity/> [<https://perma.cc/P4J6-5C6K>].

<sup>99</sup> See *id.* at 3.

### B. Gender Pay Inequity

Companies also distribute power through pay, which is inextricably tied to ascendance up the corporate hierarchy.<sup>100</sup> Notwithstanding the Equal Pay Act of 1963<sup>101</sup> and the prohibition against pay discrimination in Title VII of the Civil Rights Act of 1964,<sup>102</sup> women in the U.S. earned roughly 80 cents for every dollar earned by their male counterparts for similar work in 2018.<sup>103</sup> Although the gender pay gap has narrowed since 1980, it has remained relatively stable over the past fifteen years. Given the current pace of change, a recent study concluded that it will take until 2059 for women to reach gender parity.<sup>104</sup>

<sup>100</sup> See Ryan A. Smith, *Money, Benefits, and Power: A Test of the Glass Ceiling and Glass Escalator Hypotheses*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 149 (2012), <https://journals.sagepub.com/doi/full/10.1177/0002716211422038> [https://perma.cc/KWQ5-ZEMS] (exploring the intersection of racial and gender diversity to wage inequality). But see Zhen Zeng, *The Myth of the Glass Ceiling: Evidence from a Stock-Flow Analysis of Authority Attainment*, 40 SOC. SCI. RES. 312, 312 (2010) (arguing that disparities do not necessarily increase with movement up the authority hierarchy as the glass ceiling hypothesis implies). See generally David Anderson, Margrét V. Bjarnadóttir, Cristian Dezso & David Gaddis Ross, *Why Companies' Attempts to Close the Gender Pay Gap Often Fail*, HARV. BUS. REV. (Jan. 21, 2019), <https://hbr.org/2019/01/why-companies-attempts-to-close-the-gender-pay-gap-often-fail> [https://perma.cc/6Y44-G8CJ] (discussing approaches to minimizing the pay gap).

<sup>101</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, EQUAL PAY ACT OF 1963 AND LILLY LEDBETTER FAIR PAY ACT OF 2009 (2014) [https://www.eeoc.gov/eeoc/publications/brochure-equal\\_pay\\_and\\_ledbetter\\_act.cfm](https://www.eeoc.gov/eeoc/publications/brochure-equal_pay_and_ledbetter_act.cfm) (last visited Jan. 12, 2021) [https://perma.cc/59SN-SFEE].

<sup>102</sup> 42 U.S.C. § 2000e-2 (2018).

<sup>103</sup> According to a Pew Research Center analysis of median hourly earnings for workers in the United States, in 2017, women earned 82% of what men earned. See Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, But Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 9, 2018), <http://leametz.pbworks.com/f/Gender%20pay%20gap%20has%20narrowed%2C%20but%20changed%20little%20in%20past%20decade.pdf> [https://perma.cc/AXY5-PZZ2]. The U.S. Census Bureau cites 80 cents on the dollar. Mary Leisenring, *Women Still Have to Work Three Months Longer to Equal What Men Earned in a Year*, U.S. CENSUS BUREAU (Mar. 31, 2020), <https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html> [https://perma.cc/S9RG-B3AM]. While there is a renewed debate on the gender pay gap and precisely how to calculate it, there is widespread agreement that the gender pay gap exists and is pervasive. For a literature review, see Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789 (2017); Lobel, *supra* note 33, at 5-9 (describing the gap as “sticky”); Katie Meara, Francesco Pastore & Allan Webster, *The Gender Pay Gap in the USA: A Matching Study*, 33 J. POPULATION ECON. 271 (2019).

<sup>104</sup> For women of color, the pace is even slower, with black women making 62 cents on the dollar and Hispanic women making 54 cents on the dollar. *The Simple Truth About the Gender Pay Gap, Fall 2019 Update*, AM. ASS'N U. WOMEN (2019), [https://ww3.aauw.org/aauw\\_check/files/2016/02/Simple-Truth-Update-2019\\_v2-](https://ww3.aauw.org/aauw_check/files/2016/02/Simple-Truth-Update-2019_v2-)

Crucially, these pay inequities persist as women change employers through the practice of “previous salary questions” where employers ask candidates what their current salary is as a benchmark for their salary offer.<sup>105</sup> In addition, “pay secrecy” policies that prevent employees from sharing salary information obfuscate the very existence of a gendered pay gap.<sup>106</sup>

### C. Boilerplate Contractual Terms

Mandatory arbitration clauses and NDAs reinforce power imbalances by ensuring that sexual harassment remains shrouded in a penumbra of secrecy. Pre-dispute mandatory arbitration agreements require employees to pursue claims against their employers in an arbitration proceeding as opposed to in court.<sup>107</sup> The ordinariness of these agreements in employment contracts in the U.S. has muffled their impact.<sup>108</sup> An incredible sixty million workers, which is more than half of non-union private-sector employees, have contracted away their right to litigation.<sup>109</sup>

In fact, mandatory arbitration agreements have become so ubiquitous that they are perceived as a necessary term of employment. This was not always the case. The Federal Arbitration Act (“FAA”) was enacted in 1920 and upheld by the U.S. Supreme Court in 1924.<sup>110</sup> In the decades that followed the enactment of Title VII, however, the FAA’s applicability to the employment context remained unclear. It was not until 1991 in *Gilmer v. Interstate/Johnson Lane Corp.*, an age discrimination case, that the Supreme Court held a mandatory

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002.pdf [https://perma.cc/9M6B-PNKY]; Laura Bates, *Women Can’t Wait Until 2059 for Equal Pay*, TIME (Apr. 11, 2016 12:32 PM EDT), <https://time.com/4286884/women-cant-wait-for-equal-pay/> [https://perma.cc/724E-LJRC].

<sup>105</sup> See Lobel, *supra* note 33, at 22.

<sup>106</sup> *Id.* at 39.

<sup>107</sup> See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2014) (explaining how arbitration is used as a “substitute for adjudication”).

<sup>108</sup> ALEXANDER J.S. COLVIN, ECON. POL’Y INST., *THE GROWING USE OF MANDATORY ARBITRATION* 7 (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf> [https://perma.cc/KVY4-7JEF]; IMRE S. SZALAI & JOHN D. WESSEL, EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY, *THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA’S TOP 100 COMPANIES* (2018), <http://employeeightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf> [https://perma.cc/VT66-RAFS].

<sup>109</sup> See COLVIN, *supra* note 108, at 5.

<sup>110</sup> *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 118 (1924).

arbitration clause in an employment agreement to be enforceable.<sup>111</sup> A decade later, in *Circuit City v. Adams*, the U.S. Supreme Court specifically held that the FAA applied to arbitration agreements in employment agreements.<sup>112</sup> Since then, the rationale set forth in *Gilmer* and *Circuit City* has been extended to cases involving sexual harassment.<sup>113</sup>

Employment law scholars have long criticized mandatory arbitration agreements. These critiques broadly fall under two categories. The first has its roots in contract law and argues that the unequal bargaining power and lack of leverage between employees and employers render these contracts unenforceable “contracts of adhesion.”<sup>114</sup> The second critique is built on the many empirical studies demonstrating that employees fare worse in arbitration than in litigation.<sup>115</sup> The concerns with mandatory arbitration are amplified in the context of Title VII violations, particularly with regard to sexual harassment claims. That moral underpinning is evident in President Barack Obama’s 2014 Executive Order 13673, Fair Pay and Safe Workplaces,<sup>116</sup> which required federal contractors to provide paycheck transparency and banned forced arbitration clauses for sexual harassment, sexual assault or discrimination claims. Yet, its effect was short-lived, because on March 27, 2017, President Donald Trump issued Executive Order 13738, which revoked the Fair Pay and Safe Workplaces Order.<sup>117</sup>

Similar to mandatory arbitration agreements, NDAs have protected companies from bearing the full reputational cost of sexual

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<sup>111</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

<sup>112</sup> *Circuit City Stores v. Adams*, 532 U.S. 105, 109 (2001).

<sup>113</sup> See Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo and Time’s Up-Inspired Action Against the Federal Arbitration Act*, 87 *FORDHAM L. REV.* 2653, 2661-66 (2019).

<sup>114</sup> See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 *HARV. C.R.-C.L. L. REV.* 155, 178 (2019).

<sup>115</sup> See, e.g., Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT BLOG (Dec. 19, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/> [<https://perma.cc/94QQ-WYBS>] (discussing Microsoft’s endorsement of a senate bill that addresses sexual harassment).

<sup>116</sup> Exec. Order No. 13673, Fair Pay and Safe Workplaces. 79 *Fed. Reg.* 45309 (July 31, 2014).

<sup>117</sup> See Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 *YALE L.J.* 2122, 2128 (2019). As of the time of this publication it is unclear whether President Biden will issue an executive order addressing fair pay and safe workplaces.

harassment.<sup>118</sup> These agreements are commonly added to settlement terms and prevent the victim and accused from disclosing the facts and allegations pertaining to the sexual harassment.<sup>119</sup> To be fair, these agreements may serve some laudable goals, including protecting the privacy of the victim.<sup>120</sup> In practice, however, the #MeToo movement revealed the troubling way that NDAs have operated to silence victims and protect repeat offenders.

#### IV. KEY STAKEHOLDERS CONVERGE ON CORPORATE CULTURE

Gone are the days when the board of directors and executives were comfortably insulated from external accountability. Today, an expansive and increasingly vocal number of stakeholders influence corporate decision-making.<sup>121</sup> So much so that companies often struggle

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<sup>118</sup> See David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U.L. REV. 165, 220 (2019); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 234 (2018).

<sup>119</sup> Employment law scholars have also criticized NDAs because they can exploit the power imbalance between employer and the employee. See generally Hoffman & Lampmann, *supra* note 118, at 165 (discussing the power and informational imbalances that stem from NDAs).

<sup>120</sup> Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 77 (2018), <https://www.stanfordlawreview.org/online/targeting-repeat-offender-ndas/> [https://perma.cc/E2R3-L69W].

<sup>121</sup> For the past century, corporate law has grappled with the extent to which stakeholders should influence corporate decision-making. See A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (“It is the thesis of this essay that all powers granted to a corporation or to the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.”); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (arguing that the corporation has a “social service as well as a profit-making function”). For a more contemporary version of this debate, see Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 793 (2015); Martin Lipton, Karessa L. Cain & Kathleen C. Iannone, *Wachtell Lipton Discusses Stakeholder Governance and the Fiduciary Duties of Directors*, COLUM. L. SCH. BLUE SKY BLOG (Sept. 3 2019), <https://clsbluesky.law.columbia.edu/2019/09/03/wachtell-lipton-discusses-stakeholder-governance-and-the-fiduciary-duties-of-directors/> [https://perma.cc/Y9A2-F346]. The business community is also embracing a different articulation of corporate purpose. See *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’* BUSINESS ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/9F6K-7Q9W].



to mediate among discordant stakeholder demands.<sup>122</sup> As this Part explores, when it comes to addressing the risk of sexual harassment, these stakeholders are united in their desire for companies to focus on corporate culture.

### A. The Investment Community

#### 1. The Big Three

It was the shift to indexed investments that propelled institutional investors to the very top of the investment food chain.<sup>123</sup> The “Big Three” asset managers — BlackRock, State Street, and Vanguard — collectively comprise the “Titans of Wall Street.”<sup>124</sup> By some estimates, they could end up controlling over half our capital markets by 2024, but even today their power is formidable.<sup>125</sup> As a group, the Big Three is the largest shareholder in 40% of all U.S. listed companies and the largest shareholder in 90% of companies in the S&P 500.<sup>126</sup>

<sup>122</sup> See Flore Bridoux, Nicole Stofberg & Deanne Den, *Stakeholders’ Responses to CSR Tradeoffs: When Other-Orientation and Trust Trump Material Self-Interest*, 6 FRONTIERS PSYCHOL. 1 (2015) (discussing how stakeholders react to tradeoffs among stakeholder groups). See generally Scott J. Reynolds, Frank C. Schultz & David R. Hekman, *Stakeholder Theory and Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests*, 64 J. BUS. ETHICS 285 (2006) (finding that “indivisible resources and unequal levels of stakeholder saliency constrain managers’ efforts to balance stakeholder interests”); Deborah E. Rupp, Jyoti Ganapathi, Ruth V. Aguilera & Cynthia A. Williams, *Employee Reactions to Corporate Social Responsibility: An Organizational Justice Framework*, 27 J. ORGAN. BEHAV. 537 (2006) (addressing the “CSR” tradeoffs that managers must make in response to competing stakeholder interests).

<sup>123</sup> See Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), <https://hbr.org/2019/05/the-investor-revolution> [<https://perma.cc/S2BA-4HL7>]; Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 19-20 (2019).

<sup>124</sup> See Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 100-01 (2017); Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 299 (2017); see also Frank Partnoy, *Are Index Funds Evil?*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/are-index-funds-evil/534183/> [<https://perma.cc/E7B5-Q2QA>].

<sup>125</sup> See Fisch et al., *supra* note 123, at 20.

<sup>126</sup> See Sean J. Griffith & Dorothy S. Lund, *Conflicted Shareholder Voting in the Age of Intermediated Capitalism* 4 (Nov. 12, 2018) (unpublished manuscript), [https://ecgi.global/sites/default/files/working\\_papers/documents/griffithlundconflictedsha](https://ecgi.global/sites/default/files/working_papers/documents/griffithlundconflictedsha)

Before turning to the specific reforms that these titans are seeking, it is important to understand how passive investors flex their power.<sup>127</sup> While in the past communication between shareholders and the companies they invested in took place during quarterly earnings calls and annual meetings where proxy fights would be waged, today investors are backing up their public statements with year-round private engagement with corporate executives and, increasingly, board members. This engagement, which defines a new era of corporate governance, occurs behind closed doors and represents the investors' soft power to persuade companies to change voluntarily. When soft power fails, investors ratchet up the pressure in more public ways by filing shareholder proposals and voting against individual directors.<sup>128</sup>

As the examples below demonstrate, the focus of these investors on "corporate culture" is palpable. With some exceptions, the specific reforms they seek have little to do with sexual harassment compliance programs, nor are these investors much concerned with the inner workings of human resources or compliance departments. Rather, institutional investors are bringing their demands into the boardroom and asking directors to oversee a "corporate culture" in which sexual harassment is no longer permitted to thrive.

State Street, for instance, made "corporate culture" its chief engagement priority in 2019, arguing that a "flawed corporate culture has resulted in high-profile cases of excessive risk-taking or unethical behaviors that negatively impact long-term performance."<sup>129</sup> One key way that State Street is addressing companies with flawed corporate cultures is through board diversity. On International Women's Day in 2017, State Street unveiled its iconic "Fearless Girl" statue in front of

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reholdervotinginageofintermediatedcapitalismnov122018.pdf [https://perma.cc/8YCM-UN9Q].

<sup>127</sup> For a discussion of engagement on ESG issues, see Stavros Gadinis & Amelia Miazad, *Sustainability in Corporate Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 24, 2019), <https://corpgov.law.harvard.edu/2019/09/24/sustainability-in-corporate-law/> [https://perma.cc/ABC4-2GEK] (arguing that engagement has become a defining feature of corporate governance in our era.); Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 832-34; F. William McNabb III, *Getting to Know You: The Case for Significant Shareholder Engagement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 24, 2015), <https://corpgov.law.harvard.edu/2015/06/24/getting-to-know-you-the-case-for-significant-shareholder-engagement/> [https://perma.cc/SD5K-TV44]; Andreas G.F. Hoepner, Ioannis Oikonomou, Zacharias Sautner, Laura T. Starks & Xiao Y. Zhou, *ESG Shareholder Engagement and Downside Risk 1* (Apr. 2020) (unpublished manuscript), <https://ssrn.com/abstract=2874252> [https://perma.cc/K6X3-QKUR] (finding that engagement on ESG issues by directors, including diversity, reduces downside risk).

<sup>128</sup> See Gadinis & Miazad, *supra* note 51.

<sup>129</sup> See Taraporevala, *supra* note 13.

the charging bull on Wall Street.<sup>130</sup> The “Fearless Girl” aptly symbolizes the power imbalance that State Street was no longer willing to tolerate, and it called on companies to add more women to their boards.<sup>131</sup> Predictably, the campaign was both celebrated and criticized. Some critics called it “corporate feminism,” while others referred to it as “a marketing coup.”<sup>132</sup> Following a heated debate on social media and the public opposition of the Charging Bull’s artist, the statue was ultimately moved to its current permanent home near the New York Stock Exchange.<sup>133</sup> While State Street’s campaign caused quite a stir, it was evidently not a publicity stunt. In 2017 State Street kept its word and fearlessly voted against 400 companies with all-male boards.<sup>134</sup>

State Street has stepped up its efforts in tandem with the growing momentum of the #MeToo movement’s growing force. In 2019, State Street announced that it would vote against *all* the members of a company’s nominating committee beginning in 2020 if the company failed to add at least one woman to its board.<sup>135</sup> As Rakhi Kumar, who led ESG (environmental, social, and governance) investment at State Street, recently warned, State Street has every intention of voting against board members who choose not to address their male-dominated boards — “We want them to know that we’re watching. You have another year to be quiet, after which there are consequences to not engaging with us.”<sup>136</sup>

Although State Street’s focus began with board diversity, it has expanded to addressing power differentials more broadly. As State Street’s 2018-19 Investment Stewardship report acknowledges:

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<sup>130</sup> See Nel-Olivia Waga, *International Women’s Day 2017: Wall Street Meets ‘The Fearless Girl,’* FORBES (Mar. 7, 2017, 5:27 PM EST), <https://www.forbes.com/sites/neloliviawaga/2017/03/07/international-womens-day-2017-wall-street-meets-the-fearless-girl/?sh=2d0d6b5535b1> [https://perma.cc/YK2N-BQ6Y].

<sup>131</sup> See Sandra E. Garcia, ‘Fearless Girl’ Statue Finds a New Home: At the New York Stock Exchange, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/nyregion/fearless-girl-statue-stock-exchange-.html> [https://perma.cc/AB8K-J8RQ].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Justin Baer, *State Street Votes Against 400 Companies Citing Gender Diversity*, WALL ST. J. (July 25, 2017, 8:38 PM ET), <https://www.wsj.com/articles/state-street-votes-against-400-companies-citing-gender-diversity-1501029490> [https://perma.cc/HA8T-FUWM].

<sup>135</sup> Andrea Vittorio & Jeff Green, *State Street to Vote Against More Directors at Male-Only Boards*, BLOOMBERG (Sept. 27, 2018, 6:00 AM PDT), <https://www.bloomberg.com/news/articles/2018-09-27/state-street-to-vote-against-more-directors-at-male-only-boards> [https://perma.cc/GW5X-WVCG].

<sup>136</sup> *Id.*

In 2018, we observed that social issues such as gender diversity, pay equality, wage strategies, sexual harassment in the workplace and worker retraining are rising in prominence as emerging ESG issues facing companies. Overseeing and mitigating these risks are the next frontier of challenges facing boards.<sup>137</sup>

While State Street's efforts have perhaps been more visible, but BlackRock and Vanguard have also been focused on board gender diversity. In 2019, BlackRock identified "governance, including your company's approach to board diversity," as its *first* engagement priority.<sup>138</sup> In its 2019 Investment Stewardship Annual Report, BlackRock confirmed that, during the 2019 proxy season, it voted against fifty-two directors at Russell 1000 companies that had fewer than two women on their boards.<sup>139</sup> Moreover, BlackRock's 2019 proxy voting guidelines state that it expects U.S. public companies to have at least two female directors, and may vote against nominating committee members when BlackRock believes a company has inadequately accounted for diversity in its board composition.<sup>140</sup>

BlackRock has also moved beyond board diversity. Starting in 2018, it formally identified human capital management ("HCM") as one of its engagement priorities and noted that it would engage with boards on:

- Oversight of policies meant to protect employees (e.g., whistleblowing, codes of conduct, EEO policies) and the level of reporting the board receives from management to assess their implementation
- Process to oversee that the many components of a company's HCM strategy align themselves to create a **healthy culture** and prevent **unwanted behaviors**
- Reporting to the board on the integration of **HCM risks into risk management processes**

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<sup>137</sup> STEWARDSHIP REPORT 2018-19, STATE ST. GLOBAL ADVISORS 3 (2019), <https://www.ssga.com/library-content/products/esg/annual-asset-stewardship-report-2018-19.pdf> [https://perma.cc/JR9D-ZL6P].

<sup>138</sup> Larry Fink, *Purpose & Profit*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 23, 2019), <https://corpgov.law.harvard.edu/2019/01/23/purpose-profit/> [https://perma.cc/H6MA-5UFG]; see BLACKROCK, 2019 INVESTMENT STEWARDSHIP ANNUAL REPORT 12 (2019), <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2019.pdf> [https://perma.cc/VJ46-QPUR].

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*

- Current board and employee composition as it relates to diversity
- Consideration of linking HCM performance to executive compensation to promote board accountability
- Board member visits to establishments or factories to independently assess the **culture** and operations of the company.<sup>141</sup>

BlackRock maintained its focus on HCM as a key engagement priority in 2019. For Vanguard, too, board diversity is one of its two key engagement priorities for 2019.<sup>142</sup> Yet Vanguard went even further and became the only one of the Big Three to tie its own executive compensation metrics to improving diversity at all levels of the corporate hierarchy.<sup>143</sup> In addition to these efforts at public companies, today's investors are digging much deeper to ascertain the culture of fund portfolio management firms, such as by searching social media accounts for potential sexual harassment risks.<sup>144</sup>

## 2. Pension Funds

In direct response to the #MeToo movement, the largest pension funds in California came together to launch the Trustees United Principles, which explicitly links lack of diversity and "power imbalances" to an increased risk of sexual harassment.<sup>145</sup> On January 19, 2019, the Trustees announced that, "Institutional Investor Trustees Representing \$635 Billion in Assets Launch Principles Addressing Sexual Harassment and Workplace Misconduct."<sup>146</sup> The Principles

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<sup>141</sup> See *id.* at 20 (emphasis added).

<sup>142</sup> VANGUARD, INVESTMENT STEWARDSHIP 2019 ANNUAL REPORT 18 (2019), [https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019\\_investment\\_stewardship\\_annual\\_report.pdf](https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf) [<https://perma.cc/6DA8-5RWJ>].

<sup>143</sup> David Ricketts & Chris Newlands, *Vanguard and Fidelity Link Pay to Gender Diversity Targets*, FINANCIAL NEWS (Dec. 11, 2018, 3:24 PM), <https://www.fnlonon.com/articles/vanguard-and-fidelity-tie-pay-to-female-representation-20181210> [<https://perma.cc/ZJ5R-LR5M>].

<sup>144</sup> See James Langton, *Sexual Harassment a Due-Diligence Issue*, INVESTMENT EXEC. (Dec. 6, 2019), <https://www.investmentexecutive.com/news/research-and-markets/sexual-harassment-a-due-diligence-issue/> [<https://perma.cc/CB33-ZRFE>].

<sup>145</sup> *Trustees United for Long-Term Value*, TRS. UNITED (2020), <https://www.trusteesunited.com/> [<https://perma.cc/2ABU-SEVL>].

<sup>146</sup> *Institutional Investor Trustees Representing \$635 Billion in Assets Launch Principles Addressing Sexual Harassment and Workplace Misconduct*, TRS. UNITED (Jan. 14, 2019),



begin by emphasizing the billions of dollars of shareholder value lost as a result of recent #MeToo scandals, as well as by shifting social norms — “There’s clearly an inflection point in our society where we’re saying we’re no longer going to tolerate this behavior, and that’s an important signal to investors.”<sup>147</sup>

The Principles are notable for their focus on engaging directors and top management on addressing power differentials. Principle 1 begins by asking directors to “publicly share due diligence processes used to respond to sexual harassment and violence complaints filed by all employees . . . and subcontracted workers.”<sup>148</sup> While this principle addresses compliance, the demand for board oversight of sexual harassment policies has traditionally been managed by human resources departments, which is a notable shift.<sup>149</sup> Principle 2 blames contractual clauses, such as NDAs and forced arbitration clauses, for perpetuating harassment.<sup>150</sup> Principle 3 addresses diversity “at all levels” and correlates an increase in diversity to the ability “to be more attuned to the risks associated with harassment, misconduct, and discrimination.”<sup>151</sup> With respect to board diversity, in particular, these investors assert that “[d]iverse boards which reflect the racial and gender composition of a company’s workforce can help to create organizational cultures that prevent sexual harassment and related risks from materializing.”<sup>152</sup> Notably, Principle 4 explicitly refers to power imbalances, a term which the Trustees debated in the drafting process.<sup>153</sup> The Trustees who ultimately prevailed believed that it was important to explicitly call out “power imbalances” as a red flag for the risk of increased harassment.<sup>154</sup>

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<https://www.trusteesunited.com/Home/News> [<https://perma.cc/BAX4-QYAU>] [hereinafter *Institutional Investor*].

<sup>147</sup> BLOOMBERG, *California Pension Trustees Call For Disclosures of #MeToo Costs*, L.A. TIMES (Jan. 14, 2019, 4:35 PM), <https://www.latimes.com/business/la-fi-calpers-calstrs-metoo-20190114-story.html> [<https://perma.cc/FZ9A-BMN7>].

<sup>148</sup> TRS. UNITED, *Institutional Investor*, *supra* note 146.

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *See infra* Appendix A: Interview Participants, Interview with Anne Simpson, Managing Investment Director, Board Governance & Sustainability, CalPERS.

### 3. Proxy Advisors

In response to #MeToo, Institutional Shareholder Services (“ISS”) and Glass Lewis, the two largest proxy advisors, have been more focused on both diversity and gender pay equity.<sup>155</sup> In their 2019 Proxy Voting Guidelines both announced that they would recommend voting against nominating committee chairs on boards with no women directors.<sup>156</sup> While ISS changed its approach to using gender diversity as a factor for vote recommendations on the heels of the #MeToo movement,<sup>157</sup> Glass Lewis has been more explicit in linking #MeToo to its vote recommendations on diversity and the gender pay gap.<sup>158</sup> As Courteney Keatinge, the Senior Director of ESG at Glass Lewis recently explained:

We’ve seen a number of high-profile instances of companies where sexual harassment allegations have caused significant disruptions to their operations. Accordingly, we’ve seen more investor engagement on issues related to employee diversity resulted in companies starting to provide more disclosure on issues related to human capital management, including how they’re addressing allegations of misconduct, ensuring gender pay equity and promoting women and minorities throughout their ranks.<sup>159</sup>

Proxy advisors have also moved beyond diversity to address other power imbalances. One illustrative example is ISS’s recent recommendation to vote in favor of requiring a company to prepare a report on the risks associated with using mandatory arbitration in cases

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<sup>155</sup> ISS and Glass Lewis Policy Updates for the 2020 Proxy Season, SIDLEY (Nov. 18, 2019), <https://www.sidley.com/en/insights/newsupdates/2019/11/iss-and-glass-lewis-policy-updates-for-the-2020-proxy-season> [https://perma.cc/SZT2-Y9DR].

<sup>156</sup> ISS, AMERICAS PROXY VOTING GUIDELINES UPDATES FOR 2021: BENCHMARK POLICY CHANGES FOR U.S., CANADA, AND LATIN AMERICA 5 (2020), <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf> [https://perma.cc/45V8-QMPA].

<sup>157</sup> See Bradley Keoun, *All-Male Boards Could Face New Pressure from Shareholder Adviser ISS*, STREET (Sept. 19, 2018, 12:16 PM EDT), <https://www.thestreet.com/investing/all-male-boards-could-face-new-pressure-from-shareholder-adviser-iss-14716455> [https://perma.cc/8LRQ-J98Z].

<sup>158</sup> See MARTIN MORTELL, GLASS LEWIS, 2018 PROXY SEASON PREVIEW – UNITED STATES 5 (2018), <https://www.glasslewis.com/wp-content/uploads/2018/03/2018-Proxy-Season-Preview-US.pdf> [https://perma.cc/D7XC-WRP6].

<sup>159</sup> See *infra* Appendix A, Interview Participants, Interview with Courteney Keatinge, Senior Director, Environmental, Social & Governance Research, Glass Lewis & Co.

of sexual harassment.<sup>160</sup> This illustrates that proxy advisors are explicitly linking power imbalances to an increased risk of sexual harassment.

#### 4. Shareholder Activists

Shareholder proposals, used by investors to encourage governance reforms at companies are a “pillar of corporate governance.”<sup>161</sup> Investors have long used them to address excessive executive compensation and the election of independent directors.<sup>162</sup> Today they are also a favorite tool among investors who want to encourage reforms on ESG issues.<sup>163</sup> The number of shareholder proposals on ESG topics has more than doubled over the past decade.<sup>164</sup> Although shareholder proposals rarely receive a majority vote, the mere filing of these proposals can impact a company’s reputation, making them particularly potent in the #MeToo era.<sup>165</sup> The number of shareholder proposals addressing diversity and

<sup>160</sup> See Alistair Gray & Anna Nicolaou, *US Companies Face Shareholder Votes Over #MeToo Concerns*, FIN. TIMES (Apr. 29, 2019), <https://www.ft.com/content/d37e8638-6882-11e9-9adc-98bf1d35a056> [<https://perma.cc/SD9H-DH7V>].

<sup>161</sup> Sanford Lewis, *Analysis and Recommendations on Shareholder Proposal Decision-Making Under the SEC No-Action Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 26, 2018), <https://corpgov.law.harvard.edu/2018/07/26/analysis-and-recommendations-on-shareholder-proposal-decision-making-under-the-sec-no-action-process/> [<https://perma.cc/PT2P-GHHW>]; see also Ronald J. Gilson & Jeffrey N. Gordon, *The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work*, 31 J. APPLIED CORP. FIN. 8 (2019) (arguing that shareholder activists address the corporate governance “vacuum” brought about by diversified investors because they “tee-up” issues and act as “information intermediaries” to flag important issues).

<sup>162</sup> See, e.g., CAM HOANG, GARY TYGESSON & VIOLET RICHARDSON, DORSEY, SHAREHOLDER PROPOSALS: STRATEGIES AND TACTICS 16 (2017), <https://www.dorsey.com/newsresources/events/videos/2016/10/~media/0ee87bda7cc84b59824d6c786cff39b5.ashx> [<https://perma.cc/X483-2UU5>].

<sup>163</sup> See Erwin Eding & Bert Sholtens, *Corporate Social Responsibility and Shareholder Proposals*, 24 CORP. SOC. RESP. ENVTL. MGMT. 648, 648 (2017); James E. Langston, *Shareholder Activism in 2020: New Risks and Opportunities for Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 24, 2020), <https://corpgov.law.harvard.edu/2020/01/24/shareholder-activism-in-2020-new-risks-and-opportunities-for-boards/> [<https://perma.cc/W4BD-DBVK>]; Peter Reali & Anthony Garcia, *Proxy Season Rising Demand for Board Oversight of ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 11, 2019), <https://corpgov.law.harvard.edu/2019/09/11/proxy-season-rising-demand-for-board-oversight-of-esg/> [<https://perma.cc/XC8N-YFUL>].

<sup>164</sup> See Reali & Garcia, *supra* note 163.

<sup>165</sup> See Ian Croce, *Proxy Season Data Show Big Increase in Accommodation*, PENSIONS & INVS. (Sept. 2, 2019, 12:00 AM), <https://www.pionline.com/esg/proxy-season-data-show-big-increase-accommodation> [<https://perma.cc/5JSQ-SXZY>] (“The goal of a resolution is to influence a given company to change its policy and actions . . . That’s

the gender pay gap has increased over the past two years.<sup>166</sup> While just one of the proposals went to a vote and received 15.1% support, shareholders are withdrawing them more frequently because companies are agreeing to engage or make changes.<sup>167</sup> Importantly, proposals relating to gender pay equity had the highest withdrawal rate of any category in 2018.<sup>168</sup> As one law firm publication recently noted, “[t]he withdrawal rate is unsurprising given the impact of the #MeToo movement and the public attention on workplace culture this year.”<sup>169</sup>

Arjuna Capital and Trillium Asset Management have collectively filed the highest number of shareholder proposals asking companies to disclose both their diversity metrics and their gender pay gap. In justifying their proposals, both investors have linked power imbalances to an increased risk of sexual harassment. Arjuna Capital has been at the forefront of shareholder activism related to gender pay disparities. Calling for more transparency, it led a successful campaign, which pressured iconic tech giants including Apple, eBay, Intel, Apple, Amazon, Expedia, Microsoft, and Adobe, to disclose their gender pay disparity.<sup>170</sup> Off the heels of its success, it moved on to nine financial services companies, convincing Citi to become the first U.S. bank to voluntarily disclose that its gender pay gap is 29%.<sup>171</sup> Six more followed Citi’s lead, including American Express, Bank of America, Bank of New York Mellon, Citigroup, JPMorgan, Mastercard, and Wells Fargo.<sup>172</sup>

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why votes of 10% or 20% support can make an impact. You’re actually looking for a collaboration and transition.” (internal quotations omitted)).

<sup>166</sup> See David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/> [https://perma.cc/3LWS-CPRP].

<sup>167</sup> See, e.g., *id.* (“The proposal, which also urged Nike to consider company culture and diversity metrics in evaluating the performance of senior executives, was withdrawn upon Nike’s commitment to consider Trillium’s request and to meet quarterly to discuss the results.”).

<sup>168</sup> *Id.*; see NATASHA LAMB & MICHAEL PASSOFF, GENDER PAY SCORECARD 6 (2d ed. 2019), <https://arjuna-capital.com/wp-content/uploads/2019/04/Gender-Pay-Scorecard-2019.pdf> [https://perma.cc/E5KC-L9KP].

<sup>169</sup> SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW 9 (2018), <https://pcg.law.harvard.edu/wp-content/uploads/2018/03/a1-2018-Proxy-Season-Review.pdf> [https://perma.cc/D8FK-AQ23].

<sup>170</sup> See Press Release, Natasha Lamb, Managing Partner, Arjuna Capital, 12 U.S. Banks and Tech Giants Targeted with “Median Gender Pay Gap” Shareholder Proposal (Feb. 13, 2019), <http://arjuna-capital.com/news/press-release-12-u-s-banks-and-tech-giants-targeted-with-median-gender-pay-gap-shareholder-proposal/> [https://perma.cc/9PG8-Y42Q].

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

Arjuna Capital's managing director Natasha Lamb has explicitly tied power differentials to sexual harassment risk — "When women hold the lower paying jobs and in turn have less power in the organization . . . that imbalance breeds an unhealthy culture. The symptoms of that are the power dynamics around sexual harassment."<sup>173</sup> Trillium Asset Management concurs, and filed the first proposal which specifically mentions this link.<sup>174</sup> Trillium has withdrawn its proposal because Nike has committed to engage.<sup>175</sup>

## 5. Shareholder Plaintiffs

With #MeToo revelations triggering double-digit stock price plunges, some investors have turned to filing derivative suits.<sup>176</sup> These shareholders have alleged that directors and officers breached their fiduciary duties under state law by failing to monitor the risk of sexual harassment, or violated federal securities law by failing to disclose such risks.<sup>177</sup> This trend is igniting a discussion among corporate law scholars, Director and Officer ("D&O") insurance experts, and board consultants on the viability of these claims.<sup>178</sup> While those issues remain important and unresolved, a new and unexplored phenomenon is

<sup>173</sup> Sarah Barry James, *From Hollywood to Wall Street, Investors Confront Sexual Misconduct Risk*, S&P GLOBAL (Mar. 6, 2018, 1:41 PM ET), <https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=43771908&cdid=A-43771908-13093> [<https://perma.cc/5G6E-ZP9V>].

<sup>174</sup> See Matthew Kish, *Nike Agrees to Work with Investment Firm on Diversity Efforts*, PORTLAND BUS. J. (Sept. 20, 2018, 3:57 PM EDT), <https://www.bizjournals.com/portland/news/2018/09/20/nike-agrees-to-work-with-investment-firm-on.html>. [<https://perma.cc/6RSN-9KM7>].

<sup>175</sup> *Id.*

<sup>176</sup> See, e.g., Hemel & Lund, *supra* note 37 (discussing recent shareholder derivative actions filed against directors and officers for failure to prevent and disclose sexual harassment).

<sup>177</sup> See *id.* at 1583.

<sup>178</sup> See, e.g., *id.* at 1641-58 (discussing the potential for successful shareholder actions against corporations and corporate fiduciaries following revelations of sexual misconduct); see also Kevin M. LaCroix, *Alphabet Board Hit with Derivative Suits over Alleged Sexual Misconduct at Google*, D&O DIARY (Jan. 13, 2019), <https://www.dandodiary.com/2019/01/articles/director-and-officer-liability/alphabet-board-hit-derivative-suits-alleged-sexual-misconduct-google/> [<https://perma.cc/D7HQ-X74L>]; Kevin M. LaCroix, *Nike Board Hit with Sexual Misconduct-Related Derivative Suit*, D&O DIARY (Oct. 30, 2019), <https://www.dandodiary.com/2018/10/articles/director-and-officer-liability/nike-board-hit-sexual-misconduct-related-derivative-suit/> [<https://perma.cc/QY5H-EMKY>]; Kevin M. LaCroix, *Yet Another D&O Claim Arising out of Revelations of Sexual Misconduct*, D&O DIARY (Aug. 30, 2018), <https://www.dandodiary.com/2018/08/articles/securities-litigation/yet-another-claim-arising-revelations-sexual-misconduct/> [<https://perma.cc/S5SD-FAUS>].



playing out in the background. As elucidated in Appendix B,<sup>179</sup> a close analysis of the pleadings in these lawsuits reveals that shareholders are increasingly rooting their allegations in “corporate culture.” Today, shareholders are blaming boards for failing to monitor, prevent, or disclose a “culture of sexual harassment” or “boys’ club culture.” This marks a clear departure from the traditional shareholder focus on adequate compliance, training, and reporting systems and is yet another power example of a shift from an era of compliance to an era of culture.

As of the time of this writing, there have been fourteen derivative actions brought against directors and officers arising out of the failure to monitor or disclose the risk of sexual harassment.<sup>180</sup> The first four pre-dated the #MeToo movement and were brought against directors and officers of ICN Pharmaceuticals in 2001,<sup>181</sup> American Apparel in 2011,<sup>182</sup> Hewlett-Packard in 2012,<sup>183</sup> and CTPartners in 2015.<sup>184</sup> Out of the four complaints filed prior to the #MeToo movement, CTPartners is the only one that mentions “culture of sexual harassment” or even draws a link between a male-dominated culture and the risk of sexual harassment.<sup>185</sup> Before the #MeToo movement, the phrase “culture of sexual harassment” had rarely made its way into shareholder plaintiff parlance.

Yet it has gained prominence recently. For example, the derivative complaint against the directors and officers of Twenty-First Century Fox following the revelations about sexual harassment by Roger Ailes and Bill O’Reilly<sup>186</sup> begins: “This case arises from the systematic, decades-long culture of sexual harassment . . . .”<sup>187</sup> The substantive allegations in the complaint appear under the heading, “The Culture of

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<sup>179</sup> See *infra* Appendix B.

<sup>180</sup> See Hemel & Lund, *supra* note 37, at 1589.

<sup>181</sup> See *White v. Panic* (Panic I), 793 A.2d 356, 358-59 (Del. Ch. 2000), *aff’d*, 783 A.2d 543 (Del. 2001).

<sup>182</sup> See *In re Am. Apparel, Inc. S’holder Derivative Litig.*, No. CV 10-06352, 2014 WL 10212865, at \*1, (C.D. Cal. July 28, 2014).

<sup>183</sup> See Second Amended Complaint at 1-7, *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, No. 12-CV-04115 (N.D. Cal. Sept. 9, 2013); Complaint at 2-4, *Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.*, No. 12-CV-04115 (N.D. Cal. Aug. 3, 2012).

<sup>184</sup> See Amended Complaint at 1-6, *Lopez v. CTPartners Exec. Search Inc.*, No. 15-cv-01476 (S.D.N.Y. June 15, 2015); Complaint at 1-4, *Zinno v. CTPartners Exec. Search Inc.*, No. 15-cv-01476 (S.D.N.Y. Feb. 27, 2015).

<sup>185</sup> See *infra* Appendix B.

<sup>186</sup> See Verified Derivative Complaint at 1-7, *City of Monroe Emps.’ Ret. Sys. v. Murdoch*, No. 2017-0833 (Del. Ch. Nov. 20, 2017) [hereinafter *Murdoch Complaint*].

<sup>187</sup> *Id.* at 2.

Sexual Harassment at Fox News”<sup>188</sup> and the phrase “culture of sexual harassment” or “toxic culture” appears in the complaint *thirty-four times*.<sup>189</sup> The shareholders further alleged that the board breached its fiduciary duties, including its duty of oversight, by failing to “recognize and address the culture of sexual harassment at Fox News.”<sup>190</sup>

This focus on culture continued to gain momentum in 2018, beginning with the shareholders of Signet Jewelers who filed a derivative action against the board which alleged that directors and officers violated federal securities law by failing to disclose both fraud and “a culture of rampant sexual harassment.”<sup>191</sup> The Signet Complaint referred to culture *seventy-four times* and further emphasized that “culture” was “especially important to investors in Signet stock . . . because the Company’s principal product, bridal and other jewelry, was primarily purchased for women.”<sup>192</sup> Also in 2018, shareholders of Nike filed a derivative action alleging that the board violated its fiduciary duties.<sup>193</sup> The Nike complaint begins with a similar focus on culture: “This case arises from Nike’s systematic ‘boys’ club’ culture, which resulted in the ‘bullying, sexual harassment, and gender discrimination of the Company’s female employees.”<sup>194</sup> Nike expands the board’s duty further from a “culture of harassment” to a “boys’ club culture” on the grounds that it threatened Nike’s brand “which was purportedly cultivated in a culture of empowerment.”<sup>195</sup> The shareholder plaintiffs in Nike were also the first to explicitly link the board’s lack of focus on diversity to its failure to monitor the risk of sexual harassment:

Had the Board made any reasonable inquiries — whether with members of the management knowledgeable on the issue of diversity and culture or with the Company’s third-party vendor retained to operate NIKE’s AlertLine — the Board would have discovered a huge gender disparity in the number of female employees within the executive ranks.<sup>196</sup>

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<sup>188</sup> See *id.* at 11.

<sup>189</sup> See generally *id.* at 1-76.

<sup>190</sup> *Id.* at 49.

<sup>191</sup> See Fifth Amended Class Action Complaint at 61, *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728 (S.D.N.Y. Mar. 22, 2018) [hereinafter *Signet Jewelers Complaint*].

<sup>192</sup> *Id.* at 61.

<sup>193</sup> See Stein Complaint, *supra* note 14, at 4.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.* at 5, 28.

<sup>196</sup> *Id.* at 36.

This trend appears to be gaining momentum. Shareholders of Alphabet have also filed a derivative action alleging that the board violated its fiduciary duties by failing to focus on the gender imbalance at Alphabet:<sup>197</sup> “Alphabet is a male-dominated company with a male-dominated culture, like the tech industry at large . . . for years, Alphabet’s management has fostered a ‘brogrammer’ culture, where women are sexually harassed and valued less than their male counterparts.”<sup>198</sup>

Similarly, the Lululemon shareholder derivative complaint<sup>199</sup> also faults the board for condoning a “boys’ club” culture and alleges that “[t]his case arises from Lululemon’s systematic ‘boys’ club’ culture, which resulted in bullying, sexual favoritism, and gender discrimination.”<sup>200</sup>

The growing focus on corporate culture is evident even in subsequent amendments of the same complaint.<sup>201</sup> While the original complaint against CBS, for instance, refers to culture just once, the most recently amended complaint uses the term *forty* times.<sup>202</sup> Of the ten shareholder derivative lawsuits that have been filed following #MeToo, *only two*, Liberty Tax<sup>203</sup> and National Beverage,<sup>204</sup> do not explicitly refer to the board’s failure to prevent a male-dominated corporate culture.<sup>205</sup> As noted above, even courts are recognizing the salience of #MeToo. In a recent victory for plaintiffs in the CBS case, the court reasoned: “The context of #MeToo . . . is pertinent because . . . [the movement] *changed the risks to a company* of having a CEO with an unsavory past.”<sup>206</sup>

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<sup>197</sup> Verified Stockholder Derivative Complaint at 1, N. Cal. Pipe Trades Pension Plan v. Hennessey, No. 19-CIV-00149 (Cal. Super. Ct. Jan. 9, 2019).

<sup>198</sup> *Id.* at 3.

<sup>199</sup> Verified Stockholder Derivative Complaint, Shabbouei v. Potdevin, No. 2018-0847 (Del. Ch. 2020).

<sup>200</sup> *Id.* at 2.

<sup>201</sup> See Class Action Complaint at 16, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Aug. 27, 2018).

<sup>202</sup> Amended Complaint at 1-70, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Feb. 11, 2019).

<sup>203</sup> Verified Stockholder Derivative Complaint, Asbestos Workers’ Phila. Pension Fund *ex rel.* Liberty Tax, Inc. v. Hewitt, No. 2017-0883 (Del. Ch. Dec. 11, 2017).

<sup>204</sup> Class Action Complaint, Luczak v. Nat’l Beverage Corp., No. 0:18-cv-61631-KMM (S.D. Fla. July 17, 2018).

<sup>205</sup> See *infra* Appendix B.

<sup>206</sup> Constr. Laborers Pension Tr. for S. Cal. v. CBS Corp., 433 F. Supp. 3d 515, 548 (S.D.N.Y. 2020) (emphasis added).

### B. Employees

The relationship between the employer and employee is evolving. For a growing number of employees today, work is far more than just a place to collect a paycheck. Rather, work has become a place to seek moral fulfillment and purpose.<sup>207</sup> There are a number of factors that could be contributing to this rising culture of “workism.”<sup>208</sup> As recent surveys confirm, employees’ faith in their employers “to do what is right” eclipses their faith in government, the media, or even Non-Governmental Organizations (“NGOs”).<sup>209</sup>

Many CEOs are responding to this calling, embracing their new role as “the moral voice of corporate America.”<sup>210</sup> Counterintuitively, even shareholders are championing this rising employee voice and warning that “workers, not just shareholders, can and will have a greater say in defining a company’s purpose, priorities, and even the specifics of its business.”<sup>211</sup> The potential scope of this worker power is being pushed to new limits for the U.S., with shareholder proposals and presidential candidates advocating for employee representation on the board of directors.<sup>212</sup>

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<sup>207</sup> Derek Thompson, *Workism Is Making Americans Miserable*, ATLANTIC (Feb. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441> [<https://perma.cc/49DR-NE2K>].

<sup>208</sup> See *id.* (discussing relevant factors including social media, student debt, the welfare system, and the “widening of the workist gap”).

<sup>209</sup> See 2019 Edelman Trust Barometer Reveals “My Employer” Is the Most Trusted Institution, EDELMAN (Jan. 20, 2019), <https://www.edelman.com/news-awards/2019-edelman-trust-barometer-reveals-my-employer-most-trusted-institution> [<https://perma.cc/56QT-CQVL>].

<sup>210</sup> Gelles, *supra* note 97.

<sup>211</sup> See Larry Fink, *Larry Fink’s 2019 Letter to CEOs: Profit & Purpose*, BLACKROCK, <https://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter> (last visited Dec. 30, 2020) [<https://perma.cc/6KYE-K539>].

<sup>212</sup> See Todd Bishop & Monica Nickelsburg, *An Employee on Microsoft’s Board? Shareholder Proposal Floats Concept, Board Calls it “Unnecessary,”* GEEKWIRE (Oct. 16, 2019, 4:48 PM), <https://www.geekwire.com/2019/employee-microsofts-board-shareholder-proposal-floats-concept-board-calls-unnecessary/> [<https://perma.cc/ZJP9-3B7Y>]; see also Leo E. Strine Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America’s Future* 4-8 (Univ. of Pa. Law Sch. Inst. for Law. & Econ., Research Paper No. 19-39, 2019), <https://ssrn.com/abstract=3461924> [<https://perma.cc/9WSM-C3SW>] (proposing corporate reforms to promote fairness). See generally Ewan McGaughey, *Democracy in America at Work: The History of Labor’s Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697 (2019) (arguing for co-determination and worker representation on boards in America).

The #MeToo movement erupted against this shifting dynamic. Thus, it is not surprising that employees are leveraging their growing voice to address unethical behaviors by senior executives at iconic companies like Google, McDonald's, Uber, Amazon, and Nike.<sup>213</sup> Some critics question the efficacy of this worker activism, pointing to employees' relative lack of bargaining power compared to investors, the board, and management. While it is true that many of these employees' demands remain unanswered, employees at many companies have, at a minimum, exposed and in many instances forced companies to address a number of power imbalances. As detailed in the case studies of these companies in Part V below, the governance reforms that followed this employee activism are far-reaching. Employee activism is also emboldening other key stakeholders including investors and regulators, who are pointing to it as a means of legitimizing their own demands for governance reforms.

### C. Lawmakers

In addition to the self-regulation and voluntary action by companies, the #MeToo movement has spurred a wave of new legislation.<sup>214</sup> While lawmakers are still interested in compliance-related reforms, their focus has shifted towards addressing the power imbalances described in Part III.<sup>215</sup>

At the federal level, in December of 2017, Congress addressed #MeToo in Section 13307 of the Tax Cuts and Jobs Act, which precludes tax deductions for settlement payments which are subject to an NDA and relate to sexual harassment.<sup>216</sup> Also in December of 2017, Senator Kirsten Gillibrand introduced The Ending Forced Arbitration of Sexual Harassment Act, which would prohibit predispute agreements in cases

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<sup>213</sup> See Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1535, 1546-47 (2018) ("Corporations . . . are at the forefront of some of the most contentious and important social issues of our time.").

<sup>214</sup> See, e.g., Tippet, *supra* note 118, at 255-58 (discussing proposed legislation in California, New York, and Pennsylvania); see also Murray, *supra* note 53, at 875 ("Thus, while #MeToo is not the first iteration of private actors seeking to regulate in furtherance of a new normative agenda, it is perhaps distinct in its desire — and need — to engage the state in an ongoing dialogue about regulating appropriate sexual conduct.").

<sup>215</sup> See Murray, *supra* note 53, at 867.

<sup>216</sup> *Certain Payments Related to Sexual Harassment and Sexual Abuse*, IRS, <https://www.irs.gov/newsroom/certain-payments-related-to-sexual-harassment-and-sexual-abuse> (last updated Jan. 22, 2021) [<https://perma.cc/FM6Z-DFF3>].



of sexual harassment.<sup>217</sup> More recently, on June 5, 2018, former Senator Kamala D. Harris and Senator Lisa Murkowski introduced the Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (“EMPOWER”) Act.<sup>218</sup> Its announcement makes clear that it was drafted in direct response to the #MeToo movement and seeks to address power imbalances: “Ultimately, *there is a monopoly of power in workplace harassment* — those who control a paycheck, or a reputation, or a promotion have the power to perpetrate harassment, to protect harassers, and to silence victims.”<sup>219</sup>

To address this “monopoly of power” the Act purposes several reforms, including ending the use of non-disparagement and NDAs in employment agreements.<sup>220</sup> With respect to mandatory disclosure, another bill is focused on requiring the disclosure of “human capital management.”<sup>221</sup>

State and local legislatures are not standing by idly — a recent study estimates that over 200 new bills have been passed since #MeToo.<sup>222</sup> For example, six states have either enacted or are considering legislation mandating or encouraging more women on boards.<sup>223</sup> There are also seventeen new state-wide bans and twenty local bans that prohibit employers from asking about salary history,<sup>224</sup> and there is a growing number of laws that ban or limit mandatory arbitration and NDAs in cases of sexual harassment.<sup>225</sup> With respect to board diversity mandates

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<sup>217</sup> Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. § 402(a) (2017).

<sup>218</sup> EMPOWER Act, H.R. 1521, 116th Cong. (2019).

<sup>219</sup> REP. LOIS FRANKEL, THE EMPOWER ACT 1 (2018), [https://frankel.house.gov/uploadedfiles/empower\\_act\\_-\\_summary.pdf](https://frankel.house.gov/uploadedfiles/empower_act_-_summary.pdf) [<https://perma.cc/TNJ5-4AC2>] (emphasis added).

<sup>220</sup> H.R. 1521 § 103(a)(1).

<sup>221</sup> Workforce Investment Disclosure Act of 2020, H.R. 5930 116th Cong. (2020).

<sup>222</sup> Press Release, Nat’l Women’s Law Ctr., Fifteen States Have Passed New Laws Protecting Workers from Sexual Harassment in Wake of #MeToo, NWLC Report Reveals (July 25, 2019), <https://nwlc.org/press-releases/fifteen-states-have-passed-new-laws-protecting-workers-from-sexual-harassment-in-wake-of-metoo-nwlc-report-reveals/> [<https://perma.cc/TV9R-SNPS>].

<sup>223</sup> See Felix von Meyerinck, Alexandra Niessen-Ruenzi, Markus Schmid & Steven Davidoff Solomon, *As California Goes, So Goes the Nation? Board Gender Quotas and the Legislation of Non-Economic Values* 18-19 (Univ. of St. Gallen Sch. of Fin., Working Paper No. 1904, 2020), <https://ssrn.com/abstract=3303798> [<https://perma.cc/CX4C-AY4Q>].

<sup>224</sup> *Salary History Bans*, HR DIVE, <https://www.hrdive.com/news/salary-history-ban-states-list/516662/> (last updated Aug. 7, 2020) [<https://perma.cc/S86K-MH47>] (offering a running list of states and localities that have outlawed pay history questions).

<sup>225</sup> See Sternlight, *supra* note 114, at 206-07.

in particular, these laws introduce a new normative agenda for corporate law and reflect an “unprecedented effort by a state to extend its corporate law rules to address matters of societal rather than purely economic concerns.”<sup>226</sup>

#### D. Regulatory Monitors<sup>227</sup>

##### 1. The EEOC

Created by Title VII, the EEOC is the federal agency that employers primarily look to for guidance on how to protect against workplace discrimination, including sexual harassment.<sup>228</sup> Recently, even the EEOC acknowledged the limitations of sexual harassment training programs given that they are focused on preventing legal liability rather than harassment.<sup>229</sup> In an effort to address the root cause of sexual harassment, in June 2016, the EEOC published the *Select Task Force on the Study of Harassment in the Workplace*.<sup>230</sup> Why did the EEOC’s focus shift from compliance to culture? One of the primary reasons may be the influence of social science academics. The EEOC recognized that the task force group was traditionally “heavy on lawyers” and they “deliberately fashioned an interdisciplinary approach that considered the social science on harassment in the workplace.”<sup>231</sup> Because the focus was on prevention rather than training, the report was not confined to the legal definition of workplace harassment. Rather, it included examination of conduct and behaviors that were not “legally actionable,” but if “left unchecked, may set the stage for unlawful

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<sup>226</sup> Jill Fisch & Steven Davidoff Solomon, *Centros, California’s “Women on Boards” Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493, 512 (2019). More recently and in light of the movement against racial injustice, California has passed a bill requiring racial diversity on boards. Assemb. B. 979, 2020 Leg., Reg. Sess. (Cal. 2020).

<sup>227</sup> See generally Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 374 (2019) (discussing the role of regulatory monitors); see also generally Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 320-21 (2001) (describing the much stronger authority for the EEOC envisioned in the committee version of the bills and the opposition that limited the agency’s authority).

<sup>228</sup> *Timeline of Important EEOC Events*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/timeline-important-eeoc-events> (last visited Feb. 14, 2021) [<https://perma.cc/7HMB-RP76>].

<sup>229</sup> See *supra* Part I.B.

<sup>230</sup> See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 59, at ii.

<sup>231</sup> *Id.* at iii.

harassment.”<sup>232</sup> Of the identified risk factors for harassment in the workplace, one third directly relate to power differentials and imbalance, and rely explicitly on the social science theories described in Part II.<sup>233</sup>

The first risk factor that the EEOC identifies is a “homogenous workforce” that reflects a “historic lack of diversity in the workplace.”<sup>234</sup> The EEOC recommends that employers address this risk through an “increase in diversity of all levels of the workforce.”<sup>235</sup> The report found that there is greater likelihood of harassment in “workforces in which some employees are perceived to be particularly valuable to the employer.”<sup>236</sup> The EEOC encapsulated this risk: “In short, superstar status can be a breeding ground for harassment.”<sup>237</sup> Even worse, the superstar status may shield the high-value employee from oversight and the “behavior of such individuals may go on outside the view of anyone with the authority to stop it.”<sup>238</sup> The report also identified workplaces with significant power disparities as a risk factor,<sup>239</sup> explaining that, “[l]ow-status workers may be particularly susceptible to harassment, as high-status workers may feel emboldened to exploit them.”<sup>240</sup> Today, in addition to compliance efforts, the EEOC advises employers on how to improve their workplace culture by addressing power differentials.<sup>241</sup>

## 2. The SEC

In response to investor feedback, the Securities and Exchange Commission (“SEC”) is considering whether to amend Regulation S-K to require mandatory disclosure of human capital management which would encompass diversity and inclusion, gender pay gap, and culture.<sup>242</sup> This marks a shift in the SEC’s traditionally conservative

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<sup>232</sup> *Id.* at iv.

<sup>233</sup> *See id.* at 25-30.

<sup>234</sup> *Id.* app. C at 84.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 27.

<sup>237</sup> *See id.* at 24.

<sup>238</sup> *Id.* at 27.

<sup>239</sup> *Id.* at 28.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* app. C at 86.

<sup>242</sup> *See* Press Release, U.S. Sec. & Exch. Comm’n, SEC Proposes to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 8, 2019), <https://www.sec.gov/news/press-release/2019-148> [<https://perma.cc/4A4A-XZK8>].

view of the materiality of ESG disclosure.<sup>243</sup> The change in the SEC's approach was prompted by The Human Capital Management Coalition ("HCMC"), comprised of investors with a combined U.S. \$3 trillion in assets.<sup>244</sup> On July 6, 2017, HCMC submitted a rulemaking petition to the SEC to require increased disclosure on nine human capital topics on the grounds that "skillful management of human capital is associated with better corporate performance, including better risk mitigation."<sup>245</sup> The SEC's proposal appears to rely on the fact that "a number of commenters asserted that companies with poor management of human capital may face operational, legal, and reputational risks . . . ."<sup>246</sup>

### E. Insurance Brokers and Underwriters

The swelling tide of #MeToo claims and lawsuits has even permeated insurance underwriting processes. Employment Practices Liability ("EPL") insurance typically covers harassment, discrimination and retaliation claims. D&O insurance may cover securities and other shareholder claims arising out of a #MeToo-type event. As a consequence of large #MeToo settlement payouts and defense costs, insurers that issue both types of coverage are growing wary.

Richard S. Betterley, an insurance industry expert, has tracked EPL insurance policy trends since 1991 when that coverage started to become widespread.<sup>247</sup> In 2018 and 2019, he conducted interviews with twenty-one of the largest insurers to assess whether the #MeToo movement was impacting their underwriting.<sup>248</sup> According to the

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<sup>243</sup> See Preston Brewer, *Analysis: Tracking SEC's Evolving Approach to ESG Disclosures*, BLOOMBERG LAW (Nov. 4, 2019, 3:39 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-tracking-secs-evolving-approach-to-esg-disclosures> [<https://perma.cc/BQ68-VHX5>].

<sup>244</sup> See Letter from the Human Capital Management Coalition, to William Hinman, Dir., Sec. & Exch. Comm'n Div. Corp. Fin. 1 (July 6, 2017), <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf> [<https://perma.cc/WT6D-H9LY>].

<sup>245</sup> *Id.*

<sup>246</sup> See *id.* at 21.

<sup>247</sup> See *infra* Appendix A: Interview Participants, Interview with Richard Betterley, Insurance Expert.

<sup>248</sup> See RICHARD S. BETTERLEY, BETTERLEY RISK CONSULTANTS, INC., EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2019: A STIFFENING MARKET - #METOO ONLY PART OF THE REASON 2, 5 (2019) [hereinafter 2019 SURVEY] ("Our takeaway . . . is that most insurers are much further into implementing underwriting . . . due to the wave of allegations."); RICHARD S. BETTERLEY, BETTERLEY RISK CONSULTANTS, INC., EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2018: SEXUAL HARASSMENT CLAIMS CONCERNS CONTINUE — INSURERS RESPOND 3 (2018) [hereinafter 2018 SURVEY] ("For our survey, we focus most on the most prominent insurers writing the most business or those that offer some unique product or service."); RICHARD S. BETTERLEY,

interviews in 2018, Betterley concluded that insurers were “paying close attention” to #MeToo risks, albeit still in “early stages of implementing underwriting or pricing changes.”<sup>249</sup> In 2019, that scrutiny increased, with one insurer asking about “board oversight” of #MeToo risk and another requiring the disclosure of “confidential settlement agreements” in excess of \$500,000.<sup>250</sup> Betterley expects this trend to continue.<sup>251</sup>

That #MeToo has made its way into the underwriting process isn’t all too surprising — at its core, insurance underwriting is all about assessing and pricing risk. But the specific questions that underwriters are asking today reveal that their focus has expanded beyond legal compliance to encompass culture. For the first time, underwriters are “taking a closer look at the culture of the organization,” which includes “pay equity questionnaire[s]” and diversity metrics.<sup>252</sup> According to Betterley, the #MeToo movement marks a clear departure from the “check the box” approach that insurers previously favored.<sup>253</sup>

Given that insurance is a blunt instrument, there is also increased scrutiny of certain industries including “[e]ntertainment, [m]edia, [e]ducation, and high profile executives.”<sup>254</sup> Some insurers are requiring higher self-insured retentions in certain industries, and others are going so far as to exclude entire industries.<sup>255</sup> Even in the current insurance market where competition is fierce, there has been an increase in the number of “prohibited insureds,” from 127 in 2017 to 141 in 2019.<sup>256</sup>

Insurance brokers are weighing in too. Woodruff Sawyer, for example, suggests amending executive compensation agreements to address large payouts for executives and improving diversity because “[i]t is harder to defend a company accused of allowing sexual harassment (or bias) to exist or even flourish if you have no women in

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BETTERLEY RISK CONSULTANTS, INC., EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2017: SEXUAL HARASSMENT CLAIMS CONCERNS CONTINUE — INSURERS RESPOND (2017).

<sup>249</sup> BETTERLEY, 2018 SURVEY, *supra* note 248, at 4-5.

<sup>250</sup> See BETTERLEY, 2019 SURVEY, *supra* note 248, at 6.

<sup>251</sup> See BETTERLEY, 2018 SURVEY, *supra* note 248, at 5-6.

<sup>252</sup> See *id.* at 5.

<sup>253</sup> See *infra* Appendix A: Interview Participants, Interview with Richard Betterley, Insurance Expert.

<sup>254</sup> BETTERLEY, 2018 SURVEY, *supra* note 248, at 8.

<sup>255</sup> *Id.* at 9.

<sup>256</sup> *Id.* at 28.



executive leadership.”<sup>257</sup> Coverage attorneys who advise on D&O coverage are warning that “D&O insurers are now looking at ways to assess the ‘tone at the top’ of an organization.”<sup>258</sup> Corporate counsel in the technology industry have also confirmed that in 2018 D&O carriers began asking about diversity and gender pay gap metrics.<sup>259</sup> As Rob Chesnut, Chief Ethics Officer of Airbnb recently noted, “[f]ive years ago, culture, diversity, and integrity didn’t come up in meetings. Now, it’s a significant part of the discussion.”<sup>260</sup>

#### F. Lawfirms and Board Advisors

Law firms are also narrowing in on the board’s role to oversee corporate culture. Wachtell Lipton has been issuing a steady drumbeat of advice warning companies that “[c]apitalism is at an inflection point”<sup>261</sup> and advocating for a “new paradigm”<sup>262</sup> in which boards oversee “corporate equality.”<sup>263</sup> This so-called corporate equality encompasses “sexual harassment, corporate culture, gender pay equity, and gender diversity.”<sup>264</sup> Wachtell warns that “the cultural context of the current #MeToo movement”<sup>265</sup> makes ignoring shareholder proposals on corporate equality issues far too risky.<sup>266</sup> Another example is Hogan Lovells, which advises boards to address the risk of #MeToo by “avoiding a toxic culture” and outlines the following specific steps, each of which seek to correct power differentials: diversifying the C-Suite, eliminating pre-arbitration clauses in employment agreements;

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<sup>257</sup> See *infra* Appendix A: Interview Participants, Interview with Priya Cherian Huskins, Woodruff Sawyer; see also Priya Cherian Huskins, *#MeToo and the Boardroom*, WOODRUFF SAWYER (June 27, 2018), <https://woodruffawsywer.com/do-notebook/me-too-boardroom/> [https://perma.cc/NV25-GDC4].

<sup>258</sup> See Kelly Bryant Thorig, Pamela S. Palmer & Susan K. Lessack, *#MeToo: Is Your Company Covered?*, TROUTMAN PEPPER (Nov. 1, 2018), <https://www.pepperlaw.com/publications/metoo-is-your-company-covered-2018-11-27/> [https://perma.cc/ZM5A-KWWE].

<sup>259</sup> See *infra* Appendix A: Interview Participants, Interview with Rob Chesnut, Chief Ethics Officer, Airbnb, Interview with Brian Savage, Corporate Counsel, Airbnb.

<sup>260</sup> See *infra* Appendix A: Interview Participants, Interview with Rob Chesnut, Chief Ethics Officer, Airbnb, Interview with Brian Savage, Corporate Counsel, Airbnb.

<sup>261</sup> See Martin Lipton, *It’s Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/> [https://perma.cc/53TM-2FJH].

<sup>262</sup> See *id.*

<sup>263</sup> See Katz & McIntosh, *supra* note 166.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

broadening the scope of clawback policies in the wake of #MeToo by adding provisions triggering clawbacks in the event of sexual harassment or misconduct; expanding the application of the clawback provisions to all C-Suite executives; and expanding the definition of cause in employment contracts to include sexual harassment.<sup>267</sup>

Crucially, this law firm advice is not confined to the occasional client alert. A growing number of law firms are creating entire practice groups focused on corporate culture. For example, Covington & Burling LLP recently launched its “Cultural Reviews and Investigations Practice Group” and warns its clients that “the revelation of more nuanced cultural problems within an organization ha[s] the potential to give rise to significant litigation or reputational risk.”<sup>268</sup> These novel practice groups are staffed with cross-functional teams of lawyers with expertise in employment law, corporate governance, and white-collar investigations.<sup>269</sup> The issues that these teams tackle go beyond compliance with the law. Through “cultural audits,” these outside counsel attempt to help companies transform their corporate culture to mitigate against both legal and reputational risks, including those that arise out of sexual harassment claims.<sup>270</sup>

Marking a departure from “the era of compliance,” the target of this advice is corporate directors, not the human resources or compliance departments. This is reflected by the dizzying number of board consultants and crisis management firms, from the National Association of Corporate Directors (“NACD”) to Edelman, that are advising boards on how to dutifully fulfill the new expectation to oversee corporate culture.<sup>271</sup> These consultants are imploring boards to oversee the risk of

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<sup>267</sup> Amy Bowerman Freed & J. Nicholas Hoover, *Avoiding a Toxic Culture: 10 Changes Companies Can Make Now to Address #MeToo*, C-SUITE: AN EQUILAR PUBL'N (July 30, 2019), [https://csuite.equilar.com/issue\\_30\\_summer\\_2019/avoiding\\_a\\_toxic\\_culture.html](https://csuite.equilar.com/issue_30_summer_2019/avoiding_a_toxic_culture.html) [<https://perma.cc/JG2K-ZRGM>]; see also *#MeToo Movement's Impact on Nondisclosure Agreements or Clauses Covering Sexual Harassment*, HOGAN LOVELLS (Apr. 9, 2018), <https://www.hoganlovells.com/en/publications/metoo-movements-impact-on-nondisclosure-agreements-or-clauses-covering-sexual-harassment> [<https://perma.cc/5LC4-E5ZB>].

<sup>268</sup> *Cultural Reviews and Investigations*, *supra* note 15.

<sup>269</sup> See *infra* Appendix A: Interview Participants, Interview with Carolyn Rashby, Of Counsel, Covington & Burling LLP.

<sup>270</sup> *Infra* Appendix A: Interview Participants, Interview with Carolyn Rashby, Of Counsel, Covington & Burling LLP.

<sup>271</sup> See Laurie Hays, *The Board, CEO Misconduct, and Corporate Culture*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 12, 2019), <https://corpgov.law.harvard.edu/2019/01/12/the-board-ceo-misconduct-and-corporate-culture/> [<https://perma.cc/2SAM-QLBQ>]; Jose R. Rodriguez & Susan M. Angele, *Sharpening Risk Oversight in the #MeToo Era*, KPMG (2018), <https://boardleadership.kpmg.us/relevant-topics/articles/2018/sharpening->

a “boys’ club” culture in the same way as they would treat any other disruptive business risk, such as cybersecurity.<sup>272</sup>

V. THE ERA OF CULTURE: ADDRESSING SEXUAL HARASSMENT BY  
EMPOWERING WOMEN

The preceding Part took account of the growing number of stakeholders asking corporate boards to address the risk of sexual harassment through “corporate culture” by addressing power differentials. The next obvious question is whether these pleas are actually and meaningfully being heard and acted upon. This Part takes aim at the view that corporate boards are merely paying lip service to pacify stakeholders. It begins by offering case studies of governance reforms at a number of companies that have emerged from #MeToo crises. To demonstrate that these changes are not unique to firms that have weathered public scrutiny, it goes on to examine some initial knock-on effects across the broader market.

A. Case Studies

1. Uber

On February 19, 2017, former Uber employee Susan Fowler forever altered the company’s course by publishing a blog post about her “very, very strange” year at Uber.<sup>273</sup> The viral post uncovered how Uber’s management shrugged off complaints of sexual harassment.<sup>274</sup> The most disturbing account involved Fowler’s direct supervisor, who propositioned her for sex and was not reprimanded because of his status as “a high performer.”<sup>275</sup> At least implicitly, Fowler linked Uber’s culture of sexual harassment to its gender disparity, “[o]n my last day at Uber, I calculated the percentage of women who were still in the org. Out of over 150 engineers in the SRE teams, only 3% were women.”<sup>276</sup>

Fowler’s post came at an inopportune time for Uber, just weeks after the #DeleteUber campaign was causing Uber to lose hundreds of

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risk-oversight-in-the-me-too-era.html [https://perma.cc/2S4V-BH25] (advising that “the audit committee should add a #MeToo lens to its role in assisting the board in monitoring compliance”).

<sup>272</sup> Hays, *supra* note 271.

<sup>273</sup> See Fowler, *supra* note 9.

<sup>274</sup> See *id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

thousands of users.<sup>277</sup> Perhaps in an attempt to boost morale, Uber's founder and CEO Travis Kalanick responded the next day with three promises to employees.<sup>278</sup> First, Uber had retained the law firm of Covington & Burling to conduct a "workplace culture" investigation led by former U.S. Attorney General Eric Holder.<sup>279</sup> Covington would look beyond Fowler's allegations to "diversity and inclusion at Uber more broadly."<sup>280</sup> Second, senior female leaders at Uber, including board member Arianna Huffington and newly appointed head of human resources Liane Hornsey, would embark on a listening tour to elicit feedback from female employees.<sup>281</sup> Third, Uber would finally publish a diversity report, something that it had resisted.<sup>282</sup> Kalanick's response appeared to acknowledge the link between the lack of gender diversity at Uber and the risk of sexual harassment.

In March 2017, Uber issued its first Diversity & Inclusion Report, revealing the lack of gender diversity at Uber, albeit at a rate consistent with the rest of the technology industry.<sup>283</sup> Two months later, Uber brought on Frances Frei as a Senior Vice President of Leadership and

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<sup>277</sup> See Mike Isaac, *What You Need to Know About #DeleteUber*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/business/delete-uber.html> [<https://perma.cc/59YZ-C8X5>]; Faiz Siddiqui, *#DeleteUber Will Have Lasting Fallout for Ride-Hailing App, Study Says*, WASH. POST (May 15, 2017, 9:01 PM PDT), <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/05/16/deleteuber-will-have-lasting-fallout-for-ride-hailing-app-study-says/> [<https://perma.cc/8H4H-3WFL>]. See generally MIKE ISAAC, *SUPER PUMPED: THE BATTLE FOR UBER* 96-97 (2019) (discussing the rise of Uber and stating that Uber customers using the app approximately 2.7 times became customers for life).

<sup>278</sup> Sam Shead, *Uber CEO Launches 'Urgent Investigation' and Sends Company-Wide Memo After Former Engineer Alleges Sexual Harassment*, BUS. INSIDER (Feb. 20, 2017, 3:22 PM), <https://www.businessinsider.com/uber-ceo-travis-kalanick-pledges-urgent-investigation-sexual-harassment-after-susan-fowler-blog-post-2017-2> [<https://perma.cc/494E-Q59N>].

<sup>279</sup> See Craig Timberg & Elizabeth Dwoskin, *Uber Fires 20 Employees as Part of Harassment Investigation*, WASH. POST (June 6, 2017, 1:57 PM), <https://www.washingtonpost.com/news/the-switch/wp/2017/06/06/uber-fires-more-than-20-employees-as-part-of-sexual-harassment-investigation/> [<https://perma.cc/GRP5-2YMS>].

<sup>280</sup> COVINGTON & BURLINGTON, *RECOMMENDATIONS TO SPECIAL COMMITTEE OF THE UBER BOARD OF DIRECTORS* 1 (2017), <https://www.scribd.com/document/351184653/Covington-Recommendations-Uber> [<https://perma.cc/9KQV-QPDT>] [hereinafter *THE HOLDER REPORT*].

<sup>281</sup> See *id.* at 9.

<sup>282</sup> See *id.* at 7.

<sup>283</sup> Carolyn Said, *Uber's First Diversity Report Shows Male, White, Asian Dominance*, SF GATE (Mar. 28, 2017), <https://www.sfgate.com/business/article/Uber-s-first-diversity-report-shows-male-11033515.php> (last updated Mar. 29, 2017, 7:23 AM) [<https://perma.cc/PV65-5786>].

Strategy.<sup>284</sup> Frei was a telling choice. A professor at Harvard Business School and an expert in gender and diversity, she was tasked with helping to transform the culture at Uber. Frei began by surfacing problems through “feedback sessions” with 9,000 Uber employees.<sup>285</sup> Meanwhile, Covington attorneys were also busy uncovering the full extent of Uber’s underbelly through interviews with over 200 employees and the review of over three million documents.<sup>286</sup> This internal investigation culminated in the “Holder Report,” the recommendations of which the board agreed to adopt in full.<sup>287</sup>

While the entirety of the Holder Report remains confidential, Uber published thirteen pages of recommendations on June 13, 2017.<sup>288</sup> The recommendations seek corporate governance changes and operational reforms, a surprising number of which are focused on increasing gender diversity and achieving gender pay equality. Concerning changes in senior leadership, for instance, the Holder Report recommends that Uber include diverse candidates or candidates who can: focus on diversity and inclusion in the search for its new CEO; utilize performance metrics tied to diversity; and elevate the stature of Uber’s chief diversity officer to the C-suite with a direct reporting line to the CEO or Chief Operating Officer (“COO”).<sup>289</sup> Concerning diversity and inclusion enhancements, the Holder Report recommends that Uber undertake several reforms including establishing an employee diversity advisory board; regularly publishing diversity statistics; targeting

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<sup>284</sup> Polina Marinova, *Uber Hires Harvard Professor to Help Embattled CEO Be a Better Leader*, FORTUNE (June 5, 2017, 3:52 PM PDT), <https://fortune.com/2017/06/05/uber-hires-harvard-leadership/> [https://perma.cc/6SGU-HUSG].

<sup>285</sup> See Oliver Staley & Alison Griswold, *Uber Has Fired 20 Employees After Investigating Hundreds of Misconduct Allegations*, QUARTZ (June 6, 2017), <https://qz.com/999977/by-firing-20-employees-uber-is-finally-getting-serious-about-fixing-its-culture/> [https://perma.cc/DW5W-JJBF].

<sup>286</sup> THE HOLDER REPORT, *supra* note 280, at *Introduction*; see also Polina Marinova, *10 Things You Need to Know from Eric Holder’s Uber Report*, FORTUNE (June 13, 2017, 11:09 AM PDT), <http://fortune.com/2017/06/13/uber-internal-investigation-results-public/> [https://perma.cc/WME3-ZVS6]; Oliver Staley, *The Official Recommendations for Reforming Uber Describe the Perfect Modern Company*, QUARTZ (June 14, 2017), <https://qz.com/1005316/eric-holders-recommendations-for-uberdescribe-the-perfect-moderncompany/> [https://perma.cc/T3SD-8YSS].

<sup>287</sup> Letter from Benchmark to Uber Employees (Aug. 14, 2017), <https://online.wsj.com/public/resources/documents/BenchmarkUberLetter08142017.pdf> [https://perma.cc/VTG4-L355]; see also Kevin Kelleher, *Benchmark Pens Open Letter to Win Over Uber Employees*, VENTUREBEAT (Aug. 14, 2017), <https://venturebeat.com/2017/08/14/benchmark-pens-open-letter-to-win-over-uber-employees/> [https://perma.cc/M2C6-MS8G].

<sup>288</sup> See THE HOLDER REPORT, *supra* note 280, at 1-13.

<sup>289</sup> *Id.* at 1.

diverse sources of talent; utilizing blind resume review; adopting a version of the “Rooney Rule,” whereby women and underrepresented populations must be considered for each position; recognizing managers for their diversity efforts; reviewing benefits offerings to make them gender-neutral; conducting unconscious bias review; and addressing pay equity.<sup>290</sup> Thus, the Holder Report made a direct connection between corporate culture, power differentials, and unwanted behavior.

Uber’s new CEO, Dara Khosrowshahi, took the reins on August 30, 2017, and has led Uber’s transformation, beginning with broadcasting the company’s new motto — “Do the right thing, period.”<sup>291</sup> As noted above, one of the Holder Report’s key recommendations was that Uber’s global head of diversity, Bernard C. Coleman III, be elevated to a more senior position.<sup>292</sup> But Khosrowshahi opted to hire Bo Young Lee, a woman as its first Chief Diversity and Inclusion Officer.<sup>293</sup> Reflecting the importance of diversity to Khosrowshahi, this was his *third* executive hire at Uber.<sup>294</sup> Following Lee’s hire, Uber chose to set the “audacious” goal of making Uber the “most diverse, equitable, and inclusive workplace on the planet.”<sup>295</sup>

Of course, Uber *had* to transform its culture as part of the grooming process for its initial public offering (“IPO”). It listed its cultural woes as a risk factor in its long-awaited IPO: “[o]ur workplace culture and forward-leaning approach created significant operational and cultural challenges that have in the past harmed, and may in the future continue to harm, our business results and financial condition.”<sup>296</sup> Nevertheless, Uber has made progress towards addressing gender inequity. According to its most recent diversity report, the total number of female employees grew to 42.3% from 2018 to 2019, reflecting a 2.9% increase in women

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<sup>290</sup> *Id.* at 6-8, 12.

<sup>291</sup> See Sheelah Kolhatkar, *At Uber, A New C.E.O. Shifts Gears*, NEW YORKER (Mar. 30, 2018), <https://www.newyorker.com/magazine/2018/04/09/at-uber-a-new-ceo-shifts-gears/> [https://perma.cc/YYJ9-DLWY].

<sup>292</sup> THE HOLDER REPORT, *supra* note 280, at 2.

<sup>293</sup> Greg Bensinger, *Uber Hires Chief Diversity Officer*, WALL ST. J. (Jan. 23, 2018, 5:13 PM EST), <https://www.wsj.com/articles/uber-hires-chief-diversity-officer-1516745625> [https://perma.cc/89U5-H6JJ].

<sup>294</sup> Kirsten Korosec, *Meet Uber’s First Diversity Officer*, FORTUNE (Jan. 23, 2018 4:29 PM PST), <https://fortune.com/2018/01/23/uber-first-chief-diversity-officer/> [https://perma.cc/RE2G-3WCC].

<sup>295</sup> Bo Young Lee, *Uber’s 2019 Diversity Report*, UBER (July 15, 2019), <https://www.uber.com/newsroom/2019-diversity-report/> [https://perma.cc/FW7W-QNQT].

<sup>296</sup> Uber Technologies, Inc., Registration Statement Under the Securities Act of 1933 (Form S-1) (Apr. 11, 2019).



globally across functions. A more hopeful sign is reflected in leadership roles, however, where the global representation of women grew by 7.1%. Uber has also joined the small but growing number of companies tying executive compensation to diversity targets.<sup>297</sup> By 2022, the compensation of several senior executives will be tied to increasing gender and racial diversity at Uber.<sup>298</sup> And Uber has also eliminated forced arbitration agreements for not only employees, but also riders and drivers who make sexual assault or harassment claims.<sup>299</sup> Finally, in a move that is singular to Uber, it recently published a safety transparency report with raw data for all sexual harassment and assault on its platform, as it braced for the eventual hit to Uber's stock price.<sup>300</sup>

## 2. Signet Jewelers

On March 18, 2008, employees of Sterling Jewelers filed a lawsuit accusing the company of discriminatory pay and promotion practices.<sup>301</sup> In 2013, thousands of employees submitted declarations in a private arbitration that were under seal. When the documents became public, *The Washington Post* brought to light the rampant culture of sexual harassment and misconduct at Signet Jewelers.<sup>302</sup> The story described a culture teeming with sexual misconduct, including corporate "scouting parties" to find attractive female employees and

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<sup>297</sup> Shannon Bond, *Uber Ties Executive Bonuses to Diversity Targets*, FIN. TIMES (July 15, 2019), <https://www.ft.com/content/9a6fed76-a6b9-11e9-984c-fac8325aaa04> [https://perma.cc/9XGS-PQP8].

<sup>298</sup> Morgan Fecto, *Uber Sets Diversity Goals, Ties Executive Compensation to D&I Success*, HR DIVE (July 17, 2019), <https://www.hrdiver.com/news/uber-sets-diversity-goals-ties-executive-compensation-to-di-success/558935/> [https://perma.cc/L672-D4TV]; Lee, *supra* note 295.

<sup>299</sup> Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html> [https://perma.cc/Q5VK-RJQ5].

<sup>300</sup> UBER, 2017–2018 US SAFETY REPORT 10 (2019), [https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport\\_201718\\_FullReport.pdf](https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf) [https://perma.cc/72S2-QX8V]; see also Connor Smith, *If Uber Thought Its Safety Report Would Help Its Reputation, Wall Street Didn't Buy It*, NASDAQ (Dec. 6, 2019, 10:09 AM EST), <https://www.nasdaq.com/articles/if-uber-thought-its-safety-report-would-help-its-reputation-wall-street-didnt-buy-it-2019> [https://perma.cc/F4UZ-BC36].

<sup>301</sup> *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 115 (2d Cir. 2011).

<sup>302</sup> Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, WASH. POST (Feb. 27, 2017), [https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html) [https://perma.cc/J27L-NAA4] [hereinafter *Hundreds Allege Sex Harassment*].

mandatory annual meetings which were a “boozy, no-spouses-allowed sex-fest.”<sup>303</sup> To make matters worse, CEO Mark Light allegedly not only condoned, but actively participated, in this toxic culture.<sup>304</sup>

When the markets opened the next day, Signet’s stock price fell nearly 13%, its largest one-day drop in eight years.<sup>305</sup> Shareholders didn’t wait long to file a securities fraud lawsuit.<sup>306</sup> Light’s thirty-five-year long tenure at the company ended on July 17, 2017, when he resigned “for health reasons.”<sup>307</sup> By August, the board of directors had replaced Light with the company’s first female CEO, Virginia Drosos.<sup>308</sup> A key pillar of Drosos’ turnaround plan, known as “The Path to Brilliance,” is transforming the company’s culture through achieving gender parity, and she has made impressive headway.<sup>309</sup> While a male-dominated board had traditionally led Signet, today it is one of the few boards to have achieved gender parity.<sup>310</sup> And Signet’s C-suite is now female-led, with six of the nine positions held by women.<sup>311</sup> Drosos hasn’t stopped at Signet Jewelers. The company recently announced that it is reviewing

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> See Signet Jewelers Complaint, *supra* note 191, at 47; Harwell, *Hundreds Allege Sex Harassment*, *supra* note 302.

<sup>306</sup> See Signet Jewelers Complaint, *supra* note 191, at 186-91; Press Release, Robbins Geller Rudman & Dowd LLP, Robbins Geller Rudman & Dowd LLP Files Class Action Suit Against Signet Jewelers Limited (Mar. 29, 2017), <https://markets.businessinsider.com/news/stocks/robbins-geller-rudman-dowd-llp-files-class-action-suit-against-signet-jewelers-limited-1001879395> [<https://perma.cc/5E3P-XPRW>].

<sup>307</sup> Press Release, Signet Jewelers, Signet Jewelers Appoints Virginia “Gina” C. Drosos as CEO (July 17, 2017), <https://www.businesswire.com/news/home/20170717005510/en/Signet-Jewelers-Appoints-Virginia-%E2%80%9CGina%E2%80%9D-C> [<https://perma.cc/AFS5-8T3T>]; Drew Harwell, *Signet Jewelers CEO at the Center of a Gender Discrimination Case, Retires*, SAN DIEGO UNION-TRIB. (July 17, 2017, 9:04 AM), <https://www.sandiegouniontribune.com/business/ct-signet-jewelers-ceo-retires-20170717-story.html> [<https://perma.cc/RM2V-LQKY>].

<sup>308</sup> Press Release, Signet Jewelers, *supra* note 307.

<sup>309</sup> See Anne Burdakin, *Signet Jewelers Finally Regains Some Sparkle*, NASDAQ (Dec. 14, 2019, 12:05 PM EST), <https://www.nasdaq.com/articles/signet-jewelers-finally-regains-some-sparkle-2019-12-14> [<https://perma.cc/3EGP-QKZH>].

<sup>310</sup> Press Release, Signet Jewelers, Signet Jewelers Included in 2020 Bloomberg Gender-Equality Index (Jan. 22, 2020), <https://www.bloomberg.com/press-releases/2020-01-22/signet-jewelers-included-in-2020-bloomberg-gender-equality-index> [<https://perma.cc/5STG-KZCK>]; see *Executive Officers – Signet Leadership Team*, SIGNET JEWELERS, <https://www.signetjewelers.com/investors/corporate-governance/executive-officers/default.aspx> (last visited Feb. 3, 2020) [<https://perma.cc/D4S8-7H7W>].

<sup>311</sup> Drosos’s efforts have won her recent accolades, including selection into the exclusive 2019 and 2020 *Bloomberg Gender Equality Index*. See Press Release, Signet Jewelers, *supra* note 310.

its global supply chain to “ensure that it maintains a supply chain that respects and empowers women at all levels.”<sup>312</sup>

### 3. 21st Century Fox

Beginning in 2016, *The New York Times* published a series of articles exposing repeated claims of sexual harassment by the chairman and CEO of 21st Century Fox Roger Ailes and Fox host Bill O'Reilly.<sup>313</sup> After repeated stock valuation drops, shareholders brought a derivative action and alleged that defendants breached their fiduciary duties by failing to address the culture of sexual harassment.<sup>314</sup> On November 20, 2017, Fox settled the matter the same day it was filed for \$90 million — one of the largest settlement amounts in a derivative lawsuit to date.<sup>315</sup> The non-monetary terms of the settlement, which got little attention, seek to address power differentials by requiring Fox to establish a “Workplace Professionalism and Inclusion Council.”<sup>316</sup> That Council, formally announced on November 20, 2017, was established to advise Fox News on “workplace behavior, and further recruitment and advancement of women and minorities.”<sup>317</sup>

It is telling that all of the Council's members are women with expertise in advancing women, not human resources.<sup>318</sup> Moreover, the

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<sup>312</sup> *Signet Jewelers CEO Emphasizes Female Empowerment in the Jewelry Supply Chain at U.S. Department of State*, BUS. WIRE (Aug. 8, 2019, 12:41 PM EDT), <https://www.businesswire.com/news/home/20190808005656/en/Signet-Jewelers-CEO-Emphasizes-Female-Empowerment-Jewelry> [<https://perma.cc/93RZ-9KSQ>].

<sup>313</sup> Emily Steel & Michael S. Schmidt, *More Trouble at Fox News: Ailes Faces New Sexual Claims and O'Reilly Loses Two Advertisers*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/business/media/fox-news-roger-ailes-harassment-suit.html> [<https://perma.cc/7WTU-V3UF>].

<sup>314</sup> *Murdoch Complaint*, *supra* note 186, at 2, 7.

<sup>315</sup> Kevin LaCroix, *Massive Derivative Suit Settlement for Alleged Management Failure to Prevent Sexual Misconduct*, D&O DIARY (Nov. 21, 2017), <https://www.dandodiary.com/2017/11/articles/shareholders-derivative-litigation/massive-derivative-suit-settlement-alleged-management-failure-prevent-sexual-misconduct/> [<https://perma.cc/LH6V-WV5M>].

<sup>316</sup> Emily Steel, *Fox Establishes Workplace Culture Panel After Harassment Scandal*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/business/media/fox-news-sexual-harassment.html> [<https://perma.cc/C9UP-9TSZ>]; see *Stipulation & Agreement of Settlement, Compromise, & Release at 21-22*, *City of Monroe Emps.' Ret. Sys. v. Murdoch*, No. 2017-0833 (Del. Ch. Nov. 20, 2017).

<sup>317</sup> *21st Century Fox Establishes the Fox News Workplace Professionalism and Inclusion Council*, BUS. WIRE (Nov. 20, 2017, 2:54 PM EST), <https://www.businesswire.com/news/home/20171120006042/en/21st-Century-Fox-Establishes-the-Fox-News-Workplace-Professionalism-and-Inclusion-Council> [<https://perma.cc/Z7WZ-D7PB>].

<sup>318</sup> See *Twenty-First Century Fox, Inc.*, Current Report (Form 8-K) (Nov. 28, 2017); Steel, *supra* note 316.

Council was authorized by and has the ear of the board of directors. As a result, the board cannot deny knowledge of any “red flags” because the Council is required to provide written and public reports to the board’s Nominating and Corporate Governance Committee.<sup>319</sup> To date, the Council has produced three reports to the board, each of which reveals that Fox News is increasing gender and racial diversity at different management levels throughout the organization. When Fox News CEO Paul Rittenberg retired, the network opted to hire its first-ever woman CEO, Suzanne Scott.<sup>320</sup>

#### 4. Wynn Resorts

Among the most powerful men brought down by #MeToo is Steve Wynn, the seventy-five-year-old billionaire and chairman and CEO of Wynn Resorts.<sup>321</sup> On January 26, 2018, *The Wall Street Journal* published an article recounting allegations against Wynn of sexual misconduct and rape spanning decades, prompting an immediate 10% decline in Wynn’s stock valuation. By February 6, 2018, Wynn had resigned as chairman and CEO. The very next day, shareholders filed a derivative lawsuit accusing the board of directors of disregarding a sustained pattern of sexual harassment and egregious misconduct by Steve Wynn.<sup>322</sup> Class actions by victims were also soon to follow.<sup>323</sup>

This prompted investors to seek a shakeup of the board. Before the allegations, Wynn’s board was comprised of ten directors, only one of whom was a woman.<sup>324</sup> In a move that Wynn’s new CEO called a “turning point” for the company, Wynn added three women as

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<sup>319</sup> See *21st Century Fox Establishes the Fox News Workplace Professionalism and Inclusion Council*, *supra* note 317.

<sup>320</sup> Emily Steel & Michael M. Grynbaum, *Suzanne Scott Named First Female Chief Executive of Fox News*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/business/media/fox-news-suzanne-scott.html> [https://perma.cc/ZP52-PQW4].

<sup>321</sup> See Matthew Goldstein, Tiffany Hsu & Kenneth P. Vogel, *Stephen Wynn, Casino Mogul, Accused of Decades of Sexual Misconduct*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/business/steve-wynn-sexual-misconduct-claims.html> [https://perma.cc/92FS-EH5A].

<sup>322</sup> Verified Stockholder Derivative Complaint at 15, 23, Norfolk Cty. Ret. Sys. v. Wynn, No. A-18-769062-B (8th Cir. Feb. 6, 2018).

<sup>323</sup> Jackie Valley, *USA: Female Employees File Sexual Harassment Lawsuits Against Wynn Resorts*, BUS. & HUMAN RIGHTS RES. CTR. (Oct. 2, 2019), <https://www.business-humanrights.org/en/usa-female-employees-file-sexual-harassment-lawsuits-against-wynn-resorts> [https://perma.cc/VJQ7-L6GP].

<sup>324</sup> See WYNN RESORTS, LTD., NOTICE OF 2017 ANNUAL MEETING AND PROXY STATEMENT 4 (2017), [https://www.sec.gov/Archives/edgar/data/1174922/000119312517077750/d326174ddef14a.htm#toc326174\\_8](https://www.sec.gov/Archives/edgar/data/1174922/000119312517077750/d326174ddef14a.htm#toc326174_8) [https://perma.cc/EM94-XQQ4].

independent directors, which included Betsy Atkins, Dee Dee Myers, and Wendy Webb.<sup>325</sup> Today, Wynn's board has nine members, and four of them are women, achieving near gender parity.<sup>326</sup> The new Wynn board also added an executive-level position and named Corrine Clement as vice president of a new Culture and Community Department. Importantly, this new department includes a Women's Leadership Forum, which is designed to close the gender gap in management and create equal pay. The forum has board oversight including participation by the four Wynn female directors who hold "regular town halls, events, and fireside chats to promote engagement and advancement of the female employee base."<sup>327</sup>

## 5. Google

On October 25, 2018, *The New York Times* published a story, which exposed the \$90 million "hero's farewell" that the company bid to Andrew Rubin, the creator of the Android accused of rampant sexual misconduct.<sup>328</sup> The internal backlash was swift. Days later, 20,000 Google employees representing almost a quarter of Google's global workforce walked out from over 65% of Google offices around the world.<sup>329</sup>

The "Google Walkout" was accompanied by a demand for: (1) "[a]n end to [f]orced [a]rbitration in cases of harassment and discrimination"; (2) "[a] commitment to end pay and opportunity inequity"; (3) "[a] publicly disclosed sexual harassment transparency report"; (4) "[a]

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<sup>325</sup> Aaron Smith, *Wynn Resorts Appoints 3 Women to Board in a 'Turning Point,'* CNN BUS. (Apr. 18, 2018, 7:13 PM ET), <https://money.cnn.com/2018/04/18/news/companies/wynn-women-board-of-directors/index.html> [<https://perma.cc/BRK5-BLC4>].

<sup>326</sup> See *Board Members*, WYNN RESORTS, <https://wynnresortslimited.gcs-web.com/corporate-governance/board-of-directors> (last visited Feb 1, 2020) [<https://perma.cc/GKU4-YDFK>].

<sup>327</sup> Eve Tahmincioglu, *Directors & Boards / The Aftermath of #MeToo Allegations Against Wynn Resorts CEOs*, BETSY ATKINS (Aug. 21, 2018), <https://betsyatkins.com/directors-boards-the-aftermath-of-metoo-allegations-against-wynn-resorts-ceos/> [<https://perma.cc/Q47E-WYYD>].

<sup>328</sup> Wakabayashi & Benner, *supra* note 9; see also Daisuke Wakabayashi, Erin Griffith, Amie Tsang & Kate Conger, *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [<https://perma.cc/J3J2-3PXW>].

<sup>329</sup> See Nick Statt, *Over 20,000 Google Employees Participated in Yesterday's Mass Walkout*, VERGE (Nov. 2, 2018, 8:25 PM EDT), <https://www.theverge.com/2018/11/2/18057716/google-walkout-20-thousand-employees-ceo-sundar-pichai-meeting> [<https://perma.cc/2T6S-DSZF>].

clear, uniform, globally inclusive process for reporting sexual misconduct”; (5) a promotion of “the Chief Diversity Officer to answer directly to the CEO and make recommendations directly to the Board of Directors”; and (6) the appointment of “an employee representative to the Board.”<sup>330</sup>

Almost immediately, Google’s CEO agreed to some of the demands, including abandoning mandatory arbitration and increasing the company’s efforts to improve its gender diversity.<sup>331</sup> Google has not yet acquiesced on the remaining governance reforms, and they seem rather unlikely, but the employees are nevertheless persisting in their demands.<sup>332</sup>

## 6. McDonald’s

McDonalds’ CEO Steve Easterbrook’s recent firing captured headlines in November 2019 and reflects how resolute some boards have become in holding executives accountable.<sup>333</sup> Easterbrook’s removal is extraordinary because it arose in response to a consensual relationship with an employee.<sup>334</sup> A far cry from the boards which allowed unscrupulous and even illegal behavior by star executives to go

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<sup>330</sup> Claire Stapleton, Tanuja Gupta, Meredith Whittaker, Celie O’Neil-Hart, Stephanie Parker, Erica Anderson & Amr Gaber, *We’re the Organizers of the Google Walkout. Here Are Our Demands*, CUT (Nov. 1, 2018), <https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html> [https://perma.cc/MKH4-2L94].

<sup>331</sup> Sundar Pichai, *A Note to Our Employees*, GOOGLE (Nov. 8, 2018), <https://www.blog.google/inside-google/company-announcements/note-our-employees/> [https://perma.cc/8KY4-EL8V].

<sup>332</sup> See Google Walkout For Real Change (@GoogleWalkout), TWITTER (Nov. 8, 2018, 2:10 PM), <https://twitter.com/GoogleWalkout/status/1060655853789949953> [https://perma.cc/55TH-9ZMF].

<sup>333</sup> See David Yaffe-Bellany, *McDonalds Fires C.E.O. Steve Easterbrook After Relationship with Employee*, N.Y. TIMES (Nov. 3, 2019), <https://www.nytimes.com/2019/11/03/business/mcdonalds-ceo-fired-steve-easterbrook.html> [https://perma.cc/Y3GW-2LXJ]. The day after Easterbrook departed, David Fairhurst, McDonald’s Chief People Officer also left the company and has since been replaced by Melissa Kersey. Leslie Patton & Josh Eidelson, *McDonald’s CEO Had to Go in Era of Zero Tolerance Policy*, BLOOMBERG (Nov. 4, 2019, 9:00 AM PST), <https://www.bloomberg.com/news/articles/2019-11-04/mcdonald-s-chief-people-officer-david-fairhurst-leaves> [https://perma.cc/5CTG-P3AY].

<sup>334</sup> See Heather Haddon & Suzanne Vranica, *McDonald’s Started Investigation of CEO’s Relationship with Employee Three Weeks Ago*, WALL ST. J., <https://www.wsj.com/articles/mcdonalds-started-investigation-of-ceos-relationship-with-employee-three-weeks-ago-11573241506> (last updated Nov. 8, 2019, 3:11 PM ET) [https://perma.cc/VU5V-M4CG] (“Relationship led to Steve Easterbrook’s firing by burger giant[.]”).



unchecked for years, the McDonald's board removed Easterbrook just *three weeks* after learning about the relationship.<sup>335</sup> With quarterly profits as the traditional yardstick by which CEOs are measured, Easterbrook's ouster was even more surprising given the company's strong market position.<sup>336</sup>

Easterbrook's removal could have been a very public way for the McDonald's board to deflect the increasing scrutiny that the company is facing for sexual harassment in its franchises. From McDonald's employees who filed complaints with the EEOC, to an employee walkout in ten cities, the company has been in the spotlight.<sup>337</sup> Regardless of the board's motives, the firing of a CEO is perhaps the most drastic measure a board can take under any circumstances.

Even before removing Easterbrook, McDonald's had turned its focus to gender diversity. On International Women's Day in 2019, McDonald's launched the "Better Together: Gender Balance and Diversity strategy" and committed to "[improving] the representation of women at all levels, achieve gender equality in rewards and career advancement, and champion the impact of women on the business" by 2023.<sup>338</sup> Concerning mandatory arbitration, McDonald's has also recently won accolades from shareholder activists.<sup>339</sup> While the use of mandatory arbitration remains opaque to investors, due to shareholder pressure, McDonald's disclosed that it does not require it as a condition of employment, but seeks these agreements in "limited circumstances" and subject to board oversight.<sup>340</sup> While shareholders applauded this

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<sup>335</sup> See *id.*

<sup>336</sup> Daniel Strauss, *Here's What 5 Wall Street Firms Are Saying About the Shocking Departure of McDonald's CEO — and What It Means for the Company's Future*, MKTS. INSIDER (Nov. 4, 2019, 5:16 PM), <https://markets.businessinsider.com/news/stocks/mcdonalds-ceo-firing-wall-street-analysts-commentary-2019-11-1028656420> [<https://perma.cc/N62U-82Z8>].

<sup>337</sup> David Crary, *Some McDonald's Workers Vote to Strike Over Sex Harassment*, ASSOCIATED PRESS (Sept. 12, 2018), <https://www.apnews.com/0f70d30d6bcf49bba9eb58cb91f09184> [<https://perma.cc/2RK8-2ZSB>].

<sup>338</sup> *McDonald's Launches Push for Gender Balance and Diversity*, MCDONALD'S (Mar. 8, 2019), <https://news.mcdonalds.com/stories/our-people-details/gender-balance-strategy-2019> [<https://perma.cc/6KRN-QX32>].

<sup>339</sup> See, e.g., Clean Yield Asset Management, *McDonald's Raises the Level of Transparency on Forced Arbitration Policies for All Companies*, CSRWIRE (Apr. 16, 2019), [https://www.csrwire.com/press\\_releases/41884-McDonald-s-Raises-the-Level-of-Transparency-on-Forced-Arbitration-Policies-for-All-Companies](https://www.csrwire.com/press_releases/41884-McDonald-s-Raises-the-Level-of-Transparency-on-Forced-Arbitration-Policies-for-All-Companies) [<https://perma.cc/H2YZ-LGCH>].

<sup>340</sup> *Id.*

“new level of transparency,” they also urged McDonald’s to completely eliminate the use of mandatory arbitration and NDAs.<sup>341</sup>

B. *The Knock-on Effects of the #MeToo Movement*<sup>342</sup>

1. Board Gender Diversity Is Reaching New Milestones

Advocates of board gender diversity celebrated many triumphs in 2019. In the S&P 500, Copart — the last hold-out with an all-male board — added its first female director.<sup>343</sup> In the Russell 3000 women surpassed the 20% of board seats, marking a new milestone.<sup>344</sup> As the chart below elucidates, the pace of reform has stepped-up after the #MeToo movement, with women representing nearly 45% of new directors in 2019, an almost two-fold increase since 2016.<sup>345</sup>

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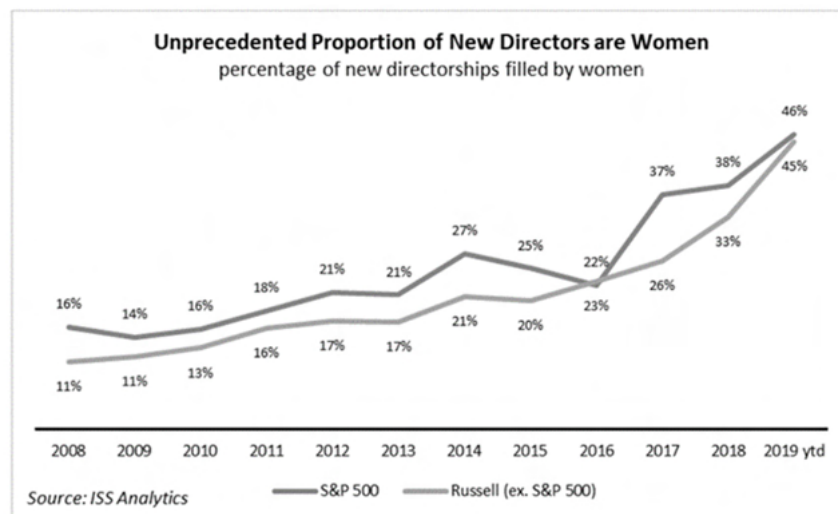
<sup>341</sup> See *id.*

<sup>342</sup> The arguments in this subpart are enhanced by a preliminary review of a dataset of the SEC filings for the Russell 3000 provided by Intelligize, a data provider. See INTELLIGIZE, [www.intelligize.com](http://www.intelligize.com) (last visited Jan. 4, 2020) [<https://perma.cc/7CCL-H7HJ>]; see also *infra* Appendices A-D.

<sup>343</sup> Vanessa Fuhrmans, *The Last All-Male Board on the S&P 500 Is No Longer*, WALL ST. J. (July 24, 2019, 5:20 PM ET), <https://www.wsj.com/articles/the-last-all-male-board-on-the-s-p-500-is-no-longer-11564003203> [<https://perma.cc/A829-AH2Z>].

<sup>344</sup> Amit Batish & Ryan Lau, *Equilar Q2 2019 Gender Diversity Index: Russell 3000 Boards Surpass 20% Female Representation*, EQUILAR (Sept. 11, 2019), <https://www.equilar.com/reports/67-q2-2019-equilar-gender-diversity-index.html> [<https://perma.cc/HV79-DZUK>]; Rachel Feintzeig, *Women’s Share of Board Seats Rises to 20%*, WALL ST. J., [https://www.wsj.com/articles/womens-share-of-board-seats-rises-to-20-11568194200?mod=hp\\_featst\\_pos1](https://www.wsj.com/articles/womens-share-of-board-seats-rises-to-20-11568194200?mod=hp_featst_pos1) (last updated Sept. 11, 2019, 6:23 PM ET) [<https://perma.cc/K4DE-3GU8>].

<sup>345</sup> See PAPADOPOULOS, *supra* note 88.



The growing pressure from both regulators and shareholders discussed in Part V suggests that this trend is likely to continue.<sup>346</sup> With almost 700 companies in the Russell 3000 subject to California's new gender diversity mandate, the regulatory pressure is acute.<sup>347</sup> Even if this regulation is short-lived given the pending challenges to its constitutionality,<sup>348</sup> pressure from investors remains strong. According to ISS, 36% of nominating committee chairs of companies with all-male boards received less than 80% of the votes cast in 2019, compared to just 20% of the nomination committee chairs of all-male boards in 2018.<sup>349</sup> Investors on the vanguard of this movement are beginning to point their pitchforks at companies with just one female director. While still rare, in 2019 there was a 4% increase in nominating committee

<sup>346</sup> See *supra* Parts IV.A, IV.D.

<sup>347</sup> See Jennifer Kristen Lee, Andrew D. Ledbetter & Rachel M. Paris, *California Mandates Female Board Directors for Publicly Held Companies*, DLA PIPER (Oct. 1, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/10/california-governor-signs-bill-mandating-female-board-directors/> [https://perma.cc/KJA3-52GF], for a discussion of the impact of this legislation on the stock price of companies.

<sup>348</sup> See Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* 1 (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 232, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3248791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791) [https://perma.cc/D8DY-5B8P] (arguing that SB 826 violates the internal affairs doctrine).

<sup>349</sup> Betty Moy Huber & Paula H. Simpkins, *Women Board Seats in Russell 3000 Pass the 20% Mark*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 5, 2019), <https://corpgov.law.harvard.edu/2019/10/05/women-board-seats-in-russell-3000-pass-the-20-mark/> [https://perma.cc/QR23-X4GH].

chairs of boards with just one woman who received less than 80% of votes cast.<sup>350</sup> The first month of 2020 drew more cheers from board diversity advocates. For companies that plan to go public, Goldman Sachs' CEO unveiled an ultimatum at Davos 2020 and stated, "[w]e're not going to take a company public unless there's at least one diverse board candidate, with a focus on women."<sup>351</sup> In 2021, Goldman will ramp that number up to two.<sup>352</sup>

While board gender diversity is increasing at an encouraging pace, the top position in the C-Suite, the CEO, is still overwhelmingly male. Just seventy women in the S&P 500 have ever held the position of CEO since 2000.<sup>353</sup> Even more discouraging is the fact that 2018 saw a *decline* to twenty-two female CEOs.<sup>354</sup> The Fortune 500 tells a slightly more optimistic story.<sup>355</sup> In 2019, thirty-three companies in the Fortune 500 have female CEOs, which is the highest number ever and a significant increase from 2018 with twenty-four women CEOs.<sup>356</sup> Nevertheless, that still represents a meager 6.6%.<sup>357</sup> There has also been little progress with respect to gender diversity in the C-Suite. According to ISS, in 2018, only 9% of C-suite positions were held by women.<sup>358</sup>

Notwithstanding these numbers, multiple studies have shown a correlation between board gender diversity and the gender diversity of the CEO and C-Suite, suggesting that we may be on the precipice of

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<sup>350</sup> *Id.*

<sup>351</sup> *Goldman's Playbook for More Diverse Corporate Boards*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/business/dealbook/goldman-diversity-boardroom.html> [<https://perma.cc/UCU9-J4UG>].

<sup>352</sup> *Id.*

<sup>353</sup> Iman Ghosh, *All the S&P 500 Women CEOs in One Timeline (2000-2019)*, VISUAL CAPITALIST (Sept. 17, 2019), <https://www.visualcapitalist.com/all-the-sp500-women-ceos-in-one-timeline-2000-2019/> [<https://perma.cc/4N9Y-XWR9>].

<sup>354</sup> Matteo Tonello, *CEO Succession Practices: 2019 Edition*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 16, 2019), <https://corpgov.law.harvard.edu/2019/12/16/ceo-succession-practices-2019-edition/> [<https://perma.cc/5TM2-7GTS>].

<sup>355</sup> See Claire Zillman, *The Fortune 500 Has More Female CEOs Than Ever Before*, FORTUNE (May 16, 2019, 3:30 AM PDT), <https://fortune.com/2019/05/16/fortune-500-female-ceos/> [<https://perma.cc/QB2W-C5D9>].

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> Subodh Mishra, *Women in the C-Suite: The Next Frontier in Gender Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 13, 2018), <https://corpgov.law.harvard.edu/2018/08/13/women-in-the-c-suite-the-next-frontier-in-gender-diversity/> [<https://perma.cc/UEJ8-FWTD>].

change.<sup>359</sup> Given that board gender diversity is a recent phenomenon, however, it may be too soon to reap its benefits in the C-Suite.<sup>360</sup>

## 2. Boards Are Amending Their Committee Charters to Signal Oversight of Culture

Boards influence corporate culture by “picking the CEO and through their influence on specific policies like incentive compensation, hiring, firing, and promotion decisions.”<sup>361</sup> One of the most potent tools that boards have is the ability to set compensation, and therein lies a promising signal of their willingness to address sexual harassment. From compensation committee charters to the specific terms of employment agreements, boards are beginning to make meaningful reforms.

**Executive Committee Compensation Charters:** As board advisors are noting, “[m]ore and more, the compensation committee is focusing time and attention on issues beyond the determination of compensation for C-suite executives, such as succession planning, corporate culture,

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<sup>359</sup> See, e.g., Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES* 171, 176 (Ronald J. Burke & Mary C. Mattis eds., 2000) (concluding that boards with more women are less inclined to let CEOs dominate the agenda and are more inclined to engage in “power sharing,” thus diminishing the power of the CEO over board decision-making); Diana Bilimoria, *The Relationship Between Women Corporate Directors and Women Corporate Officers*, 18 J. MANAGERIAL ISSUES 47 (2006), <http://www.jstor.org/stable/40604524> [<https://perma.cc/V3B7-A7UG>] (finding 25% or more female executives was positively correlated with the number of female directors, and that the presence of “influential” women on the board was the most important factor for increasing the likelihood that a female CEO would be appointed). See generally Richard Levick, *#MeToo After Moonves: What Should Companies Be Doing?*, FORBES (Sept. 17, 2018, 3:35 PM EDT), <https://www.forbes.com/sites/richardlevick/2018/09/17/metoo-after-moonves-what-should-companies-be-doing/#2e9dfbe21007> [<https://perma.cc/NMU7-3BCK>] (discussing whether companies adding women on executive boards will change company culture).

<sup>360</sup> Another recent trend is the small but growing number of companies that are beginning to create new executive level positions, such as Chief Diversity Officer. See TINA SHAH PAIKEDAY, HARSONAL SACHAR & ALIX STUART, RUSSELL REYNOLDS ASSOCS., *A LEADER’S GUIDE: FINDING AND KEEPING YOUR NEXT CHIEF DIVERSITY OFFICER* 2 (2018), <https://www.russellreynolds.com/en/Insights/thought-leadership/Documents/A%20Leaders%20Guide%20to%20Finding%20and%20Keeping%20Your%20Next%20Chief%20Diversity%20Officer.pdf> [<https://perma.cc/4FHP-5SB7>].

<sup>361</sup> John R. Graham, Jillian Grennan, Campbell R. Harvey & Shivaram Rajgopal, *Corporate Culture: The Interview Evidence* 2 (Duke I&E Research Paper No. 2016-42, Columbia Bus. Sch. Research Paper No. 16-70, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2842823](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842823) [<https://perma.cc/FGD5-KCXC>].

and diversity and inclusion.”<sup>362</sup> To signal this broader ambit, compensation committees are not only amending their charters but changing their committee names to reflect their oversight of cultural issues.<sup>363</sup> According to a recent study, nearly 40% of the S&P 500 currently refer to the committee responsible for executive compensation oversight as something in addition to compensation, such as “Compensation and Talent Management Committee,” or “Culture and Compensation Committee.”<sup>364</sup> This shift appears to be accelerating — twenty-six companies changed their committee name over the past four years, as compared to eleven from 2012 to 2015.<sup>365</sup> According to another study, “nearly 20% of the 1400 US public companies analyzed have formally expanded the purview of their board compensation committees to incorporate some aspect of leadership and talent.”<sup>366</sup>

As detailed in Appendix D, our early-stage analysis of the charters for the compensation committee for issuers in the Russell 3000 provides a glimpse into how companies are tying “culture” to “diversity” and inclusion for the first time.<sup>367</sup> Before 2016, the word “culture” was rarely used.<sup>368</sup> The pre-2016 charters<sup>369</sup> which did refer to culture did so in the context of ethical compliance with *legal* mandates, which was likely in response to the financial crisis. After 2016, boards revised executive committee charters to add the word “culture” in the context of “diversity and inclusion,” signaling the newfound importance of diversity to the board.<sup>370</sup>

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<sup>362</sup> Steve Van Putten, David Bixby & Jan Koors, *The Compensation Committee Agenda for 2019*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 1, 2019), <https://corpgov.law.harvard.edu/2019/05/01/the-compensation-committee-agenda-for-2019/> [https://perma.cc/MD4S-MX32].

<sup>363</sup> See *id.*

<sup>364</sup> Robert Newbury, Don Delves & Ryan Resch, *Compensation Committees & Human Capital Management*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 27, 2019), <https://corpgov.law.harvard.edu/2019/08/27/compensation-committees-human-capital-management/> [https://perma.cc/GB9U-999D].

<sup>365</sup> *Id.*

<sup>366</sup> Van Putten et al., *supra* note 362.

<sup>367</sup> See *infra* Appendix D: Textual Analysis of Board Compensation Committee Charters.

<sup>368</sup> See *infra* Appendix D: Textual Analysis of Board Compensation Committee Charters.

<sup>369</sup> See, e.g., *infra* Appendix D: Textual Analysis of Board Compensation Committee Charters.

<sup>370</sup> See *infra* Appendix D: Textual Analysis of Board Compensation Committee Charters. While this Article focuses on the compensation committee, a more robust textual analysis of board charters for the Audit, Compensation, and Nominating



**CEO Departures & Searches:** The board's expanded focus on corporate culture is consistent with how boards are responding to executive misconduct. For the first time in 2018, ethical lapses eclipsed financial performance or conflicts with the board as being the leading cause of leadership dismissals among the world's 2,500 largest public companies.<sup>371</sup> According to PwC, which has been conducting the survey for the past nineteen years, this rise is in part attributable to "new pressures for accountability about sexual harassment and sexual assault brought about by the rise of the 'Me Too' movement, and the increasing propensity of boards of directors to adopt a zero-tolerance stance toward executive misconduct."<sup>372</sup>

We can observe a similar story playing out in CEO succession in the S&P 500, in which #MeToo related incidents accounted for five of the twelve "non-voluntary departures" in 2018.<sup>373</sup> At first blush, that seems like a minuscule number, but in 2013-2017, just one CEO succession was based on ethical lapses.<sup>374</sup> This trend appears to be increasing across industries according to a recent survey which found that 2019 had the most CEO departures on record, even higher than in 2008 during the financial crisis.<sup>375</sup> The authors of the report attribute this increase in part to the #MeToo movement.<sup>376</sup> Not all CEO ousters relate to sexual harassment; Intel Corp. and McDonalds are recent examples of the

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Committees is currently underway and the subject of a follow-on empirical article. That analysis has also uncovered an increase in bespoke committees to address corporate culture using a variety of names including "culture and compliance," "human capital" and other variations.

<sup>371</sup> 2018 CEO Success Study: *Succeeding the Long-Serving Legend in the Corner Office*, PwC (2019), [https://www.strategyand.pwc.com/gx/en/insights/ceo-success.html?utm\\_campaign=sbpwc&utm\\_medium=site&utm\\_source=articletext](https://www.strategyand.pwc.com/gx/en/insights/ceo-success.html?utm_campaign=sbpwc&utm_medium=site&utm_source=articletext) [https://perma.cc/N6BB-7PEQ].

<sup>372</sup> Per-Ola Karlsson, Martha Turner & Peter Gassmann, *Succeeding the Long-Serving Legend in the Corner Office*, STRATEGY+BUSINESS (May 15, 2019), <https://www.strategy-business.com/article/Succeeding-the-long-serving-legend-in-the-corner-office?gko=90171> [https://perma.cc/K573-39WX].

<sup>373</sup> Tonello, *supra* note 354.

<sup>374</sup> *Id.*

<sup>375</sup> See 2019 Year-End CEO Report: 160 CEOs out in December, Highest Annual, Quarterly Totals on Record, CHALLENGER, GRAY & CHRISTMAS, INC. (2019), <http://www.challengergray.com/press/press-releases/2019-year-end-ceo-report-160-ceos-out-december-highest-annual-quarterly-totals> [https://perma.cc/3WHN-LTUW]. "Challenger tracks CEO changes at companies that have been in business for at least two years" and have at least ten employees. *Id.*

<sup>376</sup> *Id.*

board's willingness to take decisive action when CEOs have violated corporate policies, even in the context of consensual relationships.<sup>377</sup>

Notwithstanding these examples, perhaps the reason why we are not seeing more CEO removals lies in compensation agreements, which make it challenging for boards to remove the top executive. As the next section details, here, too, the sands are shifting.

### 3. Boards Are Amending Executive Compensation Agreements to Explicitly Address Sexual Harassment and Reward Diversity and Inclusion

According to employment lawyers and executive compensation consultants, the #MeToo movement has caused companies to contemplate changes to their executive compensation agreements.<sup>378</sup> A handful of companies have already made these changes, which fall into four categories: (1) the addition of "sexual harassment" within the definition of cause for termination; (2) the addition of sexual harassment as a "trigger" to allow the clawback of compensation paid; (3) the addition of a representation & warranty to address prior misconduct; and (4) the inclusion of diversity and inclusion as a metric for assessing executive bonuses. This section briefly outlines each of these changes.<sup>379</sup>

**The Definition of Cause:** Though extremely rare, to account for the risk of harassment, some companies, are explicitly adding "sexual harassment" to the definition of cause.<sup>380</sup> Based on a preliminary review of the termination for cause definitions for executive employment agreements in the Russell 3000, only twenty-five issuers explicitly refer to "sexual harassment" as a triggering cause for the

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<sup>377</sup> Vanessa Fuhrmans & Rachel Feintzeig, *Scrutiny of CEOs' Personal Lives Rises in #MeToo Era*, WALL ST. J. (June 21, 2018), <https://www.wsj.com/articles/scrutiny-of-ceos-personal-lives-rises-in-metoo-era-1529608172> [<https://perma.cc/6KEC-4WCJ>].

<sup>378</sup> Jenna McGregor, *How #MeToo Is Reshaping Employment Contracts for Executives*, WASH. POST (Oct. 31, 2018), <https://www.washingtonpost.com/business/2018/10/31/how-metoo-is-reshaping-employment-contracts-executives/> [<https://perma.cc/NW8W-E2MF>]; Christine Powell, *4 Ways #MeToo Is Affecting Executive Compensation*, LAW360 (Apr. 9, 2018, 5:49 PM EDT), <https://www.law360.com/articles/1022482/4-ways-metoo-is-affecting-executive-compensation> [<https://perma.cc/W3XP-DUBL>].

<sup>379</sup> See *infra* Appendix C: Sample of Amendments to Executive Compensation Agreements.

<sup>380</sup> JOHN L. UTZ, #METOO, CLAWBACKS AND EXECUTIVE COMPENSATION IN 2019 – HAS ANYTHING CHANGED? 1 (June 20, 2019), <http://www.utzlattan.com/wp-content/uploads/2019/06/MeToo-Clawbacks-and-Exeutive-Compensation-in-2019-Has-Anything-Changed.pdf> [<https://perma.cc/9ZVJ-XA3Y>].

removal of an executive.<sup>381</sup> Furthermore, as employment lawyers explain, the cause definition is likely being modified in more nuanced ways.<sup>382</sup> For example, companies may simply reference violations of corporate codes of conduct or other “shadow governance documents” which can be easily amended.<sup>383</sup>

In a high-profile example of how the cause clause operates in practice, the CBS board relied on the following definition of cause in Leslie Moonves’s 2017 executive employment agreement to remove him as CEO and deny him the \$120 million in severance that he would have otherwise been entitled to under the agreement. Moonves’s agreement had the common “material adverse impact” language “provided that such violation has a material adverse effect on the Company.”<sup>384</sup> Given the significant hit to CBS’s stock price following two *New Yorker* articles exposing Moonves’s sexual harassment, the CBS board was able to safely take the position that his violation adversely affected the company.<sup>385</sup> Moonves, however, has not gone quietly. His compensation agreement also permitted him to appeal the board’s determination in a binding and confidential arbitration proceeding.<sup>386</sup> The Moonves example illustrates how the “material adverse effect” language can tie the board’s hands, which will likely become a point of negotiation between boards and CEOs in the future.

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<sup>381</sup> This is based on a preliminary review of executive compensation agreements contained in a dataset provided by Intelligize, a data provider. See INTELLIGIZE, [www.intelligize.com](http://www.intelligize.com) (last visited Jan. 4, 2020) [<https://perma.cc/7CCL-H7HJ>]. But see Rachel S. Arnow-Richman, James Hicks & Steven Davidoff Solomon, Anticipating Harassment: MeToo and the Changing Norms of Executive Contracts 28 (Mar. 1, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3787232](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787232) [<https://perma.cc/23SJ-C>] (An empirical study of CEO contracts which finds that “Explicit inclusions of harassment or discrimination as grounds for cause” have increased “by more than eight percentage points in the post-MeToo period.”).

<sup>382</sup> See Utz, *supra* note 380, at 1-2.

<sup>383</sup> See Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097, 1097, 1100-01 (2020) (providing the first literature review of documents that govern corporate decision-making beyond charters and bylaws and describing sexual harassment policies as “shadow governance” documents).

<sup>384</sup> CBS Corp., Executive Employment Agreement (Exhibit 10(a)) 23 (May 19, 2017), [https://www.sec.gov/Archives/edgar/data/813828/000081382817000031/cbs\\_ex10a-063017.htm](https://www.sec.gov/Archives/edgar/data/813828/000081382817000031/cbs_ex10a-063017.htm) [<https://perma.cc/2LBK-CD9T>].

<sup>385</sup> See Edmund Lee & Rachel Abrams, *CBS Says Les Moonves Will Not Receive \$120 Million Severance*, N.Y. TIMES (Dec. 17 2018), <https://www.nytimes.com/2018/12/17/business/media/les-moonves-cbs-severance.html> [<https://perma.cc/X8FC-RR4M>].

<sup>386</sup> See Joe Flint, *Leslie Moonves to Fight CBS Decision to Withhold \$120 Million Severance*, WALL ST. J. (Jan. 17, 2019, 1:34 PM ET), <https://www.wsj.com/articles/leslie-moonves-to-fight-cbs-decision-to-withhold-120-million-severance-11547737633> [<https://perma.cc/DB23-8BDB>].

**The Expansion of Clawback Provisions:** As required since 2002 by the Sarbanes-Oxley Act, companies may require executives to return the money they were already paid if they have engaged in specified types of wrongdoing that resulted in a financial restatement.<sup>387</sup> The #MeToo movement has ignited a renewed focus on clauses that clawback earned compensation or forfeit future benefits due to misconduct in situations beyond financial restatement.<sup>388</sup> Companies attempting to rehabilitate their culture post-crisis, such as Wells Fargo and Equifax, have also recently expanded their clawback policies.<sup>389</sup> Verizon also recently expanded its clawback provision to allow the board to clawback compensation for “misconduct that results in significant reputational or financial harm to Verizon.”<sup>390</sup> Proxy advisor Glass Lewis has emphasized that, “in the midst of the #MeToo movement, issues related to clawback policies are incredibly relevant to companies and their shareholders.”<sup>391</sup> Following its #MeToo crisis, Intel expanded its clawback policy to include behavior that violates its internal policies or constitutes cause as defined in each employment letter.<sup>392</sup> While anecdotal, employment lawyers are also reporting that the #MeToo

<sup>387</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 304, 116 Stat. 745 (2002); see also UTZ, *supra* note 380, at 2.

<sup>388</sup> See *supra* Part V.B.i. See generally MERIDIAN COMP. PARTNERS, 2018 CORPORATE GOVERNANCE & INCENTIVE DESIGN SURVEY 25 (2018), <https://www.meridiancp.com/wp-content/uploads/Meridian-2018-Governance-and-Design-Survey-1.pdf> [https://perma.cc/GR57-8GXW] (providing data regarding clawback triggers and what is covered by clawbacks).

<sup>389</sup> See EQUIFAX INC., NOTICE OF 2019 ANNUAL MEETING AND PROXY STATEMENT 11, 48 (2019), <https://investor.equifax.com/~media/Files/E/Equifax-IR/Annual%20Reports/2019-proxy-statement-web.pdf> [https://perma.cc/6L82-7QU6] (listing one event that triggers clawback action as “[m]isconduct resulting in significant financial and/or reputational harm and the employee either engaged in the misconduct or failed to fulfill his or her supervisory responsibility to prevent another employee from engaging in such misconduct”); WELLS FARGO & CO., PROXY STATEMENT 97 (2019), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2019-proxy-statement.pdf> [https://perma.cc/WC4Y-R2XC].

<sup>390</sup> VERIZON COMMUNICATIONS INC., PROXY STATEMENT PURSUANT TO SECTION 14(A) (2019), <https://www.sec.gov/Archives/edgar/data/732712/000119312519078250/d613466ddef14a.htm> [https://perma.cc/JK7Z-CSWH] (emphasis added); see also Alphabet Inc., Notice of Exempt Solicitation (Voluntary Submission) (May 2019), [https://www.sec.gov/Archives/edgar/data/1414734/000141473419000007/alphabetshltr.htm#\\_edn1](https://www.sec.gov/Archives/edgar/data/1414734/000141473419000007/alphabetshltr.htm#_edn1) [https://perma.cc/E5RG-E8KN].

<sup>391</sup> GLASS LEWIS, 2018 SEASON REVIEW: U.S. SHAREHOLDER PROPOSALS 13 (Max Darrow, Courteney Keatinge & Dimitri Zagoroff eds., 2018), [http://www.glasslewis.com/wp-content/uploads/2018/10/2018\\_SHP\\_Review.pdf](http://www.glasslewis.com/wp-content/uploads/2018/10/2018_SHP_Review.pdf) [https://perma.cc/XAH8-5RD8].

<sup>392</sup> See INTEL CORP., 2019 PROXY STATEMENT 92 (2019), [https://s21.q4cdn.com/600692695/files/doc\\_financials/2018/Annual/2019-Proxy.pdf](https://s21.q4cdn.com/600692695/files/doc_financials/2018/Annual/2019-Proxy.pdf) [https://perma.cc/B88H-Y6WK].

movement has caused companies to add a clawback clause for sexual harassment.<sup>393</sup>

Given that the #MeToo movement is still underway, and clawing back executive compensation is a significant reform which requires negotiations with powerful CEOs, these changes are still occurring at the margins. As one executive compensation expert explained, “[b]oards are still in the contemplation phase and we haven’t yet seen a wholesale shift to broader clawback policies, but conversations are definitely occurring.”<sup>394</sup> But there appears to be a growing momentum behind the broader adoption of clawback policies.

**Representations & Warranties:** Employment lawyers are also reporting that companies are seeking a representation or warranty by the executive that they have not engaged in misconduct that would violate sexual harassment policies.<sup>395</sup> Notably, these agreements cover behavior that occurred at a prior employer and for which the current employer would have no legal liability. Moreover, even before the CEO applicant is considered, there is an increase in “social due diligence,” including more robust background checks and research into social media archives.<sup>396</sup>

**Diversity & Inclusion Targets in Executive Compensation Agreements:** In addition to these “sticks,” companies are using carrots to incentivize employers to make diversity and inclusion a priority. Beginning in 2017, Microsoft linked 50% of its executive’s cash incentives to strategic performance goals that include diversity and

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<sup>393</sup> See JONATHAN M. OCKER, JUSTIN KRAWITZ & BENJAMIN T. GIBBS, PILLSBURY LAW, THE STATE OF PLAY ON CLAWBACKS AND FORFEITURES BASED ON MISCONDUCT 2 (2019), <https://www.pillsburylaw.com/print/content/25587/state-of-play-on-clawbacks-and-forfeitures-based-on-misconduct.pdf> [https://perma.cc/P7EU-864X] (discussing a recent survey showing that some large technology companies have policies that include clawbacks for breaches of restrictive covenants and detrimental activity); WAYNE N. OUTTEN & CODY YORKE, OUTTEN & GOLDEN LLP, RECENT TRENDS IN EXECUTIVE COMPENSATION IN THE UNITED STATES, SIXTH TRANSATLANTIC CONFERENCE 5-6 (2019), <https://www.outtengolden.com/sites/default/files/pdf/2020-02/recent-trends-executive-compensation-united-states-2020-02-05.pdf> [https://perma.cc/39WZ-K4NF].

<sup>394</sup> Anders Melin, *Corporate America Weighs New Clawback Policies for #MeToo Sins*, BLOOMBERG (Oct. 9, 2018, 5:00 AM PDT), <https://www.bloomberg.com/news/articles/2018-10-09/corporate-america-weighs-new-clawback-policies-for-metoo-sins> [https://perma.cc/A8L6-V446].

<sup>395</sup> See Regal Beloit Corp., Key Executive Employment and Severance Agreement (Exhibit 10.23) (Oct. 26, 2016) <https://www.sec.gov/Archives/edgar/data/82811/000008281117000017/exhibit10232016123110k.htm> [https://perma.cc/C6LW-ASWK].

<sup>396</sup> See Lublin, *supra* note 32.

inclusion as a metric.<sup>397</sup> At Intel, diversity determines 50% of its executives' annual cash incentives.<sup>398</sup> As discussed above, pursuant to "the Holder Report," Uber recently announced that it is linking executive pay to diversity and inclusion metrics for its top executives.<sup>399</sup>

#### 4. Companies Are Adding #MeToo Inspired Representations and Warranties into Mergers and Acquisitions Agreements

The #MeToo movement has also triggered a fundamental change in how companies navigate mergers and acquisitions through the incorporation of a representation and warranty referred to as the "Weinstein clause."<sup>400</sup> The "Weinstein clause," also known as a "#MeToo rep," effectively functions as a guarantee that no allegations of sexual harassment or sexual misconduct have been made against any current or former officer of the target company, and the company has not entered into any settlement agreements related to allegations of

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<sup>397</sup> See MICROSOFT CORP., NOTICE OF ANNUAL SHAREHOLDERS MEETING AND PROXY STATEMENT 2017, at 39 (2017), [https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddef14a.htm#toc461626\\_38c](https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddef14a.htm#toc461626_38c) [<https://perma.cc/8MKD-9QY9>] (stating under the header, "Qualitative performance categories," "50% of our Named Executives' fiscal year 2017 annual cash incentives were determined based on subjective scoring of their performance against financial, operational, and strategic indicators in three performance categories," including, "organizational diversity and inclusion"); Deb Lifshay, *Diversity Goals in Executive Compensation Plans*, PEARL MYER ADVISOR BLOG (July 2019), <https://www.pearlmeyer.com/blog/diversity-goals-in-executive-compensation-plans> [<https://perma.cc/Q7WS-UEZC>].

<sup>398</sup> See INTEL CORP., 2018 PROXY STATEMENT NOTICE OF ANNUAL SHAREHOLDERS' MEETING 66 (2018), [https://www.sec.gov/Archives/edgar/data/50863/000119312518107675/d498273ddef14a.htm#toc498273\\_36](https://www.sec.gov/Archives/edgar/data/50863/000119312518107675/d498273ddef14a.htm#toc498273_36) [<https://perma.cc/RR9D-XLNS>].

<sup>399</sup> See THE HOLDER REPORT, *supra* note 280, at 2.

<sup>400</sup> See Anna Windemuth, *The #MeToo Movement Migrates to M&A Boilerplate*, 129 YALE L.J. 488, 491 (2019) (describing the "Weinstein Clause" as a "tactical industry response to reduced tolerance for misconduct"); Nabila Ahmed, *Wall Street is Adding a New 'Weinstein Clause' Before Making Deals*, BLOOMBERG (Aug. 1, 2018, 8:59 PM), <https://www.bloombergquint.com/business/-weinstein-clause-creeps-into-deals-as-wary-buyers-look-to-cover> [<https://perma.cc/8BGD-6SR3>]. For a discussion on the distinctions between representations and warranties see, for example, Sean J. Griffith, *Deal Insurance: Representation & Warranty Insurance in Mergers & Acquisitions*, 104 U. MINN. L. REV. 1839 (2020); see also John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice*, in RESEARCH HANDBOOK ON MERGERS & ACQUISITIONS 36, 38-39 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) ("M&A contracts do not typically distinguish between them, but include them together without identification.").



sexual harassment or sexual misconduct.<sup>401</sup> The earliest example of a Weinstein clause appears to have surfaced in a March 2018 merger agreement between SJW Group and Connecticut Water Services which states:<sup>402</sup>

[t]o the [k]nowledge of SJW, in the last five years, no allegations of sexual harassment have been made to SJW against any individual in his or her capacity as (i) an officer of SJW, (ii) a member of the SJW board or (iii) an employee of SJW or any SJW [s]ubsidiary at a level of [v]ice [p]resident or above.<sup>403</sup>

M&A agreements have long included representations and warranties. Prior to the #MeToo movement, however, these representations were narrowly tailored to protect against legal liability.<sup>404</sup> After #MeToo, buyers began seeking assurances that go far beyond compliance with the law to capture “allegations” of sexual harassment.<sup>405</sup> Importantly, these deals include a “look back” that covers activity ranging from two years to ten years which extends beyond the statute of limitations for sexual harassment claims.<sup>406</sup> In 2018, there were thirty-nine deals filed with #MeToo reps and in 2019, as of December 10, there were eighty-five deals filed, including an appearance of the provision in mega-deals such as Salesforce’s \$15.3-billion acquisition of Tableau.<sup>407</sup>

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<sup>401</sup> See Phil Brown, *For Your Consideration: “The Weinstein Clause,”* INTELLIGIZE (Aug. 16, 2018), <https://www.intelligize.com/for-your-consideration-the-weinstein-clause/> [https://perma.cc/WAU9-YPJ2].

<sup>402</sup> Jaclyn Jaeger, *The ‘Weinstein Clause’: M&A Deals in the #MeToo Era*, COMPLIANCE WEEK (Oct. 12, 2018, 6:45 AM), <https://www.complianceweek.com/the-weinstein-clause-manda-deals-in-the-metoo-era/2113.article> [https://perma.cc/PH42-8GKC].

<sup>403</sup> SJW GRP., HYDRO SUB, INC., & CONN. WATER SERV., INC., AGREEMENT AND PLAN OF MERGER 20 (Exhibit 2.1) (Mar. 14, 2018), <https://www.sec.gov/Archives/edgar/data/766829/000119312518083275/d517078dex21.htm> [https://perma.cc/576R-4EE9].

<sup>404</sup> See Jaeger, *supra* note 402; see also Windemuth, *supra* note 400, at 488.

<sup>405</sup> See Jaeger, *supra* note 402.

<sup>406</sup> Grace Maral Burnett, *Analysis: #MeToo Reps Becoming M&A Market Standard*, BLOOMBERG (June 25, 2019, 10:18 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-metoo-reps-becoming-m-a-market-standard> [https://perma.cc/LQ5E-MLC8].

<sup>407</sup> Windemuth, *supra* note 400, at 499 (finding the number of M&A deals with #MeToo reps in 2018); see also Burnett, *supra* note 406 (finding the number of M&A deals with #MeToo reps from January 2019 through June 17, 2019). To find the remaining number of #MeToo reps for 2019, our researchers collected publicly filed instances of the provision from June 17, 2019 through December 10, 2019 which included the mega-deal Salesforce acquisition of Tableau. See Salesforce.com, Inc., Current Report (Form 8-K) (June 9, 2019), <https://www.sec.gov/Archives/edgar/data/1108524/000119312519169276/d764344d8k.htm> [https://perma.cc/PGN2-EEWL]. Two

While it is likely that many buyers can obtain representation and warranty insurance (“RWI”) for these “#MeToo reps,” brokers are warning that the due diligence done by the buyer, including an inquiry into “the company’s culture” will dictate the availability of insurance.<sup>408</sup> That is because insurance is intended to cover risks that are “genuinely unknown or not revealed by a good diligence process.”<sup>409</sup> This focus by underwriters on corporate culture, discussed more fully in Part IV, means that corporate culture is a business risk.<sup>410</sup>

##### 5. The Venture Capital (“VC”) Community Is Increasing Its Due Diligence for “Cultural Risk” in Private Equity Deals

Silicon Valley’s venture capital industry is famous for its male-dominated and sexist culture — 85% of partners at venture capital firms are men and 71% have no female partner at all.<sup>411</sup> But even that community has reached an inflection point.<sup>412</sup> Binary Capital is a case in point. In June 2017, the firm was brought down days after *The New York Times* revealed that its founder and CEO Justin Caldbeck was accused of habitually sexually harassing entrepreneurs.<sup>413</sup> Days later,

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other recent mega-deals, WellCare-Centene and WorldPay-Fidelity, feature identical terms. Burnett, *supra* note 406.

<sup>408</sup> See Emily Maier, *Can You Insure Against the “Weinstein Clause” in M&A Deals?*, WOODRUFF SAWYER (Oct. 8, 2018), <https://woodrufflaw.com/mergers-acquisitions/insure-against-weinstein-clause-ma-deals/> [https://perma.cc/SG2E-8UBT]; see also Jeffrey Chapman, Jonathan Whalen & Benjamin Bodurian, *Representations and Warranties Insurance in M&A Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 11, 2017), <https://corpgov.law.harvard.edu/2017/12/11/representations-and-warranties-insurance-in-ma-transactions/> [https://perma.cc/A5UA-AWLA].

<sup>409</sup> Maier, *supra* note 408.

<sup>410</sup> See *id.*

<sup>411</sup> NVCA-DELOITTE, NVCA-DELOITTE HUMAN CAPITAL SURVEY 5-6 (2d ed. 2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-audit-egc-nvca-human-capital-survey-2018.pdf> [https://perma.cc/24DG-AZK6]; Yuki Noguchi, *Investor’s Naked Selfies Ignite #MeToo Moment: Female Founder Fights Back*, NPR (Jan. 6, 2020, 4:36 PM ET), <https://www.npr.org/2020/01/06/793134459/investors-naked-selfie-ignites-metoo-moment-female-founder-fights-back> [https://perma.cc/R2PV-8RUQ].

<sup>412</sup> See Michael J. Coren, *Sexism Is Alive and Well in Silicon Valley, but Life for Female Founders Is Changing*, QUARTZ (July 12, 2017), <https://qz.com/1026422/sexism-in-silicon-valley-is-alive-and-well-but-life-for-female-founders-is-already-changing-2/> [https://perma.cc/W38U-9LMZ].

<sup>413</sup> See Katie Benner, *Women in Start-Up World Speak Up About Harassment*, N.Y. TIMES (July 4, 2017), <https://www.nytimes.com/2017/07/04/insider/technology-sexual-harassment.html> [https://perma.cc/J4WF-AVMD].

Caldbeck left the firm and investors pulled their funds, causing the firm's swift collapse.<sup>414</sup>

The shifting cultural norms about sexual harassment in the venture capital community were reflected in the immediate condemnation that Caldbeck received from leaders in Silicon Valley. The most prominent example was Reid Hoffman, founder of LinkedIn, who felt he needed to "immediately" respond in a post entitled "The Human Rights of Women."<sup>415</sup> In that post, Reid zeroed in on the "power relationship" underlying female entrepreneurs and venture capitalists on whose funding they depend and urged investors to adopt the #DecencyPledge, which asks venture capitalists to be mindful of this power dynamic and implores Limited Partners on whose funding venture capitalists depend to have a "zero tolerance" and pull their funding from VCs who exhibit misconduct.<sup>416</sup>

While the public cry for a #DecencyPledge is laudable, it is obviously nonbinding. But the investor community hasn't stopped at empty words. In direct response to Caldbeck and other #MeToo revelations, the Institutional Limited Partners Association ("ILPA"), which funds venture capitalists, updated its guidelines to include a section on diversity and inclusion.<sup>417</sup> These new guidelines include six new due diligence questionnaires, including a "team diversity template" to require disclosure of gender and racial diversity metrics across the organizational hierarchy.<sup>418</sup>

While they do not enjoy the bargaining power that limited partners have, female entrepreneurs are also taking it upon themselves to devise

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<sup>414</sup> Emily Chang & Sarah McBride, *Binary Capital's Jonathan Teo Offers to Resign from Venture Firm*, BLOOMBERG (June 27, 2017, 5:03 PM PDT), <https://www.bloomberg.com/news/articles/2017-06-28/binary-said-to-shut-down-latest-fund-after-co-founder-misconduct> [<https://perma.cc/6B5N-JUTD>].

<sup>415</sup> Reid Hoffman, *The Human Rights of Women Entrepreneurs*, LINKEDIN (June 23, 2017), <https://www.linkedin.com/pulse/human-rights-women-entrepreneurs-reid-hoffman/> [<https://perma.cc/2KN6-94NA>].

<sup>416</sup> *Id.*

<sup>417</sup> See Kalliope Gournitis, *Reputational Risk in the #MeToo Era*, PRIVATE EQUITY INT'L (June 27, 2018), <https://www.privateequityinternational.com/reputational-risk-metoo-era/> [<https://perma.cc/Q9LJ-SWD7>]; ILPA, *ILPA Publishes Diversity and Inclusion Resources for the Private Equity Industry*, GLOBE NEWSWIRE (Sept. 24, 2018, 7:00 AM ET), <https://www.globenewswire.com/news-release/2018/09/24/1574794/0/en/ILPA-Publishes-Diversity-and-Inclusion-Resources-for-the-Private-Equity-Industry.html> [<https://perma.cc/VWV3-MSET>].

<sup>418</sup> See INSTITUTIONAL LTD. P'SHIP ASS'N, *DUE DILIGENCE QUESTIONNAIRE* apps. A-E (Sept. 2018), [https://ilpa.org/wp-content/uploads/2018/09/ILPA\\_Due\\_Diligence\\_Questionnaire\\_v1.2.pdf](https://ilpa.org/wp-content/uploads/2018/09/ILPA_Due_Diligence_Questionnaire_v1.2.pdf) [<https://perma.cc/B3JU-9W5Y>].

contractual innovations to address the risk of sexual harassment.<sup>419</sup> A recent contractual innovation, the “Candor Clause,” was created by a female founder Elizabeth Giorgi after being sexually harassed by an investor.<sup>420</sup> Other female founders are creating and championing the use of similar clauses including a “morality clause” which allows for the removal of a director in response to a “#MeToo event.”<sup>421</sup> Given how broadly worded these provisions are, their enforceability is uncertain. But recent interviews with corporate lawyers who work on these deals underscore a heightened awareness of cultural issues and “social due diligence” in the venture capital community.<sup>422</sup>

## 6. Boards Are Addressing Pay Equity Through Pay Transparency

Since the #MeToo movement, there has been a renewed interest in pay equity. After decades of stagnation, scholars have recently noted that pay equity “is gaining spectacular momentum.”<sup>423</sup> This increased focus has led to a dizzying number of new state and local laws addressing pay equity.<sup>424</sup> Even in jurisdictions which have yet to act, companies are taking it upon themselves — often in response to investor and employee pressure — to voluntarily address pay equity, beginning with pay transparency.<sup>425</sup> Recent high profile examples include Starbucks, which announced that it reached 100% gender and

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<sup>419</sup> See Noguchi, *supra* note 411.

<sup>420</sup> *Id.*

<sup>421</sup> Anne Stych & Brian Rinker, *Serena Ventures, Bumble Fund Tech Company with MeToo ‘Morality Clause,’* BIZWOMEN (Dec. 13, 2019, 8:13 AM EST), <https://www.bizjournals.com/bizwomen/news/latest-news/2019/12/serena-ventures-bumble-fund-tech-company-with.html?page=all> [https://perma.cc/KS7G-9FV8]; *Alice’s Morality Clause*, HELLO ALICE BLOG (Jan. 12, 2020), <https://blog.helloalice.com/alices-morality-clause/> [https://perma.cc/D3EF-ZNBP]; see also Melinda Gates, *What #MeToo Meant For Venture Capitalists*, REFINERY29 (Nov. 14, 2018, 8:30 AM), <https://www.refinery29.com/en-us/melinda-gates-vc-venture-capital-metoo> [https://perma.cc/T3RH-XDWJ].

<sup>422</sup> See *infra* Appendix A: Interview Participants, Interview with Susan Mac Cormac, Partner, Morrison & Foerster LLP.

<sup>423</sup> See *infra* Appendix A: Interview Participants, Interview with Susan Mac Cormac, Partner, Morrison & Foerster LLP.

<sup>424</sup> See Lobel, *supra* note 33, at 1, 3 (providing a hopeful outlook of recent state laws which reflect “a shift from a command-and-control approach to ongoing private-public collaborative efforts — which can better ensure continuous checks and safeguards and incentivize employers to self-audit, assess, and establish beyond compliance practice”); *Salary History Bans*, *supra* note 224.

<sup>425</sup> See Kristin Wong, *Want to Close the Pay Gap? Pay Transparency Will Help*, N.Y. TIMES (Jan. 20, 2019), <https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html> [https://perma.cc/2PHD-KKJ3].

racial pay equity.<sup>426</sup> Starbucks' leadership prompted the Employers for Pay Equity Initiative,<sup>427</sup> a consortium of thirty-six (and growing) U.S. employers who have committed to doing the same.

#### 7. Companies Are Abandoning Mandatory Arbitration of Sexual Harassment and Misconduct Claims

As discussed above, the focus on removing mandatory arbitration and NDAs for cases of sexual harassment is increasing on the legislative front across jurisdictions.<sup>428</sup> In addition to mounting regulatory pressure, companies are self-regulating and abandoning NDAs and mandatory arbitration. This self-regulation is being driven by a fear of reputational risk, fueled by several grassroots efforts launched by high profile "silence breakers." NBC Universal also announced that it was releasing former employees from NDAs, becoming the first major network to do so.<sup>429</sup> Along similar lines, Gretchen Carlson launched "Lift Our Voices," a non-profit which is calling on Fox News, Bloomberg, and other companies to release victims of sexual harassment from NDAs.<sup>430</sup> Lift Our Voices recently touted Wells Fargo which ended mandatory arbitration for sexual harassment cases on February 12,

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<sup>426</sup> See Jeff Green, *Starbucks Discloses Gender and Racial Pay Gap: There Isn't One*, BLOOMBERG (Dec. 4, 2019, 8:33 AM), <https://www.bloomberg.com/news/articles/2019-12-04/starbucks-discloses-gender-and-racial-pay-gap-there-isn-t-one> [<https://perma.cc/U4J6-VBB9>]. But see Kim Elsesser, *Is Starbucks' Gender and Racial Pay Gap Really Zero?*, FORBES (Dec. 6, 2019, 2:43 PM EST), <https://www.forbes.com/sites/kimelsesser/2019/12/06/is-starbucks-gender-and-racial-pay-gap-really-zero/#68829cdc5178> [<https://perma.cc/TZZ9-AGCY>].

<sup>427</sup> See EMPLOYERS FOR PAY EQUITY, <http://www.employersforpayequity.com/> (last visited Feb. 13, 2020) [<https://perma.cc/T3VF-PMS6>].

<sup>428</sup> See, e.g., Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 135 (2018), [https://www.yalelawjournal.org/pdf/Mizrahi\\_9ssdttnny.pdf](https://www.yalelawjournal.org/pdf/Mizrahi_9ssdttnny.pdf) [<https://perma.cc/V8D2-48VS>] (discussing how California has introduced and passed legislation that targets mandatory arbitration and non-disclosure agreements).

<sup>429</sup> Elana Lyn Gross, *NBCUniversal Releases Former Employees from Nondisclosure Agreements, Spurring the Conversation*, FORBES (Nov. 4, 2019, 5:02 PM EST), <https://www.forbes.com/sites/elanagross/2019/11/04/nbcuniversal-releases-former-employees-from-nondisclosure-agreements-spurring-the-conversation/#ebb482d4c6d5> [<https://perma.cc/E8X2-CFL4>].

<sup>430</sup> See Gretchen Carlson, Opinion, *Fox News, I Want My Voice Back*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/opinion/gretchen-carlson-bombshell-movie.html> [<https://perma.cc/D6VQ-EYR5>]; see also *In the News*, LIFT OUR VOICES, <https://liftourvoices.org/in-the-news/> (last visited Dec. 30, 2020) [<https://perma.cc/2HDG-NK75>].

2020, as a recent victory.<sup>431</sup> Yet another campaign, “Force the Issue,” is focused on ending mandatory arbitration, and pressures companies by publishing a running list of companies which have mandatory arbitration. Its recent victories include Capital One Financial Group and Fox Corporation, both of which have recently abandoned mandatory arbitration.<sup>432</sup>

#### CONCLUSION

As Melvin Eisenberg argued more than two decades ago, “Changes in the belief-systems of corporate actors cause shifts in norms. These shifts, in turn, are translated into the fabric of corporate institutions and corporate law.”<sup>433</sup> Despite the widespread attention that the #MeToo movement has received from scholars, policymakers, and the media, there has not been a focus on how it is being translated into corporate governance. This Article fills that gap by providing a comprehensive framework for understanding how the #MeToo movement is transforming key stakeholders’ demand and, in turn, the inner workings of companies. While it is too early to verify, this framework offers an optimistic perspective on an era of corporate governance that is rooted in culture and can therefore mitigate, rather than mask, the risk of sexual harassment.

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<sup>431</sup> See Carlson, *supra* note 430; David Galloreese, *Zero Tolerance for Sexual Harassment*, WELLS FARGO STORIES (Feb. 12, 2020), <https://stories.wf.com/zero-tolerance-sexual-harassment/> [https://perma.cc/27SJ-YBKE].

<sup>432</sup> See *Force the Issue*, <https://forcetheissue.org/> (last visited Feb. 13, 2020) [https://perma.cc/9C42-YC2R].

<sup>433</sup> Eisenberg, *supra* note 55, at 1292.



## APPENDIX A: INTERVIEW PARTICIPANTS

Participant Name & Title	Date
Richard Betterley, Insurance Expert, <i>The Betterley Report</i>	12/17/19
Verity Chegar, Vice President, ESG Strategist, <i>BlackRock</i>	12/25/19
Rob Chesnut, Chief Ethics Officer, <i>Airbnb</i>	10/11/19
Keir Gumbs, Associate General Counsel, <i>Uber</i>	12/11/19
Priya Huskins, Partner & Senior Vice President, <i>Woodruff-Sawyer</i>	8/12/19
Courteney Keatinge, Senior Director, ESG Research, <i>Glass Lewis</i>	4/22/18
Susan Mac Cormac, Partner, <i>Morrison &amp; Foerster LLP</i>	1/15/19
Carolyn Rashby, Of Counsel, <i>Covington &amp; Burling LLP</i>	12/5/19
Brian Savage, Corporate Counsel, <i>Airbnb</i>	1/21/19
Anne Simpson, Managing Investment Director, Board Governance & Sustainability, <i>CalPERS</i>	10/11/19
Tim Youmans, Lead-North America, <i>EOS at Federated Hermes</i>	8/18/19

## APPENDIX B: TEXTUAL ANALYSIS OF DERIVATIVE COMPLAINTS

Figure 1.

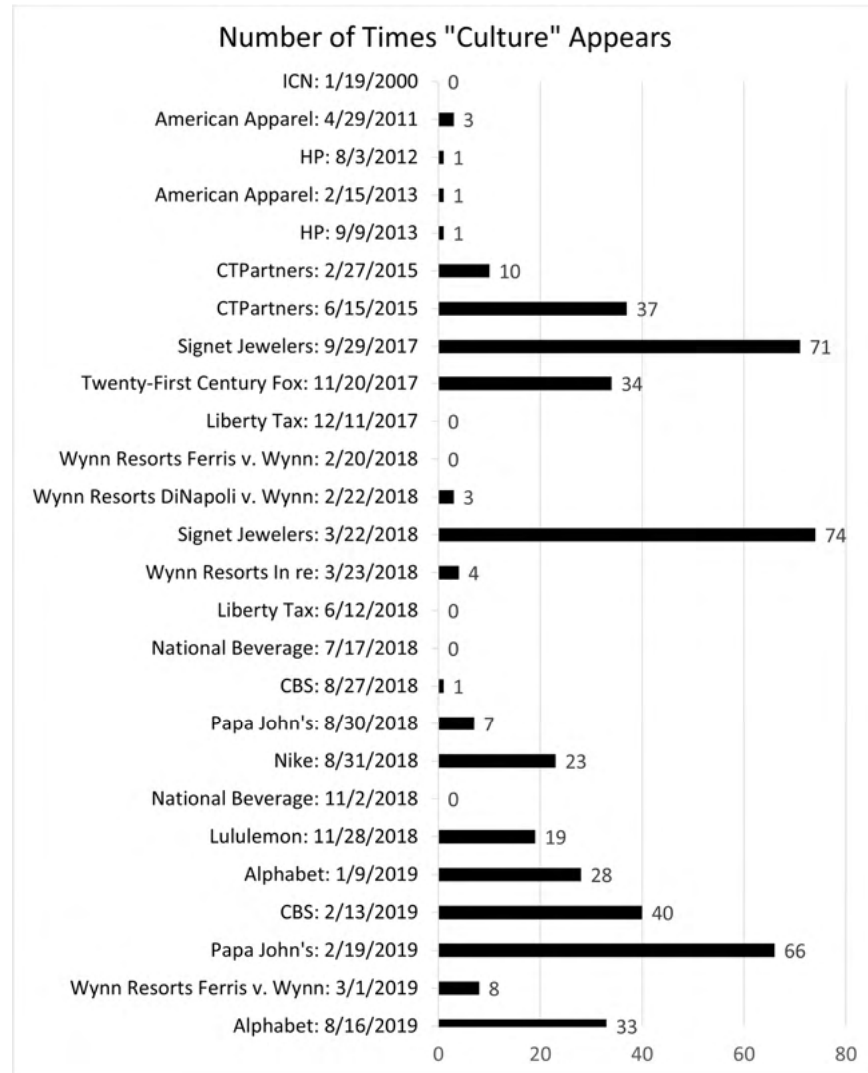


Figure 2.

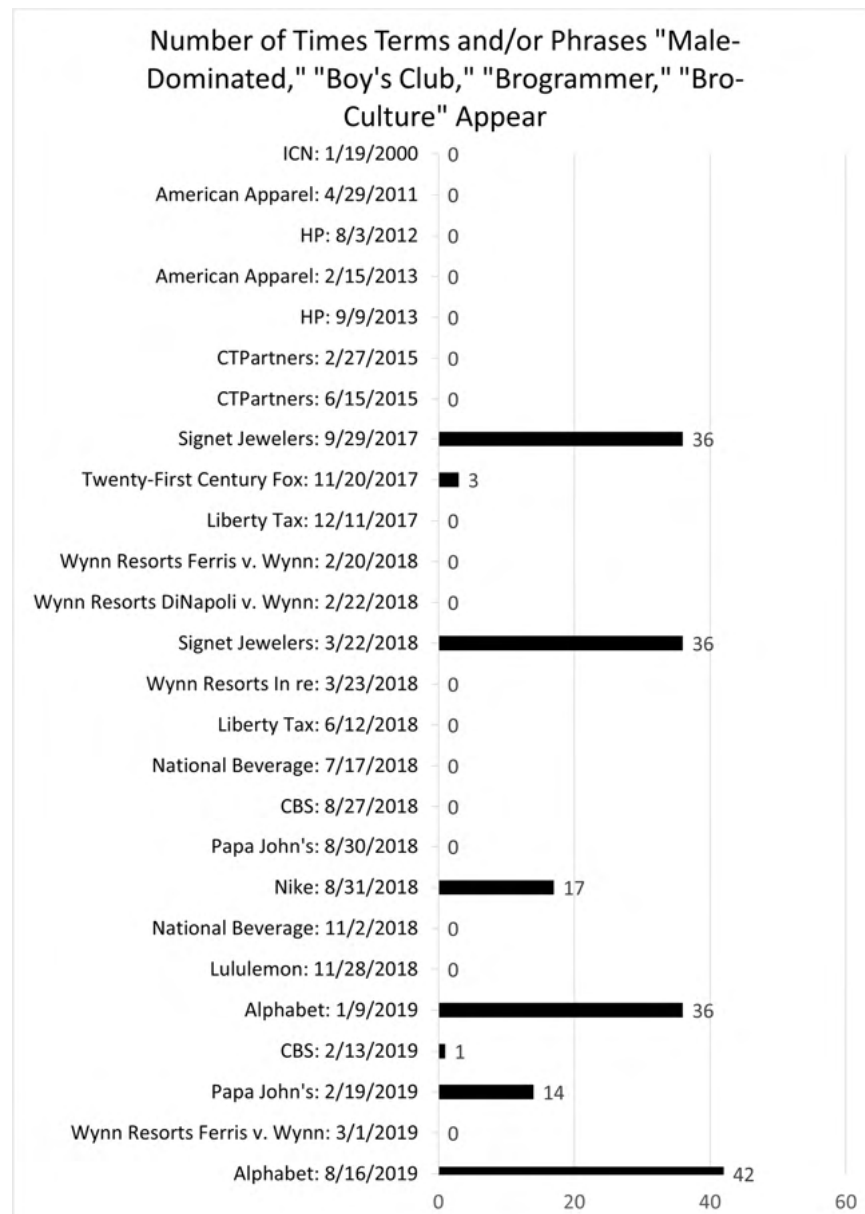


Figure 3.

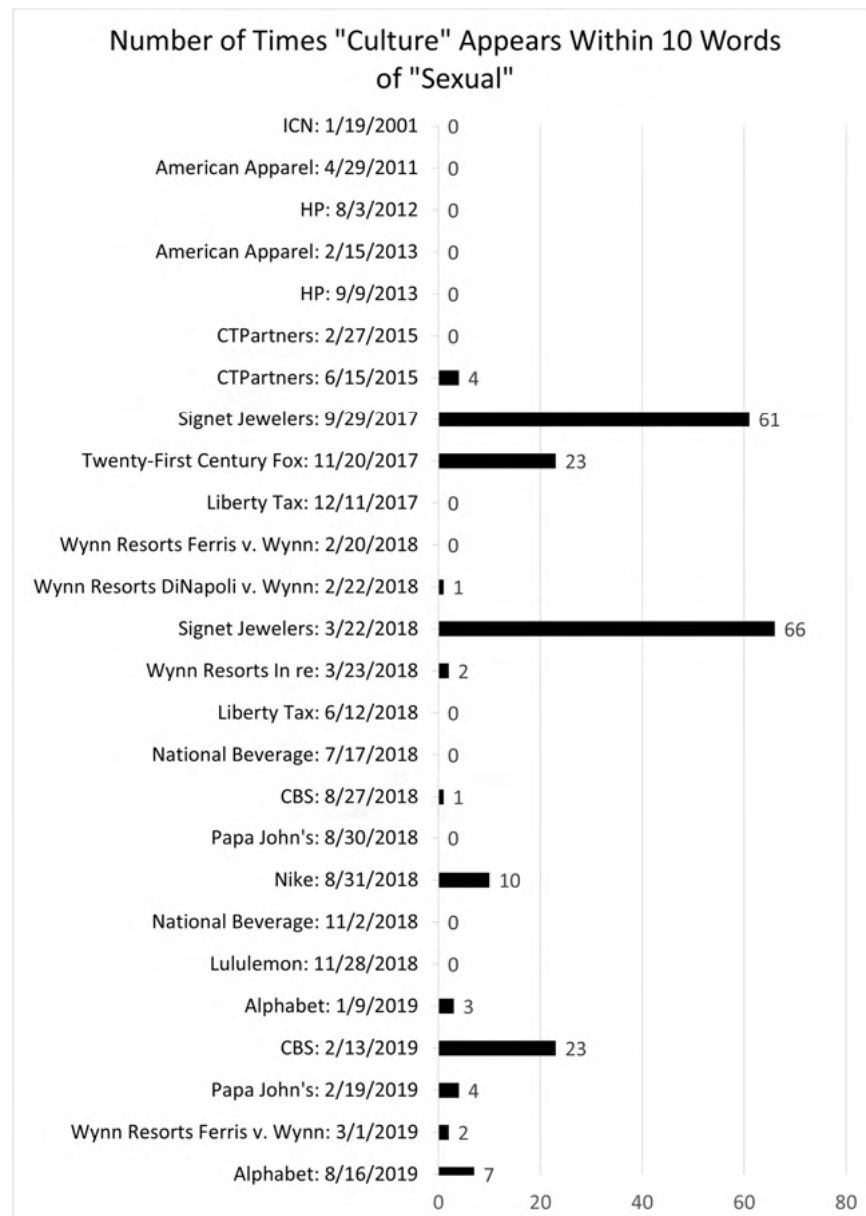


Table of Derivative Complaints Referenced in Figures 1-3

Date	Company	Complaint	Mentions of 'Culture'
1/19/01	ICN	White v. Panic ( <i>Panic I</i> ), 793 A.2d 356, 358-59 (Del. Ch. 2000), <i>aff'd</i> , 783 A.2d 543 (Del. 2001).	0
4/29/11	American Apparel	<i>In re</i> Am. Apparel S'holder Derivative Litig., No. CV-10-6352 (C.D. Cal. Apr. 29, 2011).	3
8/3/12	HP	Complaint, Cement & Concrete Workers Dist. Council Pension Fund, et al. v. Hewlett Packard Co., et al., No. 12-CV-04115 (N.D. Cal. Aug. 3, 2012).	1
2/15/13	American Apparel	Second Amended Class Action Complaint for Violation of Federal Securities Laws, <i>In re</i> Am. Apparel S'holder Derivative Litig., No. CV-10-6352 (C.D. Cal. Feb. 15, 2013).	1
9/9/13	HP/Hurd	Complaint, Cement & Concrete Workers District Council Pension Fund, et al. v. Hewlett Packard Co., et al., No. 12-CV-04115 (N.D. Cal. Aug. 3, 2012).	1
2/27/15	CTPartners	Complaint, Zinno v. CTPartners Exec. Search Inc., No. 15-1476 (S.D.N.Y. Feb. 25, 2015).	10

6/15/15	CTPartners	Amended Complaint, Lopez v. CTPartners Exec. Search Inc., No. 15-1476 (S.D.N.Y. June 15, 2015).	37
9/29/17	Signet Jewelers	<i>In re</i> Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728 (S.D.N.Y. Nov. 29, 2017).	71
11/20/17	Twenty-First Century Fox	Verified Derivative Complaint at 1-2, City of Monroe Emps.' Ret. Sys. v. Murdoch, No. 2017-0833 (Del. Ch. Nov. 20, 2017).	34
12/11/17	Liberty Tax	Verified Stockholder Derivative Complaint at 1, Asbestos Workers' Phila. Pension Fund <i>ex rel.</i> Liberty Tax v. Hewitt, No. 2017-0883 (Del. Ch. filed Dec. 11, 2017).	0
2/20/18	Wynn Resorts	Class Action Complaint, John V. Ferris, et al. v. Wynn Resorts Limited, et al. 18-CV-00479 (Nev. Dist. Ct. filed Feb. 20, 2018).	0
2/22/18	Wynn Resorts	Verified Stockholder Derivative Complaint at 5, DiNapoli <i>ex rel.</i> Wynn Resorts Ltd. v. Wynn, No. A-18-770013-B (Nev. Dist. Ct. Feb. 22, 2018).	3
3/22/18	Signet Jewelers	Fifth Amended Class Action Complaint for Violations of the Federal Securities Laws, <i>In re</i> Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-	74



		06728 (S.D.N.Y. filed Mar. 22, 2018).	
3/23/18	Wynn Resorts	<i>In re</i> Wynn Resorts, Ltd. Derivative Litigation, No. 2:18-CV-00293 (D. Nev. filed Mar. 23, 2018).	4
6/12/18	Liberty Tax	Amended Verified Stockholder Derivative Complaint, Asbestos Workers' Phila. Pension Fund <i>ex rel.</i> Liberty Tax v. Hewitt, No. 2017-0883 (Del. Ch. Dec. 11, 2017).	0
7/17/18	National Beverage	Class Action Complaint, Luczak v. Nat'l Beverage Corp., No. 0:18-cv-61631 (S.D. Fl. July 17, 2018).	0
8/27/18	CBS	Class Action Complaint, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Aug. 27, 2018).	1
8/30/18	Papa John's	Class Action Complaint, Danker v. Papa John's Int'l, Inc., No. 1:18-cv-07927 (S.D.N.Y. Aug. 30, 2018).	7
8/31/18	Nike	Stein v. Knight, No. 18CV38553 (Or. Cir. Ct. Aug. 31, 2018).	23
11/2/18	National Beverage	Consolidated Amended Class Action Complaint, Luczak v. Nat'l Beverage Corp., No. 0:18-cv-61631 (S.D. Fl. Nov. 2, 2018).	0

11/28/18	Lululemon	Shabbouei v. Potdevin, No. 2018-0847 (Del. Ch. Filed Nov. 28, 2018).	19
1/9/19	Alphabet	Verified Stockholder Derivative Complaint, <i>In re</i> Alphabet Shareholder Derivative Litigation, Case No. 19CV341522, (Cal. Super. Ct. Jan. 1, 2019). The case was originally filed as LR Trust, et. al. v. Larry Page, et al., and related actions.	28
2/13/19	CBS	Amended Class Action Complaint, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Feb. 13, 2019).	40
2/19/19	Papa John's	Amended Class Action Complaint, Danker v. Papa John's Int'l, Inc., No. 1:18-cv-07927 (S.D.N.Y. Feb. 19, 2019).	66
3/1/19	Wynn Resorts	Amended Class Action Complaint, John V. Ferris, et al. v. Wynn Resorts Limited, et al. 18-CV-00479 (Nev. Dist. Ct. Mar. 1, 2019).	8

APPENDIX C: SAMPLE OF AMENDMENTS TO EXECUTIVE COMPENSATION  
AGREEMENTS

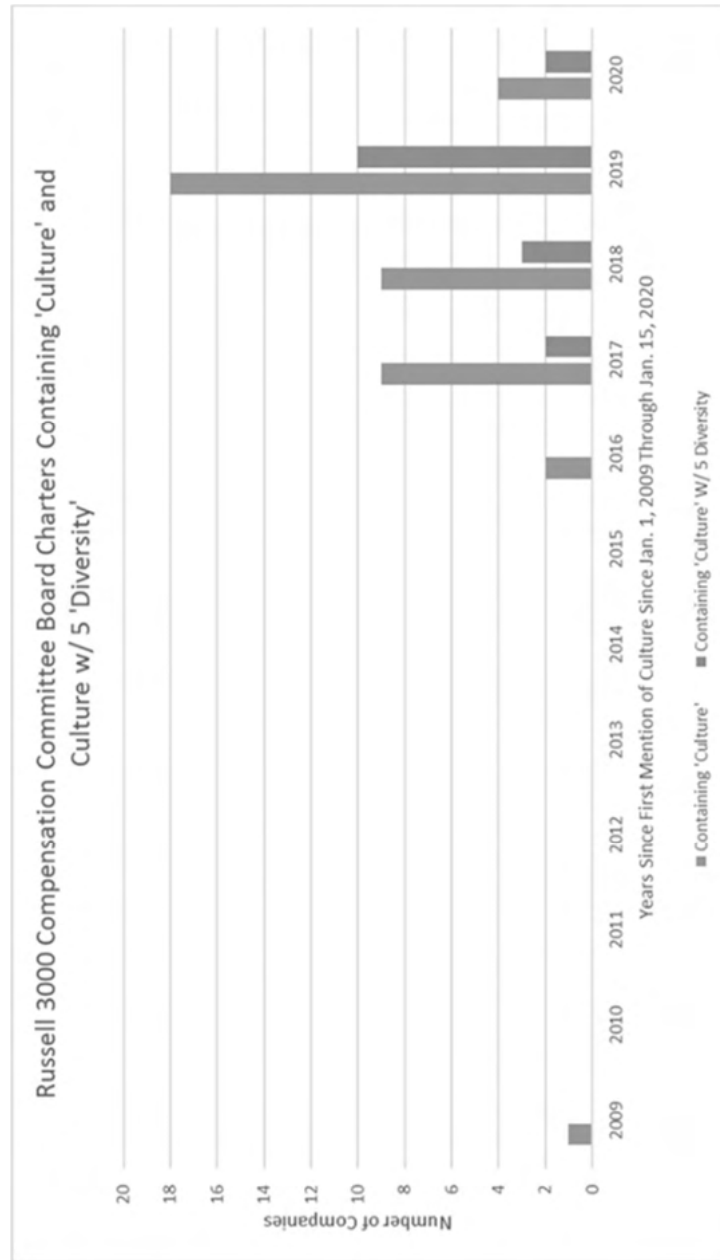
Date Amended	Type	Company	Language	Source
4/24/19	Cause Clause	Endo Health Solutions	“(vi) any material breach by Executive of a Company policy related to sexual or other types of harassment or abusive conduct, which breach is injurious to the Company or its employees, or (vii) the continued material breach by Executive of this Agreement.”	Endo Health Solutions, Executive Employment Agreement (Form 8-K) 6 (Apr. 24, 2019), <a href="https://www.sec.gov/Archives/edgar/data/1593034/000159303419000011/ex101paulcampanelliemployee.htm">https://www.sec.gov/Archives/edgar/data/1593034/000159303419000011/ex101paulcampanelliemployee.htm</a> .
3/12/19	Representation or Warranty of the Executive	Regal Beloit Corporation	“The Executive represents and warrants to the Company that, to the best of his knowledge and belief: (e) The Executive has not been the subject of any complaint or allegation regarding his sexual harassment, his sexual misconduct . . . in any prior employment situation.”	Regal Beloit Corp., Executive Employment Agreement (Form 8-K) 7 (Mar. 12, 2019), <a href="https://www.sec.gov/Archives/edgar/data/0000082811/000008281119000020/rbc-8k3x14x19ex101.htm">https://www.sec.gov/Archives/edgar/data/0000082811/000008281119000020/rbc-8k3x14x19ex101.htm</a> .
11/29/17	Diversity & Inclusion Targets in Executive Compensation Agreements	Microsoft	“50% of our Named Executives’ fiscal year 2017 annual cash incentives were determined based on subjective scoring of their performance against . . . strategic indicators in three performance categories” including,	MICROSOFT CORP., NOTICE OF ANNUAL SHAREHOLDERS MEETING AND PROXY STATEMENT 2017, at 39 (2017), <a href="https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddef14a.htm#toc461626">https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddef14a.htm#toc461626</a> .

			<b>“Organizational diversity and inclusion.”</b>	
4/9/19	Diversity & Inclusion Targets within Executive Employment Agreement and in Accordance with Executive Compensation Bonus Plan	Uber	<p>“b. Annual Cash Bonus. For each calendar year, you will be eligible to participate in the Uber Technologies, Inc. Executive Bonus Plan (the ‘Bonus Plan’), under which you may receive an annual cash bonus (the ‘Bonus’). The target amount of your Bonus (the ‘Target Cash Bonus’) will be determined by the Compensation Committee . . . The actual amount of any Bonus, and your entitlement to the Bonus, will be subject to the terms of the Bonus Plan.”</p> <p>“(j) ‘Performance Criteria’ means the performance criteria upon which the Performance Goals for a particular Performance Period are based, which may include any of the following . . . workforce diversity . . .”</p>	<p>Uber Technologies, Inc., Executive Employment Agreement (Form 8-K) 2 (Apr. 9, 2019), <a href="https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752dex1028.htm">https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752dex1028.htm</a>. Uber Technologies, Inc., Executive Bonus Plan (Form S-1) 2 (Apr. 11, 2019), <a href="https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752dex107.htm">https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752dex107.htm</a>.</p>
3/16/19	Expanded Clawback Provisions in accordance with Executive Employment Agreements	Wells Fargo	<p>“Misconduct that has or might reasonably be expected to cause reputation or other harm to our Company or any conduct that constitutes ‘cause,’ . . . .”</p>	<p>WELLS FARGO &amp; CO., 2019 PROXY STATEMENT 97 (March 16, 2019), <a href="https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2019-proxy-statement.pdf">https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2019-proxy-statement.pdf</a>.</p>

11/20/17	Expanded Clawback Provisions within Executive Employment Agreement	Everest Re Group Ltd.	<p>“Termination and Clawback. Notwithstanding anything in this Agreement to the contrary, if the Executive engages in material willful misconduct in respect of his obligations hereunder, including, but not limited to, fraudulent misconduct, during the term of this Agreement or during the period in which he is otherwise entitled to receive payments hereunder following his termination of employment, then (i) the Executive shall be required to repay to the Company any incentive compensation (including equity awards) paid to the Executive during the period in which he engaged in such misconduct, as determined by a majority of the Board of Directors of Group in its sole discretion.”</p>	<p>Everest Re Group Ltd., Executive Employment Agreement (Form 8-K) 6 (Nov. 20, 2017), <a href="https://www.sec.gov/Archives/edgar/data/0001095073/000109507317000053/adde ssoagreement.htm">https://www.sec.gov/Archives/edgar/data/0001095073/000109507317000053/adde ssoagreement.htm</a>.</p>
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APPENDIX D: TEXTUAL ANALYSIS OF BOARD COMPENSATION COMMITTEE  
CHARTERS

Figure 1.





## Former State Senator Hannah-Beth Jackson's Enacted Bills Covering Sexual Harassment and Gender Equity

[SB 400](#) (Stats. 2013, c. 759) expands existing employment protections for victims of domestic violence or sexual assault to also include victims of stalking.

[SB 186](#) (Stats. 2014, c. 232) authorizes the governing board of a community college district to remove, suspend, or expel a student for sexual assault or sexual exploitation, regardless of the victim's affiliation with the community college, even if the offense is not related to college activity or attendance.

[SB 358](#), (Stats. 2014, c. 546) the *California Fair Pay Act*, prohibits an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility. The bill requires the employer to affirmatively demonstrate that a wage differential is based upon one or more specified factors, including a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than sex. The bill requires the employer to demonstrate that each factor relied upon is applied reasonably, and that the one or more factors relied upon account for the entire differential. The bill prohibits an employer from retaliating against an employee who invokes or assists in enforcement of these provisions and provides for recovery in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest, and appropriate equitable relief. The bill prohibits an employer from prohibiting an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under these provisions.

[SB 967](#) (Stats. 2014, c. 748) The "*Yes Means Yes Act*" requires the governing boards of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions, in order to receive state funds for student financial assistance, to adopt policies concerning sexual assault, domestic violence, dating violence, and stalking that include certain elements, including *an affirmative consent standard* ("Yes Means Yes") in the determination of whether consent was given by a complainant. The bill requires these governing boards to adopt sexual assault policies and protocols and would require the governing boards, to the extent feasible, to enter into memoranda of understanding or other agreements or collaborative partnerships with on-campus and community-based organizations to refer students for assistance or make services available to students. The bill would also require the governing boards to implement comprehensive prevention and outreach programs addressing sexual assault, domestic violence, dating violence, and stalking.

[SB 695](#) (Stats. 2015, c. 424) This bill requires the Instructional Quality Commission to consider including comprehensive information for grades 9 to 12, inclusive, on sexual harassment and violence, during the next revision of the publication "Health Framework for California Public Schools" after January 1, 2016. The bill also requires the governing board of a school district that has elected to require its pupils to complete a course in health education for graduation from high school to include instruction in sexual harassment and violence and ensure that teachers consult information related to sexual harassment and violence in the health framework when delivering health instruction.

[SB 1375](#) (Stats. 2015, c. 655) requires on or before July 1, 2017, all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools to post in a prominent and conspicuous location on their Internet Web sites that all classes and courses are to be conducted without regard to the sex of the pupil enrolled in these classes or courses. Existing federal law, known as Title IX, prohibits a person, on the basis of sex, from being excluded from participation in, being denied the benefits of, or being subject to discrimination under, any education program or activity receiving federal financial assistance. The bill requires the Superintendent of Public Instruction to annually send a letter through electronic means to all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools informing them of the new requirement that would be created by this bill and of their responsibilities under Title IX.

[SB 224](#) (Stats. 2018, c. 951) Amended Civ. Code § 51.9, which covers sexual harassment in business relationships, creating personal liability for a director or producer, who holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a 3rd party and sexually harasses the plaintiff. The bill expanded those individuals covered to include investors (§51.9(a)(1)(B)), elected officials (§51.9(a)(1)(F)), lobbyists (§51.9(a)(1)(G)), and directors and producers (§51.9(a)(1)(H)). The bill eliminated the element that the plaintiff prove that there is an inability by the plaintiff to easily terminate the relationship.

[SB 826](#) (Stats. 2018, c. 954) – Corporations: boards of directors. (Corp. Code §§ 301.3 & 2115.5)). Mandated female representation on boards of directors of corporations incorporated in California. Governor Brown's [signing message](#) about the need for such mandates is noteworthy! Two years later, [AB 979](#) (Holden) (Stats. 2020, c. 316) amended these provisions to require diversity to also include underrepresented communities.

[SB 493](#) (Stats. 2018, c. 303) Requires post-secondary institutions receiving California state funding to protect students from harassment by:

- (1) disseminating a notice of nondiscrimination to each employee, volunteer, and individual or entity contracted with the institution,
- (2) designating at least one employee of the institution to coordinate its efforts to comply with its responsibilities specified in this act,
- (3) adopting rules and procedures for the prevention of sexual harassment,
- (4) adopting and publishing on its internet website grievance procedures providing for the prompt and equitable resolution of sexual harassment complaints,
- (5) publishing on the institution's internet website the name, title, and contact information for the Title IX coordinator or other employee designated to coordinate the institution's efforts to comply with and carry out the responsibilities specified in this act and any individual official with the authority to investigate complaints or to institute corrective measures, as specified,
- (6) including specified training to each employee engaged in the grievance procedure,
- (7) including annual training for residential life student and nonstudent staff for the trauma-informed handling of reports regarding incidents of sexual harassment or violence at an institution with on-campus housing,
- (8) notifying employees of the obligation to report sexual harassment to appropriate school officials, and

(9) providing training to all employees on the identification of sexual harassment.

The bill authorizes enforcement of its provisions through a civil action.

[SB 1300](#) (Stats. 2018, c. 955) An omnibus bill, which:

- Liberalized the standard for proving sexual harassment in California (Gov. Code §12923), declaring that harassment cases are rarely appropriate for summary judgement (Gov. Code §12923(e)), a single instance of harassment may be sufficient for a hostile work environment claim (Gov. Code §12923(b)), and that courts should not apply the “stray remarks” doctrine developed under federal law (Gov. Code §12923(c)).
- Expanded employer liability for the acts of non-employees who harass employees, applicants, unpaid interns or volunteers, to any form of harassment, not just sexual. (Gov. Code §12940(j)(1)).
- Made employees who commit any kind of harassment (not just sexual) personally liable for their harassment (Gov. Code § 12940 (j)(3)(B)).
- Added Gov. Code § 12964.5 which forbids employers from conditioning employment, continued employment, a raise or bonus on signing an NDA forbidding disclosure of harassment claims, and includes the right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, public prosecutor, law enforcement agency, or any court or other governmental entity about the harassment.
- Precluded employers from requiring an employee to sign a non-disparagement agreement or other document prohibiting an employee from disclosing information “about unlawful acts in the workplace,” including sexual harassment. (Gov. Code § 12964.5(a)(2)(A)).
- Nullified any such improper “releases” or NDAs as contrary to public policy. (Gov. Code § 12964.5(b)). Exempts a negotiated settlement agreement to resolve an underlying claim under FEHA that has been filed by the employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer’s internal complaint process. (Gov. Code § 12964.5(c)(1)). The agreement must be voluntary, deliberate and informed, provides consideration to the employee, and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney. (Gov. Code § 12964.5(c)(2)).
- Required bystander intervention training (providing information and practical guidance to enable bystanders to recognize potentially problematic behaviors, and provide the motivation, skills, and confidence to intervene as appropriate) as part of the AB 1825 mandates. (Gov. Code § 12950.2).
- Limited attorney’s fees for prevailing defendants to cases where the claims were frivolous. (Gov. Code § 12965(b)).

[SB 973](#) (Stats. 2020, c. 363) authorizes both the Department of Industrial Relations the Division of Labor Standards Enforcement (DLSE) and the Department of Fair Employment and Housing (DFEH) to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices unlawful under those discriminatory wage rate provisions and mandates the two agencies adopt procedures to ensure that the departments coordinate activities to enforce those provisions.

The bill also requires private employers with 100+ employees, who are required to file an annual Employer Information Report under federal law, to submit a pay data report to the DFEH that contains

specified gender wage information. DFEH would make the reports available to DLSE upon request. The DFEH can seek an order requiring the employer to comply, if it does not receive the employer's required report. The bill would require the DFEH to maintain the pay data reports for a minimum of 10 years and would make it unlawful for any DFEH or DLSE officer or employee to make public in any manner whatever any individually identifiable information obtained from the report prior to the institution of certain investigation or enforcement proceedings. The Employment Development Department is required to provide DFEH, upon its request, with the names and addresses of all businesses with 100 or more employees.

## Former State Senator Hannah-Beth Jackson's Enacted Bills Covering Sexual Harassment and Gender Equity

[SB 400](#) (Stats. 2013, c. 759) expands existing employment protections for victims of domestic violence or sexual assault to also include victims of stalking.

[SB 186](#) (Stats. 2014, c. 232) authorizes the governing board of a community college district to remove, suspend, or expel a student for sexual assault or sexual exploitation, regardless of the victim's affiliation with the community college, even if the offense is not related to college activity or attendance.

[SB 358](#), (Stats. 2014, c. 546) the *California Fair Pay Act*, prohibits an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility. The bill requires the employer to affirmatively demonstrate that a wage differential is based upon one or more specified factors, including a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than sex. The bill requires the employer to demonstrate that each factor relied upon is applied reasonably, and that the one or more factors relied upon account for the entire differential. The bill prohibits an employer from retaliating against an employee who invokes or assists in enforcement of these provisions and provides for recovery in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest, and appropriate equitable relief. The bill prohibits an employer from prohibiting an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under these provisions.

[SB 967](#) (Stats. 2014, c. 748) The "*Yes Means Yes Act*" requires the governing boards of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions, in order to receive state funds for student financial assistance, to adopt policies concerning sexual assault, domestic violence, dating violence, and stalking that include certain elements, including *an affirmative consent standard* ("Yes Means Yes") in the determination of whether consent was given by a complainant. The bill requires these governing boards to adopt sexual assault policies and protocols and would require the governing boards, to the extent feasible, to enter into memoranda of understanding or other agreements or collaborative partnerships with on-campus and community-based organizations to refer students for assistance or make services available to students. The bill would also require the governing boards to implement comprehensive prevention and outreach programs addressing sexual assault, domestic violence, dating violence, and stalking.

[SB 695](#) (Stats. 2015, c. 424) This bill requires the Instructional Quality Commission to consider including comprehensive information for grades 9 to 12, inclusive, on sexual harassment and violence, during the next revision of the publication "Health Framework for California Public Schools" after January 1, 2016. The bill also requires the governing board of a school district that has elected to require its pupils to complete a course in health education for graduation from high school to include instruction in sexual harassment and violence and ensure that teachers consult information related to sexual harassment and violence in the health framework when delivering health instruction.

[SB 1375](#) (Stats. 2015, c. 655) requires on or before July 1, 2017, all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools to post in a prominent and conspicuous location on their Internet Web sites that all classes and courses are to be conducted without regard to the sex of the pupil enrolled in these classes or courses. Existing federal law, known as Title IX, prohibits a person, on the basis of sex, from being excluded from participation in, being denied the benefits of, or being subject to discrimination under, any education program or activity receiving federal financial assistance. The bill requires the Superintendent of Public Instruction to annually send a letter through electronic means to all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools informing them of the new requirement that would be created by this bill and of their responsibilities under Title IX.

[SB 224](#) (Stats. 2018, c. 951) Amended Civ. Code § 51.9, which covers sexual harassment in business relationships, creating personal liability for a director or producer, who holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a 3rd party and sexually harasses the plaintiff. The bill expanded those individuals covered to include investors (§51.9(a)(1)(B)), elected officials (§51.9(a)(1)(F)), lobbyists (§51.9(a)(1)(G)), and directors and producers (§51.9(a)(1)(H)). The bill eliminated the element that the plaintiff prove that there is an inability by the plaintiff to easily terminate the relationship.

[SB 826](#) (Stats. 2018, c. 954) – Corporations: boards of directors. (Corp. Code §§ 301.3 & 2115.5)). Mandated female representation on boards of directors of corporations incorporated in California. Governor Brown's [signing message](#) about the need for such mandates is noteworthy! Two years later, [AB 979](#) (Holden) (Stats. 2020, c. 316) amended these provisions to require diversity to also include underrepresented communities.

[SB 493](#) (Stats. 2018, c. 303) Requires post-secondary institutions receiving California state funding to protect students from harassment by:

- (1) disseminating a notice of nondiscrimination to each employee, volunteer, and individual or entity contracted with the institution,
- (2) designating at least one employee of the institution to coordinate its efforts to comply with its responsibilities specified in this act,
- (3) adopting rules and procedures for the prevention of sexual harassment,
- (4) adopting and publishing on its internet website grievance procedures providing for the prompt and equitable resolution of sexual harassment complaints,
- (5) publishing on the institution's internet website the name, title, and contact information for the Title IX coordinator or other employee designated to coordinate the institution's efforts to comply with and carry out the responsibilities specified in this act and any individual official with the authority to investigate complaints or to institute corrective measures, as specified,
- (6) including specified training to each employee engaged in the grievance procedure,
- (7) including annual training for residential life student and nonstudent staff for the trauma-informed handling of reports regarding incidents of sexual harassment or violence at an institution with on-campus housing,
- (8) notifying employees of the obligation to report sexual harassment to appropriate school officials, and



(9) providing training to all employees on the identification of sexual harassment.

The bill authorizes enforcement of its provisions through a civil action.

[SB 1300](#) (Stats. 2018, c. 955) An omnibus bill, which:

- Liberalized the standard for proving sexual harassment in California (Gov. Code §12923), declaring that harassment cases are rarely appropriate for summary judgement (Gov. Code §12923(e)), a single instance of harassment may be sufficient for a hostile work environment claim (Gov. Code §12923(b)), and that courts should not apply the “stray remarks” doctrine developed under federal law (Gov. Code §12923(c)).
- Expanded employer liability for the acts of non-employees who harass employees, applicants, unpaid interns or volunteers, to any form of harassment, not just sexual. (Gov. Code §12940(j)(1)).
- Made employees who commit any kind of harassment (not just sexual) personally liable for their harassment (Gov. Code § 12940 (j)(3)(B)).
- Added Gov. Code § 12964.5 which forbids employers from conditioning employment, continued employment, a raise or bonus on signing an NDA forbidding disclosure of harassment claims, and includes the right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, public prosecutor, law enforcement agency, or any court or other governmental entity about the harassment.
- Precluded employers from requiring an employee to sign a non-disparagement agreement or other document prohibiting an employee from disclosing information “about unlawful acts in the workplace,” including sexual harassment. (Gov. Code § 12964.5(a)(2)(A)).
- Nullified any such improper “releases” or NDAs as contrary to public policy. (Gov. Code § 12964.5(b)). Exempts a negotiated settlement agreement to resolve an underlying claim under FEHA that has been filed by the employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer’s internal complaint process. (Gov. Code § 12964.5(c)(1)). The agreement must be voluntary, deliberate and informed, provides consideration to the employee, and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney. (Gov. Code § 12964.5(c)(2)).
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# NortonLifeLock Beats Investor Suit Over Board Diversity

By **Dean Seal**

Law360 (August 31, 2021, 7:50 PM EDT) -- A California federal judge has dismissed shareholder derivative claims against NortonLifeLock Inc. that accused the cybersecurity giant's board of failing to uphold its stated commitment to diversity and inclusion.

U.S. District Judge Richard Seeborg acknowledged Monday that his ruling comes after **the dismissals** of several **similar derivative actions** filed by the same law firm that accuse a range of name-brand public companies, including Facebook Inc. and Oracle Corp., of falling short on their publicly declared diversity commitments.

The suit **accusing NortonLifeLock** of refusing to appoint Black or minority individuals to its board "simply does not plausibly plead an actionable false statement," Judge Seeborg said. The suit also failed to show that its claims couldn't have been brought directly to the directors before being asserted in a lawsuit.

"Without questioning that there may be systemic under-representation in corporate boardrooms, or plaintiff's good faith in looking for legal recourse, the flaws in this putative class action complaint require dismissal," the judge said, giving the plaintiff 30 days to amend the suit.

The ruling marks another defeat for Bottini & Bottini Inc., the California-based law firm that launched a **cluster of shareholder litigations** last summer asserting similar diversity-related derivative claims against NortonLifeLock, Facebook, Oracle, **retailer** The Gap Inc., **beverage maker** Monster Beverage Corp. and **telecommunications company** Qualcomm Inc. So far, all of those suits have been tossed except the Qualcomm action, which is currently facing a dismissal motion.

Shareholders backed by Robbins Geller Rudman & Dowd LLP have also attempted to **advance similar claims** against Cisco Systems Inc. and Danaher Corp. in federal court, though the former company is currently pursuing a dismissal and the latter **scored one in June**.

The suit in Judge Seeborg's court, filed in August 2020, claimed that NortonLifeLock's top brass made misleading public statements in financial filings and elsewhere about the company's progress toward increasing its diversity when it was aware of discriminatory practices keeping minorities from taking on leadership roles or being appointed to the board.

While the suit does not point to specific discriminatory incidents, it says the company's rules and other obstacles faced by director candidates of color amount to "explicit or implicit racism" and "discrimination."

"NortonLifeLock's board enjoys the undesirable distinction of being one of the few publicly-traded companies in the United States with no African Americans on the board," the suit alleged. "Diversity in the workforce is a strong indication of a lack of discrimination; conversely, a lack of diversity provides a strong indication that discrimination is present."

The company pushed back on the allegations, **telling Judge Seeborg in April** that the suit overlooks minority groups represented on the board and attempts to "redefin[e] the term 'diverse' to mean African Americans on the board."

On top of that, the company argued, the suit fails to demonstrate that any of the board's statements

were actually false, misleading or deleterious to the company.

Judge Seeborg agreed on Monday, saying that courts "routinely find similar statements to be non-actionable puffery or aspirational."

The judge also found that the investor behind the litigation failed to make a presuit demand for the board to investigate the allegations and take remedial actions, and further failed to explain why doing so would have been futile.

The order filed Monday also notes that the suit contains state law claims that, pursuant to the forum selection clause in NortonLifeLock's bylaws, would have to be brought in Delaware Chancery Court. Accordingly, Judge Seeborg dismissed those claims without prejudice to being refiled in Delaware.

Counsel for the parties did not immediately respond to requests for comment Tuesday.

The investor is represented by Francis A. Bottini Jr. and Yury A. Kolesnikov of Bottini & Bottini Inc.

NortonLifeLock is represented by William J. Trach, Elizabeth L. Deeley, Andrew B. Clubok, Susan E. Engel and Stephen P. Barry of Latham & Watkins LLP.

The case is EllieMaria Toronto ESA v. NortonLifeLock Inc. et al., case number 5:20-cv-05410, in the U.S. District Court for the Northern District of California.

--Editing by Alanna Weissman.

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**FOR IMMEDIATE RELEASE**  
**September 29, 2020**

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**Seven Shareholder Derivative Lawsuits Seek Diversity on Corporate Boards**  
*Plaintiffs Sue Oracle, Facebook, Qualcomm, the Gap, NortonLifeLock, Cisco and Monster Beverage*

SAN FRANCISCO – Attorneys from two California law firms have filed shareholder derivative lawsuits against the boards of seven major corporations since July, seeking to bring diversity to boardrooms and c-suites by holding the boards responsible for their false and misleading statements about diversity in the companies' proxy statements.

"There is a glaring lack of diversity in the corporate boardrooms where decisions are being made," said Louise Renne, former San Francisco City Attorney and an attorney for the plaintiffs in three of the cases. "With the renewed focus on the Black Lives Matter movement this year, it's clearer than ever that we need to use all the tools available to address systemic racism. This litigation is another avenue to push for diversity and bring new voices into the top levels of decision-making."

The plaintiffs' legal team has employed the firmly-established protection of the federal securities laws to try to hold corporate boards liable for making misleading statements about diversity to shareholders. In 2009, the Securities & Exchange Commission passed a new rule requiring publicly-traded companies to start disclosing what role, if any, diversity plays in the process used by companies to nominate persons to serve on their board of directors. However, until now shareholders have not brought many cases under the 2009 SEC rule.

The shareholders who have brought the cases against the seven companies - Oracle, Facebook, Qualcomm, the Gap, NortonLifeLock, Cisco and Monster Beverage – seek to hold the board of directors and top executives at each corporation liable for making misleading statements about diversity, statements which have led to reputational and financial damage. Both institutional and individual shareholders view statements about diversity as highly material and important to their investment decisions.

Specifically, the plaintiffs allege that the board members breached the Securities Exchange Act of 1934 by authorizing false statements about their commitment to diversity in their proxy statements. The U.S. Securities and Exchange Commission requires companies to provide these documents to shareholders so they can make informed voting decisions. Plaintiffs claim board members did not follow through on the promises in their proxy statements.

Since diversity leads to financial and reputational benefits for companies, plaintiffs also allege that the board of directors at these corporations have breached their fiduciary duties by making false statements about diversity and then failing to seek and nominate diverse candidates to the board.

The cases have all been filed in California courts over the last three months. Attorneys from Bottini & Bottini, Inc. and Renne Public Law Group, the two firms involved in the litigation, filed the two most recent cases this month against Monster Beverage Corporation and Cisco Systems.



"Monster, similar to the other corporations involved in these lawsuits, publicly asserts that their diversity is a 'tremendous asset,' yet they don't have a single Black or minority senior executive or board member," said Ruth Bond, an attorney for three plaintiffs and a partner at Renne Public Law Group. "Stakeholders expect companies to follow through on their promises. Leadership needs to back up the words in their public reports by including diverse voices at the highest levels."

The lawsuits seek several remedies, including the replacement of several current directors at each company with Black and minority directors. Additionally, plaintiffs seek funds dedicated to the hiring and promotion of Black and minority workers, compensation plans that tie 30 percent of executive compensation to the achievement of diversity goals, annual diversity reports and annual diversity training for all board and high-level executive officers.

"Corporate directors agree that diversity needs to be increased at their companies and that doing so leads to increased profits, but so far they have not followed through on their promises," said Frank Bottini, an attorney for the plaintiffs in all seven cases. "We encourage companies to work with us to bring about necessary change, but if they fail to do so then the directors of such companies should be held liable for their false statements to shareholders."

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# The Global #MeToo Movement



# The Global #MeToo Movement

Editors

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Anti-Discrimination Law

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## CHAPTER 37

# How the #MeToo Movement Is Transforming Corporate Governance

Amelia Miazad<sup>1</sup>

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### Introduction

As the preceding chapter reveals, companies and organizations have traditionally responded to sexual harassment by erecting “symbolic structures” that have proven ineffectual.<sup>2</sup> Relying on her empirical research, Professor Lauren Edelman cautions against these structures and demonstrates how they protect companies and executives at the expense of employees and sexual harassment victims.<sup>3</sup> Even the Equal Employment Opportunity Commission (EEOC), which long championed sexual harassment training and compliance programs, has conceded that “training programs from the past thirty years clearly have not worked because they focus on preventing legal liability instead of the actual sexual harassment.”<sup>4</sup> But if sexual harassment training and compliance programs are anemic at best, and potentially counter-productive, what meaningful action *can* companies take to prevent sexual harassment?

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1. Founding Director and Senior Research Fellow, Business in Society Institute, U.C. Berkeley School of Law. Danielle Santos, Research and Project Associate at Business in Society Institute, provided terrific research assistance and analysis for this chapter. For a more comprehensive account of the changes that companies have made in response to the #MeToo movement, see Amelia Miazad, *Sex, Power and Corporate Governance*, 54 U.C. Davis L. Rev. \_\_\_\_ (2020).

2. Lauren B. Edelman, *The #MeToo Movement, Symbolic Structures, and the Limits of the Law*, *supra*, chapter 36.

3. *Id.*

4. Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, The EEOC Guidance (June 2016), [https://www1.eeoc.gov/eeoc/task\\_force/harassment/report.cfm?renderforprint=1](https://www1.eeoc.gov/eeoc/task_force/harassment/report.cfm?renderforprint=1).

To answer that question we must first examine the root cause of sexual harassment, which social scientists have long identified as a gender-imbalanced culture that encourages men to exploit their power over women.<sup>5</sup> As Professor Dacher Keltner, an expert on the corrupting influence of power has explained, power leads to “empathy deficits and diminished moral sentiments.”<sup>6</sup> Social psychologists have also found that “power encourages individuals to act on their own whims, desires, and impulses,”<sup>7</sup> and power-induced disinhibition<sup>8</sup> may lead to other bad behaviors including “sexual over-perception.”<sup>9</sup> Numerous studies have corroborated that organizations that promote sexism<sup>10</sup> and sex segregation<sup>11</sup> are more likely to experience sexual harassment.<sup>12</sup> Importantly, as social scientist Vicki Schultz reminds us, “targeting only sexual misconduct without addressing related patterns of sexism and deeper institutional dynamics has serious shortcomings that risk undermining the broader quest for gender equality.”<sup>13</sup> In summary, social science across disciplines is replete with examples of how an unequal distribution of power between men and women can lead to sexual harassment.

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5. See, e.g., Frank Dobbin and Erin L. Kelley, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112:4 Am. J. Soc. 1203 (2007) [hereinafter Dobbin and Kelley, *How to Stop Harassment*].

6. Video: Gender, Power and Stemming Sexual Harassment (World Economic Forum Annual Meeting 2018) (available at <https://www.weforum.org/events/world-economic-forum-annual-meeting-2018/sessions/gender-power-and-stemming-sexual-harassment>).

7. Dacher Keltner, *The Power Paradox*, GREATER GOOD SCI. CTR. (Dec. 1, 2007), [https://greatergood.berkeley.edu/article/item/power\\_paradox](https://greatergood.berkeley.edu/article/item/power_paradox).

8. Joris Lammers, *Power and Morality*, 6 CURRENT OPINION PSYCHOL. 15 (2015).

9. Jonathan W. Kunstman & Jon K. Maner, *Sexual Overperception: Power, Mating Motives, and Biases in Social Judgment*, 100 J. PERSONALITY & SOC. PSYCHOL. 282, 282-294 (2011).

10. Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 18, 20, 17- 48, FACULTY SCHOLARSHIP SERIES. 5301(2018). [https://digitalcommons.law.yale.edu/fss\\_papers/5301](https://digitalcommons.law.yale.edu/fss_papers/5301) Sexism may involve the pressure for men and women to adhere to stereotypical gender roles. This confinement to gender roles prevents women from benefiting from the privilege of exuding more socially valued characteristics. It also prevents men from compromising the hierarchy among values by embracing devalued norms. See, Kathryn Abrams, *New jurisprudence of sexual harassment*. 83 Cornell L. Rev, 1209, 1169- 1230 (1997). See also, Jennifer L. Berdahl et al., *Work as a masculinity contest*, 74(3) J. OF SOCIAL ISSUES, 428, 422-448. (2018).

11. Schultz, *supra*, note 10, at 22, 23, 24, 17-48 (2018).

12. Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60:1 PERSONNEL PSYCHOL. 127, 127-162 (2007).

13. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 33, 22- 66, FACULTY SCHOLARSHIP SERIES, 5366 (2018), [https://digitalcommons.law.yale.edu/fss\\_papers/5366](https://digitalcommons.law.yale.edu/fss_papers/5366).



If the social scientists are correct, and gender power imbalances increase the risk of sexual harassment, then we ought not to wonder why the #MeToo movement brought its day of reckoning to corporate America.<sup>14</sup> U.S. companies are teeming with gender power imbalances, and they start at the very top, with the composition of the board of directors, the chief executive officer (CEO), and executive management. These power holders reinforce gender imbalances through unequal pay practices and pay secrecy policies. Contractual provisions in employment agreements, such as mandatory arbitration agreements and nondisclosure agreements, continue to reinforce these imbalances by silencing victims and masking the pervasiveness of sexual harassment. And multi-million-dollar golden parachutes in executive compensation agreements offer plush landings and insulate offenders from accountability.

After #MeToo, however, a chorus of influential stakeholders including investors, employees, customers, regulators, advisors, and NGOs are taking aim at these very power imbalances. This disquiet within the stakeholder community is beginning to cause executives and directors to institute meaningful reforms. While companies are still seeking comfort in training and compliance programs,<sup>15</sup> there is a novel focus on seismic corporate governance reforms, from increasing board gender diversity to tying executive compensation agreements to diversity targets. At this early juncture, it is rash to predict the eventual impact of these changes, and they are still far from widespread. Notwithstanding, as this chapter argues, these reforms are uniquely promising because they address gender power imbalances and may foreshadow a new era of corporate governance that is rooted in gender equity.

## Influential Stakeholders Demand That Corporate Boards Address Gender Power Imbalances

Gone are the days when the board of directors was comfortably insulated from external voices. Today, a vocal chorus of stakeholders, which includes investors, employees, customers, regulators, advisors, and NGOs, are attempting to exert their influence on board strategy.<sup>16</sup> While gender equality had been

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14. While gender power imbalances exist in companies globally, this chapter is focused on the United States.

15. Gerry Smith, *Demand for Anti-Harassment Training Videos Surges in #MeToo Era*, BLOOMBERG, Mar. 13, 2018, <https://www.bloomberg.com/news/articles/2018-03-13/better-call-hr-demand-for-training-videos-surges-in-metoo-era>.

16. Martin Lipton, *Stakeholder Governance—Issues and Answers*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, 2019, <https://corpgov.law.harvard.edu/2019/10/25/stakeholder-governance-issues-and-answers/>. See also, *Business Roundtable*

brewing as a concern for many stakeholders by 2017, the #MeToo movement propelled it to the forefront of their agendas and united their disparate voices. As the examples below elucidate, these stakeholders are beginning to draw an explicit link between increasing gender diversity and equity and mitigating the risk of sexual harassment.

## Investors

### **The Big Three**

BlackRock, State Street, and Vanguard, referred to as “The Big Three,” are the largest asset managers in the world. As the dominant shareholder in 40 percent of all U.S.-listed companies and 90 percent of companies in the S&P 500, their collective impact is massive,<sup>17</sup> and their growing focus on gender is palpable. One visible example is State Street’s iconic “Fearless Girl” statue, which it erected in front of the charging bull on Wall Street when it launched its campaign for more board gender diversity.<sup>18</sup> While State Street’s efforts began in January 2017, just before the #MeToo movement erupted, it has stepped up its efforts ever since. In 2018, State Street fearlessly voted against the chairs of the nominating committees of 500 companies with all-male boards.<sup>19</sup> State Street went further and announced that beginning in 2020, it would vote against the entire slate of board members on the nominating committee of any company not meeting its gender diversity criteria.<sup>20</sup> Also, in 2019 State Street made

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*Redefines the Purpose of a Corporation to Promote “An Economy That Serves All Americans”* THE BUSINESS ROUNDTABLE, Aug. 19, 2019, <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

17. Jill E. Fisch, Asaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (Dec. 2019).

18. *State Street Global Advisors Calls on 3,500 Companies Representing More Than \$30 Trillion in Market Capitalization to Increase Number of Women on Corporate Boards: On the Eve of International Women’s Day, SSGA Issues Guidelines and Places Statue in New York City’s Financial District as a Symbol of Need for Action*, STATE STREET, Mar. 7, 2017, <https://newsroom.statestreet.com/press-release/corporate/state-street-global-advisors-calls-3500-companies-representing-more-30-tri-0>.

19. *New York City Mayor and State Street Global Advisors Announce New Location for Fearless Girl Following her March 2017 Wall Street Debut, More Than 150 Publicly-Traded Companies Have Added Female Directors to their Boards*, STATE STREET, Apr. 19, 2018, <https://newsroom.statestreet.com/press-release/corporate/new-york-city-mayor-and-state-street-global-advisors-announce-new-location-f>.

20. Andrea Vittorio and Jeff Green, *State Street to Vote Against More Directors at Male-Only Boards* BLOOMBERG, Sept. 27, 2018, <https://www.bloomberg.com/news/>

“corporate culture” its chief engagement priority, arguing that a “flawed corporate culture has resulted in high-profile cases of excessive risk-taking or unethical behaviors that negatively impact long-term performance.”<sup>21</sup>

State Street’s efforts have perhaps been more visible, but BlackRock and Vanguard have also increased their advocacy for board gender diversity. In 2019, for example, BlackRock identified “governance, including your company’s approach to board diversity,” as its first engagement priority.<sup>22</sup> In its 2019 Investment Stewardship Annual Report, BlackRock confirmed that, during the 2019 proxy season, it voted against 52 directors at Russell 1000 companies that had fewer than two women on their boards.<sup>23</sup> For Vanguard, too, board diversity was one of its two engagement priorities in 2019, and Vanguard went even further to tie its own company’s executive compensation metrics to improving diversity in its corporate hierarchy.<sup>24</sup>

## Pension Funds

In direct response to #MeToo, the largest pension funds in California came together to launch the Trustees United Principles (the Principles) which explicitly link lack of diversity and “power imbalances” to an increased risk of sexual harassment.<sup>25</sup> On January 19, 2019, the Trustees announced that “Institutional Investor Trustees Representing \$635 Billion in Assets Launch Principles Addressing Sexual Harassment and Workplace Misconduct.”<sup>26</sup> The Trustees who drafted the Principles have emphasized that they are responding

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articles/2018-09-27/state-street-to-vote-against-more-directors-at-male-only-boards; Stewardship Report 2018-2019, STATE STREET GLOBAL ADVISORS, <https://www.ssga.com/investment-topics/environmental-social-governance/2019/09/annual-asset-stewardship-report-2018.pdf>.

21. Cyrus Taraporevala, *2019 Proxy Letter—Aligning Corporate Culture with Long-Term Strategy*, STATE STREET GLOBAL ADVISORS, Jan. 15, 2019, <https://corpgov.law.harvard.edu/2019/01/15/2019-proxy-letter-aligning-corporate-culture-with-long-term-strategy/>.

22. Larry Fink, *Larry Fink’s 2019 letter to CEOs*, BLACKROCK, 2019, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

23. BlackRock, *2019 Investment Stewardship Annual Report 12* (2019), <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2019.pdf>.

24. David Ricketts and Chris Newlands, *Vanguard and Fidelity link pay to gender diversity targets Industry titans bring in new measures as they implement Women in Finance Charter commitments*, FINANCIAL NEWS, Dec. 11, 2018, <https://www.fnlonon.com/articles/vanguard-and-fidelity-tie-pay-to-female-representation-20181210>.

25. *Trustees United Principles, Trustees United for Long Term Value*, TRUSTEESUNITED.COM (2020), <https://www.trusteesunited.com/>.

26. Trustees United, *Institutional Investor Trustees Representing \$635 Billion in Assets Launch Principles Addressing Sexual Harassment and Workplace Misconduct Principles focus on*

to the changing social norms on sexual harassment—“There’s clearly an inflection point in our society where we’re saying we’re no longer going to tolerate this behavior, and that’s an important signal to investors.”<sup>27</sup>

The Principles are notable for their focus on engaging directors and top management on addressing power differentials. Principle 1 begins by asking directors to “publicly share due diligence processes used to respond to sexual harassment and violence complaints filed by all employees and contractors.”<sup>28</sup> While this principle addresses compliance, the demand for board oversight of sexual harassment, which has traditionally been managed primarily by human resources (HR) departments, is a notable shift. Principle 2 blames contractual clauses, such as nondisclosure agreements and forced arbitration clauses, for perpetuating harassment and demands that companies put an end to those policies.<sup>29</sup> Principle 3 addresses diversity “at all levels” and correlates an increase in diversity to the ability “to be more attuned to the risks associated with harassment, misconduct, and discrimination.”<sup>30</sup> By backing board diversity, in particular, these investors have staked their claim that “diverse boards which reflect the racial and gender composition of a company’s workforce can help to create organizational cultures that prevent sexual harassment and related risks from materializing.”<sup>31</sup> The most poignant example is Principle 4, which specifically asks companies to address “power imbalances” that lead to discrimination and abuse by implementing agreements, including collective bargaining agreements and responsible contractor policies.<sup>32</sup>

### Shareholder Activists

The #MeToo movement has also triggered a rise in shareholder proposals addressing diversity and the gender pay gap.<sup>33</sup> Shareholder activist Arjuna

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*promoting long-term value creation by advancing safe corporate cultures* (2019), <https://www.trusteesunited.com/Home/News>.

27. Bloomberg, *California pension trustees call for disclosures of #MeToo costs*, L.A. TIMES, Jan. 14, 2019, <https://www.latimes.com/business/la-fi-calpers-calstrs-metoo-20190114-story.html>.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. David A. Katz, Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, Sept. 28, 2018, <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/>.

Capital has been at the forefront of this movement.<sup>34</sup> Arjuna led a successful campaign to pressure seven technology giants, eBay, Intel, Apple, Amazon, Expedia, Microsoft, and Adobe, into upgrading their standards and transparency related to gender pay disparity.<sup>35</sup> On the heels of this success, Arjuna Capital next targeted nine financial services companies, resulting in Citi becoming the first U.S. bank to voluntarily disclose that its gender pay gap is 29 percent.<sup>36</sup> Six more followed Citi's lead, including American Express, Bank of America, Bank of New York Mellon, Citigroup, JPMorgan, Mastercard, and Wells Fargo, and disclosed their efforts to advance gender pay equity.<sup>37</sup> As Natasha Lamb, Arjuna's managing director has argued, "When women hold the lower-paying jobs and in turn have less power in the organization ... that *imbalance breeds an unhealthy culture*. The symptoms of that are *the power dynamics around sexual harassment*"<sup>38</sup> (emphasis added).

While Natasha Lamb has emphasized the link between gender inequity and sexual harassment, Trillium Asset Management has filed the first shareholder proposal to specifically mention this link.<sup>39</sup> That proposal was filed against Nike, Inc. (Nike) and asks Nike's Board Compensation Committee to improve its risk oversight concerning workplace sexual harassment by "preparing a report assessing the feasibility of integrating improvement of *culture or diversity metrics into the performance measures of senior executives* under the Company's compensation incentive plans."<sup>40</sup> There is reason to be optimistic about the outcome of this proposal, as Trillium has withdrawn it because Nike has committed to engage.<sup>41</sup>

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34. *Press Release: 12 U.S. Banks and Tech Giants Targeted with "Median Gender Pay Gap" Shareholder Proposal*, ARJUNA CAPITAL, 2020, <http://arjuna-capital.com/news/press-release-12-u-s-banks-and-tech-giants-targeted-with-median-gender-pay-gap-shareholder-proposal/>.

35. *Showdown On Gender Pay Equity In Silicon Valley: Shareholders Press Seven Tech Giants To Follow Lead Of Intel, Apple On Fair Treatment Of Women*, ARJUNA CAPITAL, 2020, <http://arjuna-capital.com/news/showdown-on-gender-pay-equity-in-silicon-valley-shareholders-press-seven-tech-giants-to-follow-lead-of-intel-apple-on-fair-treatment-of-women/>.

36. Arjuna Capital, *supra*, at 34.

37. *Id.*

38. *From Hollywood to Wall Street, investors confront sexual misconduct risk*, S&P GLOBAL, 2018, <https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=43771908&cdid=A-43771908-13093>.

39. *Nike, Inc.—Sexual Misconduct Risk Management—(2018)*, TRILLIUM ASSET MANAGEMENT (2018), <https://trilliuminvest.com/shareholder-proposal/nike-inc-sexual-misconduct-risk-management-2018/>.

40. *Id.*

41. *Id.*

## Shareholder Plaintiffs

With #MeToo revelations triggering double-digit stock price plunges, an increasing number of investors have turned to derivative suits against directors and officers of companies.<sup>42</sup> This increase in #MeToo derivative claims is igniting a discussion among corporate law scholars, D&O insurance experts, and board consultants and advisors on the present and future viability of these types of lawsuits under both state corporate law and federal securities law.<sup>43</sup> While those questions remain important and unresolved, an equally interesting phenomenon is playing out in the background. After the #MeToo movement, shareholder plaintiffs began to root their allegations in “corporate culture.” Notably, the term “culture of sexual harassment” was rarely used prior to the #MeToo movement. In contrast, the very first shareholder derivative suit filed in the #MeToo era was filed against Twenty-First Century Fox and specifically faulted the board for failing to prevent the “culture of sexual harassment” perpetuated by Roger Ailes and Bill O’Reilly. The complaint in that case begins: “This case arises from the systematic, decades-long culture of sexual harassment, racial discrimination, and retaliation that led to a hostile work environment at Fox News Channel (Fox News).” The complaint goes on to refer to a “culture of sexual harassment” or “toxic culture” forty-four times.<sup>44</sup>

Following #MeToo, shareholders began to blame boards for failing to monitor, prevent, or disclose a “culture of sexual harassment” or “boys’ club culture.”<sup>45</sup> This marks a departure from the pre-#MeToo era where shareholders were focused on adequate compliance, training, and reporting systems. It would be a mistake to infer, as some have suggested, that these lawsuits have no impact because they have all been settled or dismissed. As illustrated below,

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42. Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 Colum. L. Rev. 1583, 1583-1668 (2018).

43. There are two main ways for shareholders to hold individual directors personally liable. Shareholders can bring a claim under Delaware law, alleging that the directors breached their fiduciary duties of care or loyalty. Known as a “*Caremark* claim” these lawsuits are notoriously challenging for plaintiffs to prevail on. Shareholders of publicly listed companies can also bring a claim under the anti-fraud provisions of the Securities Exchange Act of 1934, alleging that the directors failed to disclose a material risk to shareholders. While these cases have either been settled or dismissed, there has been an increase in both kinds of claims since #MeToo. See, e.g., Hemel & Lund, *supra*, at 42. See also, Kevin M. LaCroix, *Alphabet Board Hit With Derivative Suits Over Alleged Sexual Misconduct at Google*, THE D&O DIARY, Jan. 13, 2019, <https://www.dandodiary.com/tags/metoo/>.

44. See Verified Derivative Complaint at 1–2, *City of Monroe Emps.’ Ret. Sys. v. Murdoch*, No. 2017-0833 (Del. Ch. filed Nov. 20, 2017).

45. *Id.* See also Verified Derivative Complaint at 24, *Stein v. Knight*, No. 18CV38553 (Or. Cir. Ct. filed Aug. 31, 2018).



irrespective of the actual *legal* risk, companies are responding to the reputational risk of #MeToo claims by increasing gender diversity and addressing other gender power imbalances.

## Employees

The relationship between the employee and the employer is undergoing a transformative shift. As recent surveys confirm, employees' faith in their employers "to do what is right" eclipses their faith in government, the media, or even NGOs.<sup>46</sup> These newfound expectations are evident in the increasing amount of employee activism, with employees demanding that companies take positions on issues, from guns to immigration.<sup>47</sup> Thus, while worker wages are stagnant, workers' voices are getting louder. The #MeToo movement is playing out within this cultural context of employee activism. One dramatic example of this is the "Google Walk Out" in which 20,000 "Googlers" walked out from 65 percent of Google's offices around the world to protest the hero's farewell given to Google executives who were accused of harassment.<sup>48</sup> That walkout was accompanied by a demand for changes at Google, including corporate governance reforms. Specifically, the employees asked for: (1) an end to forced arbitration in cases of harassment and discrimination; (2) a commitment to end inequities in pay and opportunity; (3) a publicly disclosed sexual harassment transparency report; (4) a clear, uniform, globally inclusive process for reporting sexual misconduct; (5) a promotion of the Chief Diversity Officer to answer directly to the CEO and make recommendations directly to the board of directors; and (6) the appointment of an employee representative to the board.<sup>49</sup>

One week later Google's CEO agreed to, "make arbitration optional for individual sexual harassment and sexual assault claims"<sup>50</sup> and "recommit to our

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46. Edelman, *Trust at Work Implications for Employers*, 1-59, EDELMAN TRUST BAROMETER 2019, [https://www.edelman.com/sites/g/files/aatuss191/files/2019-05/2019\\_Edelman\\_Trust\\_Barometer\\_Implications\\_for\\_Employee\\_Experience.pdf?utm\\_source=downloads&utm\\_campaign=trust\\_barometer](https://www.edelman.com/sites/g/files/aatuss191/files/2019-05/2019_Edelman_Trust_Barometer_Implications_for_Employee_Experience.pdf?utm_source=downloads&utm_campaign=trust_barometer).

47. *Id.*, at 38. See Tom C.W. Lim., *Incorporating Social Activism*, 98 BOSTON UNIV. LAW REV. 1535, 1535 - 1605 (2018).

48. Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES, Nov. 1, 2018, <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html>.

49. Claire Stapleton et al., *We're the Organizers of the Google Walkout. Here Are Our Demands*, THE CUT, Nov. 1, 2018, <https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html>.

50. Sundar Pichai, *A Note to Our Employees*, GOOGLE, Nov. 8, 2018, <https://www.blog.google/inside-google/company-announcements/note-our-employees/>.

company-wide OKR<sup>51</sup> around diversity, equity, and inclusion again in 2019, focused on improving representation—through hiring, progression, and retention—and creating a more inclusive culture for everyone.”<sup>52</sup> Google has, predictably, ignored the key governance reforms. But the very same day that the CEO issued his statement, Google employees publicly doubled down on their demands.<sup>53</sup> As this story continues to unfold, some critics question the efficacy of this worker activism, pointing to the Google employees’ relative lack of bargaining power. While it is true that many of these employees’ demands remain unanswered, their advocacy continues and they are beginning to coordinate their efforts with shareholders and regulators, which could prove effective. This development is encouraging and could create an entirely new avenue for corporate accountability.

## Boards Respond by Addressing Power Imbalances

The preceding section described how investors and employees are asking corporate boards to address the risk of sexual harassment by increasing gender diversity, addressing pay equality, and removing contractual provisions such as mandatory arbitration that have operated to silence women. The next obvious question is whether these pleas are falling on deaf ears. Cynics claim that corporate boards are merely paying lip service to quell the tide and that any reforms are either merely symbolic or too marginal to have any lasting impact. This section takes aim at that conclusion and argues that the changes we are seeing, while still not widespread, are potentially transformative because they address power differentials.

One stark example of this is Signet Jewelers, whose CEO Mark Light was alleged to have condoned and participated in a “culture of sexual harassment.”<sup>54</sup>

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51. *Id.* “OKR” refers to Objectives and Key Results.

52. Pichai, *supra*, note 50.

53. Claire Stapleton et al., *#GoogleWalkout update: Collective action works, and we need to keep working. True equity depends on it*, MEDIUM, Nov. 8, 2018, <https://medium.com/@GoogleWalkout/googlewalkout-update-collective-action-works-but-we-need-to-keep-working-b17f673ad513>.

54. In re Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728-JMF (S.D.N.Y. filed Mar. 22, 2018), 61. For the most recent complaint in the case as of this writing, see Fifth Amended Class Action Complaint for Violations of the Federal Securities Laws, In re Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728-JMF (S.D.N.Y. filed Mar. 22, 2018) [hereinafter Signet Jewelers Complaint]. For earlier pleadings, see Second Amended Class Action Complaint for Violations of Federal Securities Law, Dube v. Signet Jewelers Ltd., No. 1:16-cv-06728-JMF (S.D.N.Y. filed Apr. 3, 2017); Complaint for Violation of the Federal Securities Laws, Irving Firemen’s Relief & Ret. Sys. v. Signet Jewelers Ltd., No. 1:17-cv-02845 (S.D.N.Y. filed Mar. 28, 2017); Class Action

While Signet Jewelers chose to defend the allegations that shareholders made against the company in the shareholder derivative lawsuit, it also implemented significant governance reforms. First, Signet replaced Mark Light with its first female CEO, Virginia Drosos.<sup>55</sup> While a male-dominated board had traditionally led Signet, today it is one of the few boards to have achieved gender parity,<sup>56</sup> and Signet's C-suite is now women-led, which recently earned it accolades from the Bloomberg Gender-Equality Index.<sup>57</sup>

Also illustrative is 21st Century Fox (Fox), which settled a shareholder derivative claim against it the same day that it was filed for \$90 million, one of the largest settlement amounts in a derivative lawsuit to date.<sup>58</sup> While the large settlement made headlines, the *non-monetary terms* of the settlement are far more powerful. Specifically, the settlement required Fox to establish a "Workplace Professionalism and Inclusion Council," which it formally announced on November 20, 2017:

21st Century Fox (21CF) announced today it has established the Fox News Workplace Professionalism and Inclusion Council (the Council), a committee comprising experts in workplace and *inclusion matters*, with a majority serving from outside the company. The Council will advise Fox News and its senior management in its ongoing efforts to ensure a proper workplace environment for all employees and guests, strengthen reporting practices for wrongdoing, enhance HR training on workplace behavior, and further *recruitment and advancement of women and minorities. Authorized by and reporting to the 21CF Board*, through its Nominating and Corporate Governance Committee, the Council will provide

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Complaint for Violations of Federal Securities Laws, Mikolchak v. Signet Jewelers Ltd., No. 3:17-cv-00923 (N.D. Tex. filed Mar. 31, 2017) [hereinafter Mikolchak Complaint] (transferred to the Southern District of New York by Order Granting Agreed Motion to Transfer Venue, Mikolchak, No. 3:17-cv-00923-B (filed Apr. 17, 2017)).

55. Anthony DeMarco, *Signet Jewelers Appoints Virginia "Gina" C. Drosos as CEO*, FORBES, Jul. 17, 2017, <https://www.forbes.com/sites/anthonydemarco/2017/07/17/signet-jewelers-appoints-virginia-gina-c-drosos-as-ceo/#9f19e623f0a8>.

56. Lucinda Shen, *Following Sexual Harassment Allegations, Signet Jewelers' Board Is Now 50% Female*, FORTUNE, Oct. 2, 2018, <https://fortune.com/2018/10/02/following-sexual-harassment-allegations-signet-jewelers-board-is-now-50-female/>.

57. Signet Jewelers, *Signet Jewelers Selected for 2019 Bloomberg Gender-Equality Index, Recognizing Commitment to Advancing Women in the Workplace*, SIGNETJEWELERS.COM, 2019, <https://www.signetjewelers.com/investors/news-releases/news-release-details/2019/Signet-Jewelers-Selected-for-2019-Bloomberg-Gender-Equality-Index-Recognizing-Commitment-to-Advancing-Women-in-the-Workplace/>.

58. Murdoch Complaint, *supra*, at 44.

*written reports to the 21CF Board*, which will be posted on 21CF's website. (emphasis added)<sup>59</sup>

It is telling that all of the Council's members are women with expertise in creating a culture that supports the advancement of women, as opposed to expertise in sexual harassment compliance or training. Moreover, the Council's mandate includes recruiting and advancing women, again emphasizing that addressing power differentials and increasing diversity mitigates the risk of sexual harassment. Finally, the Council was authorized by and has the ear of the board of directors. As a result, the board can't deny knowledge of any "red flags" because the Council is required to provide written and public reports to the board's Nominating and Corporate Governance Committee. It is too early to predict the efficacy of the Council, but it has produced three reports to the board of directors, and each reveals that Fox News is increasing gender and racial diversity at different management levels throughout the organization.<sup>60</sup> Also, when Fox News CEO Paul Rittenberg retired and left a vacancy, the network opted to hire its first-ever woman CEO, Suzanne Scott.<sup>61</sup>

Wynn Resorts, formerly led by Steve Wynn, one of the most powerful men brought down by #MeToo, provides another example. On January 26, 2018, the *Wall Street Journal* published an article recounting allegations against Wynn of sexual misconduct and rape spanning decades, prompting an immediate 10 percent decline in Wynn's stock valuation.<sup>62</sup> By February 6, 2018, Wynn had resigned as chairman and CEO.<sup>63</sup> Investors began agitating for a shakeup on the board soon after. Before the allegations, Wynn's board was comprised of eight

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59. *21st Century Fox Establishes the Fox News Workplace Professionalism and Inclusion Council*, BUSINESS WIRE, Nov. 20, 2017, <https://www.businesswire.com/news/home/20171120006042/en/21st-Century-Fox-Establishes-Fox-News-Workplace>.

60. *Report of the Fox News Workplace Professionalism and Inclusion Council*, FOX NEWS, June 6, 2018, 1- 8, [https://static.foxnews.com/pdf/Council\\_Report.pdf](https://static.foxnews.com/pdf/Council_Report.pdf). See also, Fox News, *Report of the FOX News Workplace Professionalism and Inclusion Council* dated December 26, 2018 1- 4 (2018), [https://static.foxnews.com/pdf/Council\\_Second\\_Report\\_Final.pdf](https://static.foxnews.com/pdf/Council_Second_Report_Final.pdf). See also, Fox News, *Report of the FOX News Workplace Professionalism and Inclusion Council* dated June 13, 2019 1- 4 (2019), [https://static.foxnews.com/pdf/Final\\_WPIC\\_June\\_2019\\_Report.pdf](https://static.foxnews.com/pdf/Final_WPIC_June_2019_Report.pdf).

61. Emily Steel and Michael M. Grynbaum, *Suzanne Scott Named First Female Chief Executive of Fox News*, N. Y. TIMES, May 17, 2018, <https://www.nytimes.com/2018/05/17/business/media/fox-news-suzanne-scott.html>.

62. Alexandra Berzon and Micah Maidenber, *Nevada: Wynn Resorts Executives Ignored Sexual Misconduct Claims Against Steve Wynn*, WALL ST. J., Jan. 26, 2018, <https://www.wsj.com/articles/wynn-resorts-to-settle-nevada-regulators-probe-11548711027>.

63. Maggie Astor and Julie Creswell, *Steve Wynn Resigns From Company Amid Sexual Misconduct Allegations*, N.Y. TIMES, Feb. 6, 2018, <https://www.nytimes.com/2018/02/06/business/steve-wynn-resigns.html>.

directors, only one of whom was a woman. In a move that Wynn's new CEO called a "turning point" for the company, Wynn added three women as independent directors, which included Betsy Atkins, Dee Dee Myers, and Wendy Webb.<sup>64</sup> Today, Wynn's board has nine members, and four of them are women, achieving near gender parity.<sup>65</sup> Wynn also added an executive-level position and named Corrine Clement as vice president of a new Culture and Community Department that "supports diversity and inclusion, gender equality, fair treatment in the workplace, and employee charitable efforts in the communities Wynn Resorts serves."<sup>66</sup> This new department includes a Women's Leadership Forum, which is designed to close the gender gap in management and create equal pay.<sup>67</sup> Unlike the symbolic compliance of the past, which operated outside of the board, the Forum includes participation by the four Wynn female directors who hold "regular town halls, events, and fireside chats to promote engagement and advancement of the female employee base."<sup>68</sup>

Since the #MeToo movement, some boards have become more engaged in overseeing corporate culture and preventing male executives from abusing their positions of power. McDonald's Corp. CEO Steve Easterbrook's recent firing captured headlines in September 2019 and reflects how resolute some boards have become in holding executives accountable.<sup>69</sup> Easterbrook's removal is extraordinary because it was not done in response to any allegation of sexual harassment, but rather a consensual relationship with an employee that violated company policy. A far cry from the boards that allowed unscrupulous and illegal behavior by star executives to go unchecked for years, the McDonald's

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64. Aaron Smith, *Wynn Resorts appoints 3 women to board in a 'turning point'*, CNN, Apr. 18, 2018, <https://money.cnn.com/2018/04/18/news/companies/wynn-women-board-of-directors/index.html>.

65. *Corporate Governance—Board Members, Wynn Resorts LTD.*, <https://wynnresortslimited.gcs-web.com/corporate-governance/board-of-directors>.

66. Maria Armental, *Wynn Resorts Creates "Culture and Community Department" in Wake of Sexual-Misconduct Scandal: Company veteran Corrine Clement leads new department that will also focus on diversity and gender equality*, WALL ST. J., Apr. 9, 2018, <https://www.wsj.com/articles/wynn-resorts-creates-culture-and-community-department-in-wake-of-sexual-misconduct-scandal-1523307931>.

67. Wynn Resorts, *Wynn Resorts Launches Women's Leadership Forum Series with Inaugural Event at Wynn Las Vegas*, 2018, <https://press.wynnlasvegas.com/press-releases/wynn-resorts-launches-women-s-leadership-forum-series-with-inaugural-event-at-wynn-las-vegas/s/97d36392-e135-4bd3-be5b-bb373b772c12>.

68. ValueEdge Blog Staff, *Betsy Atkins: The Aftermath of #MeToo Allegations Against Wynn Resorts*, CEOs #MeToo, BOARD DIVERSITY, BOARDS, <https://valueedgeadvisors.com/2018/08/27/betsy-atkins-the-aftermath-of-metoo-allegations-against-wynn-resorts-ccos/>.

69. Heather Haddon, *McDonald's Fires CEO Steve Easterbrook Over Relationship With Employee*, WALL ST. J., Nov. 4, 2019, <https://www.wsj.com/articles/mcdonalds-fires-ceo-steve-easterbrook-over-relationship-with-employee-11572816660>.

board removed Easterbrook *just three weeks* after learning about the relationship.<sup>70</sup> With quarterly profits as the traditional yardstick by which CEOs are measured, Easterbrook's ouster was even more surprising given McDonald's strong market position. Easterbrook's removal could very well have been a way for the McDonald's board to deflect the increasing scrutiny that the company is facing for sexual harassment in its franchises. From McDonald's employees who filed complaints with the U.S. Equal Employment Opportunity Commission to an employee walkout in thirteen states, the McDonald's board has been in the spotlight for allegedly tolerating a culture of sexual harassment.<sup>71</sup> Regardless of the board's motives, the firing of a CEO is perhaps the most drastic measure a board can take under any circumstances.

To be fair, we can expect that companies in the public eye for #MeToo scandals would attempt to rehabilitate their reputations by making, and broadcasting, visible changes. In many cases, these changes were in response to investor pressure, or even new regulations. Nonetheless, these reforms hold the promise for mitigating sexual harassment risk because they are rooted in addressing the corrupting influence of power. Moreover, given the crescendo of stakeholder demands, reforms are underway throughout the market. Take the identity of power holders, for example. As of 2019, there is no longer a company in the S&P 500 with an all-male board.<sup>72</sup> And in 2018 for the second consecutive year, women and minorities represent half of the new S&P 500 directors.<sup>73</sup> While the pace of change is far slower with respect to the identity of CEOs and executive management, as the McDonald's ouster demonstrated, there is more accountability for these leaders. One clear sign of this is that a boards are amending executive compensation agreements to change the definition of cause and eliminate the "golden parachutes" for perpetrators of sexual harassment.<sup>74</sup> With respect to pay equity, in response to both stakeholder pressure and investor pressure, companies are addressing the gender pay gap through pay equity audits and corrective measures.<sup>75</sup> Finally, as the next chapter details, contractual

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70. *Id.*

71. *Id.*

72. Vanessa Fuhrmans, *The Last All-Male Board on the S&P 500 Is No Longer*, WALL ST. J., Jul. 24, 2019, <https://www.wsj.com/articles/the-last-all-male-board-on-the-s-p-500-is-no-longer-11564003203>.

73. Women on Boards—Gender, HARVARD BUSINESS SCHOOL HBS.EDU, <https://www.hbs.edu/gender/Pages/women-on-boards.aspx>.

74. Jena McGregor, *How #MeToo is reshaping employment contracts for executives*, WASH. POST, Oct. 31, 2018, <https://www.washingtonpost.com/business/2018/10/31/how-metoo-is-reshaping-employment-contracts-executives/>.

75. *Navigating the Growing Pay Equity Movement: What Employers Need to Know About What to Do*, HARVARD BUSINESS REVIEW ANALYTIC SERVICES, 2019, <https://trusaic.com/>

terms such as mandatory arbitration and nondisclosure agreements that seek to silence victims and protect companies from the reputational risks of sexual harassment are slowly being eliminated.<sup>76</sup>

## Conclusion

In summary, as a result to the #MeToo movement, the changes that companies are voluntarily making, or being forced to make by stakeholders or regulators, are focused on corporate culture as opposed to corporate compliance. Specifically, companies today are attempting to address the risk of sexual harassment by removing power imbalances between men and women. Since these reforms are tailored to what social scientists identify as the root cause of sexual harassment, they have the potential to be effective. Admittedly, the “old-boys’ club” is still thriving in corporate America, but the #MeToo movement has shaken the gender power imbalances on which it is built.

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wp-content/uploads/2019/09/HBR\_Trusaic\_Navigating\_the\_Growing\_Pay\_Equity\_Movement.pdf.

76. Catherine Fisk, *Nondisclosure Agreements and Sexual Harassment: #MeToo and the Change in American Law of Hush Contracts*, *infra*, chapter 38.



# WORKSHOP

## 2B

# STILL BROKEN

EXECUTIVE SUMMARY

SEXUAL HARASSMENT AND  
MISCONDUCT IN THE LEGAL  
PROFESSION A NATIONAL STUDY



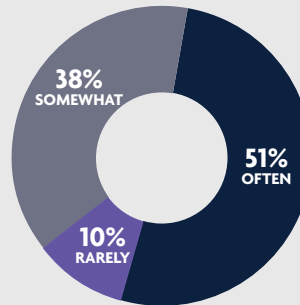
WOMEN LAWYERS ON GUARD

# SURVEY AT A GLANCE\*

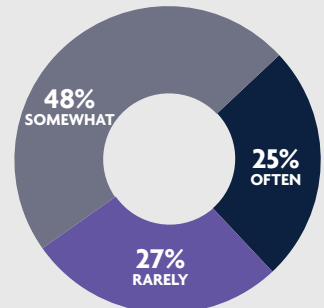
Women Lawyers On Guard's *Still Broken: Sexual Harassment and Misconduct in the Legal Profession*, a report on its national Survey, reflects significant, current evidence of sexual misconduct and harassment. The system of addressing sexual harassment in the legal profession is "still broken."

## Culture

By Frequency of Harassment  
30 Years Ago and Current



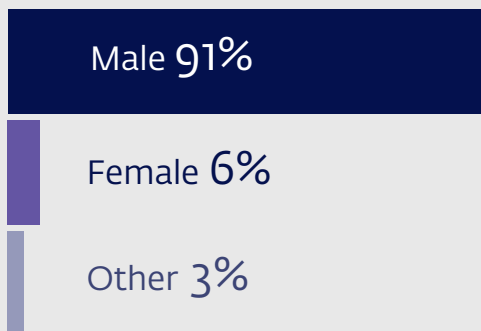
30 Yrs Ago



Current

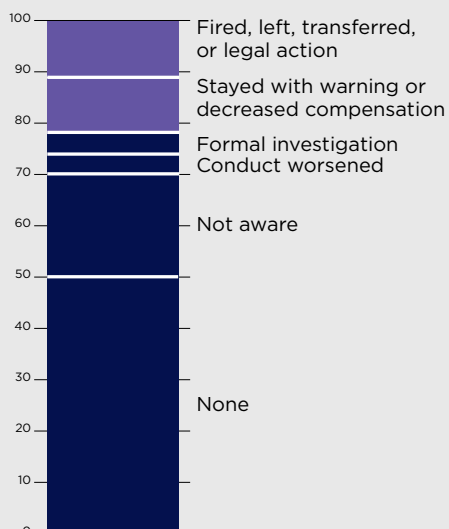
## Harasser

Gender



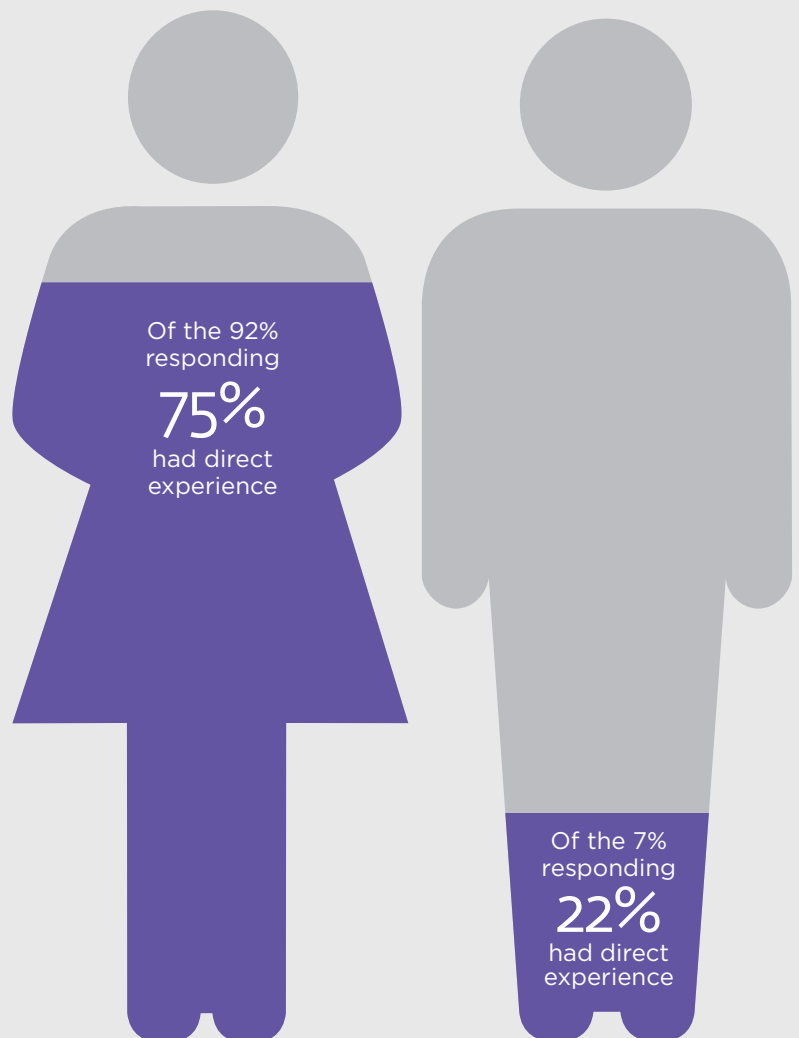
## Harasser

Consequences



## Respondents Direct Experience

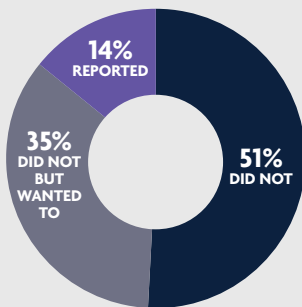
By Gender



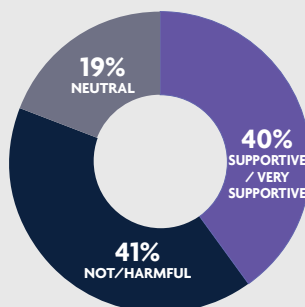
**Culture**  
By Behavior  
Current

Sexual Ridicule  
Sexualized Name-Calling  
Unwanted Requests for Dates  
Unwanted Communications of a Sexual Nature  
Intrusive Sexually Explicit Questions  
Offensive jokes  
Attractiveness Ratings  
Sexual Sounds or Gestures  
Ogling/Leering  
Stalking  
Direct or Indirect Threats/Bribes  
Displays of Explicit Materials  
Attempted or Actual Sexual Assault

**Reporting**  
By Respondents  
Current



**Reporting**  
By Support Level  
Current



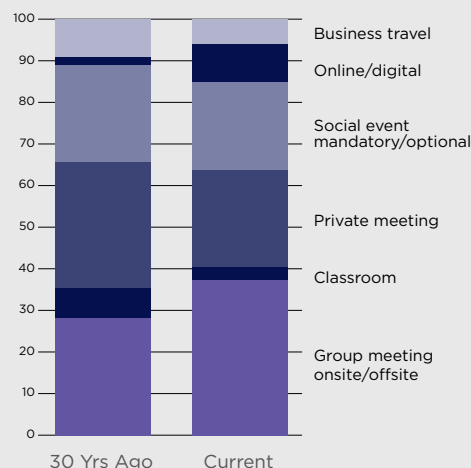
**Reporting**  
Barriers  
30 Years Ago and Current



**Reporting**  
Impact on Respondents



**Incidents**  
By Setting  
30 Years Ago and Current



A brief discussion of the Survey's six most salient findings and its conclusion can be found in the Executive Summary. The Full Report is at this [link](#).

\* For ease of presentation, all percentages in the Report have been rounded to the nearest whole number.


*"I was raped by a board member/  
customer [of a non-profit], who was  
allowed to voluntarily resign from  
the board, but [he] faced no other  
consequence and I am expected to  
still deal with him."*

## EXECUTIVE SUMMARY\*

In a nutshell, as revealed by the Women Lawyers On Guard (WLG) Survey on Sexual Misconduct and Harassment in the Legal Profession (Survey), the system of addressing sexual harassment in the legal profession is still broken and the goal of utilizing the full talents of everyone in the profession, particularly of women, will not be met until these flaws are acknowledged, understood and effectively addressed.

\*For full report including Recommendations and additional quotes from respondents, go to [www.womenlawyersonguard.org/still-broken/](http://www.womenlawyersonguard.org/still-broken/).





*"A male lawyer invited me to interview right out of law school, but instead offered me crappy pay, [and] then tried to get me to give him a blow job."*

*"A judge put his hands under my suit jacket to cop a feel . . . in his chambers."*

Individuals in all positions and at all levels of the legal profession are currently experiencing a broad spectrum of sexual misconduct and harassing behaviors. These behaviors cause significant, deleterious injury to the individuals being harassed, their organizations, and the entire legal profession. They inhibit productive advancement, retention and satisfaction in the profession and cause untold economic and psychological damage.

**The Survey.** In August of 2019, Women Lawyers On Guard, a national network of women and men that works to protect and defend equality, justice, and equal opportunity for all, completed a nationwide confidential Survey to determine the parameters and impact of sexual misconduct and harassment experienced by the legal profession. (Sexual Misconduct and Harassment is sometimes referred to collectively in this Report as “harassment” or “sexual harassment.”)

**Behavior, Not Prevalence, Was Measured.** The purpose of the Survey was *not* to measure the magnitude or prevalence of sexual harassment in the legal profession (e.g., x% of respondents have been harassed), as this has been well documented by others. *Rather, the Survey’s purpose was to dig deeper into the experiences of those who have been harassed.* In doing so, WLG hoped to provide a clearer picture of harassing behaviors and the consequences to the individuals, the organizations and the profession.

“[L]aw firms say they have a “no jerks” policy, but this policy doesn’t apply when that partner brings in a lot of money.”

**Spectrum of Sexual Misconduct and Harassing Behaviors Examined.** *The Survey examined a broad spectrum of behaviors from offensive jokes about sex or gender, to rating of one’s sexuality or sexualized name calling (bitch, whore, slut) to stalking and physical, sexual assault.* While some of the incidents reported in the Survey might not have risen to the level of “legally actionable” sexual harassment, they nevertheless still result in fear, extreme discomfort, sidelining, loss of productivity and advancement opportunities for the individual, and have a significant negative impact on the morale, reputation and productivity of the organization.

**Additional Questions Explored.** The Survey was also designed to capture the

contexts, circumstances, and aftermath of sexual harassment across legal employment practice settings and locations. The Survey asked a series of questions designed to reveal the details of these situations, including the relative hierarchical positions of the harasser and the harassed (including harassment by clients), the practice settings in which the behavior occurred, whether it occurred in group settings or in private, and the context of those settings (business travel, in- or out-of-office meetings, social business events, etc.). The Survey also specifically asked: If the incidents were not reported to employers, why not?

The Survey also examined the consequences to both women and men who were targets of, or witnessed firsthand, unwanted sexual behaviors, as well as the consequences to the persons doing the harassing.

**Changes Over Time.** For further context, many questions asked the respondents to categorize the time frames in which the harassment (or the response to that particular question) occurred, in five to ten-year increments going back 30 years or more. *Knowing when incidents occurred enabled WLG to parse current from past conduct and, in certain circumstances, analyze changes over time.*

**Dissemination of the Survey; Respondent Demographics.** WLG disseminated the confidential Survey nationwide through many different channels, including bar associations and their memberships, online groups and individuals’ networks. WLG directed it to and garnered responses from both lawyers and non-lawyers (who worked with lawyers) in private practice, the government, in-house, the judiciary, associations, non-profits, and law schools. Of the more than 2120 people who responded to the Survey, 92% identified as female and 7% as male (less than 1% preferred to self-describe or not to answer this question). The distribution of race and ethnicities paralleled that of lawyers in the legal profession and the age of respondents fell within a “bell curve.”



# THE SURVEY'S SIX MOST SALIENT FINDINGS

## *The Extent and Breadth of Misconduct/Harassment Are Insidious and Alarming.*

A broad spectrum of sexual misconduct and harassing behaviors—from criminal to civilly actionable to simply unconscionable—continues to plague all walks of the legal profession. This situation exists notwithstanding concerted efforts of employers to provide sexual harassment policies and training. In fact, sexual harassment by partners and supervising attorneys does not appear to have abated in the last 30 years. And, **in many workplaces, harassment remains embedded within the**

**culture.** Harassment by clients and opposing counsel also occurs and is particularly disturbing, given the difficulty of addressing these situations. Despite these findings, in the course of preparing the Survey, WLG heard many anecdotal comments from lawyers who thought that harassing behaviors were a thing of the past. While it is possible that these people are just not experiencing or hearing about this behavior and therefore do not believe that it still exists, the Survey demonstrates otherwise.

## *Reporting Systems Intended to Discourage and Capture Harassing Incidents Are Mostly Not Working.*

Most people do not report sexual harassment and very significant barriers to reporting still exist. **Reasons for not reporting have remained stubbornly consistent over the last 30 years**, including fear of job loss and other negative career repercussions, concerns about safety, the person to report to is the harasser, and doubts about whether reports will be believed. When the people harassed reported the behaviors, there was almost an equal chance they would encounter non-supportive or harmful reactions, rather than supportive ones, from these reporting channels.

*“... I was worried I would be blamed for somehow provoking or encouraging the behavior... I didn't want to be perceived as unfriendly so I didn't feel comfortable being more assertive against the harasser. He was later fired for sexually assaulting a summer associate, and I wish I had reported him earlier because the later incident may have been prevented.”*

## *Most Harassers Face Few to No Adverse Consequences.*

Half of respondents reported that there were no consequences to the harasser even after they reported the incidents. Many more did not know if their harasser faced any consequences because the employers did not inform the respondents of any. **For some respondents, the conduct got worse;** the harassers often continued to work with (and some continued to harass) those they targeted. The most prevalent

consequence reported by respondents was that managers gave the harassers written or verbal warnings, but this happened in only a small percentage of the situations. While respondents often faced significant consequences for years after the harassment, harassers often were promoted or given additional managerial responsibilities and suffered few or no negative consequences (financial or otherwise) for the harassment.

## The “Price” That Women, in Particular, Pay and the Cost to Organizations and the Profession Are Considerable.

The real and lasting consequences to those who have been harassed have been largely a silent story. Respondents believed their careers and personal sense of well-being had been negatively impacted (often significantly and sometimes with lasting economic consequences) whether they reported or not. They experienced anxiety about their careers and well-being; feared retaliation; and lost productivity.

*“My career as I knew it was destroyed by sexual harassment. I suffered the loss of my job . . . It took me two decades to recover . . . Nothing happened to my harasser; he continued in his high-level position.”*

The Survey also revealed “collateral victims,” those left behind without work when a harasser was asked to leave and took

their client base with them. The quotes from respondents focused a light on these experiences and situations and also crystallized the business imperative of sexual harassment to the organization: workplace disruption, loss of productivity, and damage to the organization’s reputation and morale.

**The impact on those harassed—and the fallout on those who remain behind, as well as to the organization—appears to be much more consequential, profound, and debilitating than the consequences to the harassers.**

*“ . . . no one realized the damage that it was doing to women, or the repression it caused in their careers . . . Women or men should be encouraged to speak up and should expect that proper action will be taken to address the wrongs.”*

## People at Every Level—including Women in Powerful Positions—Are Being Harassed.

Not surprisingly, associates, staff attorneys, law students, and people in less “powerful” positions are still being harassed. **More surprisingly, women judges, law partners, general counsels, and law professors reported that they are also currently being harassed.** Senior

70+ year-old lawyers, even today, are on the receiving end of unwanted sexual misconduct and harassment. Similarly, very senior non-attorneys (such as CEOs and Managing Directors) reported being subject to harassment.

## Age, Race/Ethnicity and Gender Identity Are Perceived as Compounding Dimensions.

A significant percentage of respondents believed that their age was an additional and compounding dimension to the incidents they experienced. Although reported less frequently, race/ethnicity were also perceived as significant factors affecting

their experiences. Additionally, respondents perceived that their sexual orientation or gender identity, and to a lesser degree, religion, contributed as a dimension in the situation.

# CONCLUSION

Fifty-five years after Title VII of the Civil Rights Act was enacted, and after at least 30 years of creating and deploying policies, procedures and training programs to address the problem of sexual harassment, people are still being harassed, still fear reporting and retaliation, remain unsure to whom to report, and/or believe that reporting will not end the harassment. **The results of this Survey lead to the inescapable conclusion that the system for addressing sexual harassment in the legal profession is still broken.**

Survey responses show that sexual harassment and misconduct are widespread throughout the legal profession, targeting women (and sometimes men) of all ages and at all career stages, from law student to law firm partner, from intern/clerk to judge, from staff to senior or general counsel. **The Survey demonstrates that this misconduct and harassment is sapping individual productivity and adversely impacting organizational economics at the very least, and destroying careers and organizations' productivity, at the worst.** Given the breadth and magnitude of the incidents reported in the Survey, the legal profession and society at large have much work to do.

In light of the leadership role of lawyers in society and lawyers' awareness of and responsibility to uphold the rule of law, the persistence of this conduct after more than 30 years of attempts to address it, and the failure to deal with its consequences, are unacceptable.

**The legal profession did not create this problem—it is ubiquitous in our society. But it is perpetuating it.** The profession needs to educate, create more effective policies and reporting structures, ensure adequate enforcement, proactively ferret out existing problems and toxic cultures, and

address, discourage and disrupt harassment before it reaches the level of impact.

**Written policies, “check the box” training programs, and anemic reporting systems may comply with the law but they are not enough to root out long-standing, ingrained patterns of behavior and lack of accountability.**

In particular, the profession should initiate deeper and more honest conversations with leaders of organizations, early childhood educators, parents, consultants and lawyers—men and women—in every position within the profession. It should craft new policies and enforcement mechanisms to remove the biggest obstacles in the current system: difficulty in reporting incidents and lack of support for those who do, the absence of transparency and effective consequences to the harassers, and the failure to ensure that both men and women have sufficient understanding, education and training to deal with the situation when it occurs. It is long past time for the harassers to experience appropriate and transparent consequences for their harmful behavior and for those who speak out to be supported, not suppressed.

**The time for action is now. We can and must do better.**

*“Ultimately, this is all about power and respect (or lack thereof) in the workplace . . . [T]he powerful still protect each other . . . there is still enormous pressure not to challenge the powerful. I believe that we still have a long way to go in terms of changing mindsets in the legal profession.”*

# TAKE ACTION

ONE RESPONDENT URGED US:

*“Keep pursuing the work of this survey so change can happen.”*

## HERE'S HOW YOU CAN BE PART OF THE CHANGE, TOO.



### JOIN US

No fee to join, we need your support, and we only communicate when we have something important to tell you. [JOIN HERE](#)



### DONATE: SUPPORT WLG'S NEXT INITIATIVE

By donating to WLG you will be supporting “Conversations With Men” our next initiative aimed at finding pathways to create more ethical, safe and productive work environments for everyone. [DONATE HERE.](#)

*“Conversations With Men”* Professionally facilitated small group conversations about practicing law in the #MeToo era. The goal: to empower men (and women) to have professional relationships at work without harassment or bullying. Discussions will include, for example, fear of false accusations, confusion about appropriate behavior, bystander action, and the backlash against mentoring and working with women.



### SHARE THIS REPORT WIDELY

Downloadable digital versions are available at [www.womenlawyersonguard.org/still-broken/](http://www.womenlawyersonguard.org/still-broken/). There are 2 versions: 1) an abbreviated version that includes SURVEY AT A GLANCE, EXECUTIVE SUMMARY, and TAKE ACTION or 2) a full report that includes the abbreviated version and full report together. [SHARE HERE.](#)



## VOLUNTEER

We are a volunteer-driven organization and currently are seeking assistance with grant proposals and our website. If you are passionate about our initiatives and are looking to be part of the change needed in our profession, send an email to [camron@womenlawyersonguard.org](mailto:camron@womenlawyersonguard.org) and let us know how you would like to support WLG.



## RESOURCES

National Women's Law Center/Time's Up Legal Defense Fund:  
[www.nwlc.org/times-up-legal-defense-fund/](http://www.nwlc.org/times-up-legal-defense-fund/)

National Partnership for Women and Families:  
[www.nationalpartnership.org/our-work/economic-justice/sexual-harassment.html](http://www.nationalpartnership.org/our-work/economic-justice/sexual-harassment.html)

EEOC: [www.eeoc.gov/laws/types/sexual\\_harassment.cfm](http://www.eeoc.gov/laws/types/sexual_harassment.cfm)

The Purple Campaign: [www.purplecampaign.org](http://www.purplecampaign.org)



## RECOMMENDATIONS

The focus of this Report is on the results of the Survey. Volumes could be (and have been) written on what can and should be done to address sexual harassment in the legal profession. But the time for just writing has passed and WLG hopes that the legal profession will use this Report to:

- Seek better understanding of the nature and origin of problem behaviors and their consequences to individuals and organizations through frank and nuanced conversations;
- Develop more tailored and effective strategies to address and prevent sexual harassment in the future;
- Identify vulnerabilities in organizational practices and problem cultures (including those that create or maintain power imbalance) and implement change;
- Create concrete intervention structures; and
- Identify and implement more effective reporting and accountability tools.

Each of these concepts can be unpacked and implemented in numerous effective ways at all levels and in all settings. WLG and others have identified robust recommendations and best practices to address sexual harassment in the legal profession, and WLG strongly suggests that they be put into practice.

# ACKNOWLEDGMENTS

WLG extends special thanks to the following organizations and individuals for their assistance in this significant research initiative for the legal profession:

- **The Respondents**
- **Nextions LLC:** Dr. Arin Reeves, Esq. President and Lead Researcher and staff.
- **American University Washington College of Law:** Billie Jo Kaufman, retired Associate Dean of the Law Library; Bryan Rapp, head of the IT Department; and Babak Zarin, AU student
- **The Boards of Directors of WLG and Women Lawyers On Guard Action Network, Inc.**
- **JS Plank & DM DiCarlo Family Foundation**
- **Disseminators of the Survey:** Members and Friends of WLG and the following organizations\*

## State and Local Bar Associations (alphabetical by state)

Women Lawyers Section–Birmingham Bar Association

Anchorage Association of Women Lawyers

Arizona Women Lawyers Association

Lawyers Club of San Diego

Women Lawyers of Sacramento

California Women Lawyers

Florida Association for Women Lawyers

Hawaii Women Lawyers

Idaho Women Lawyers

Women's Bar Association of Illinois

Polk County (Iowa) Women Attorneys

Kansas Women Attorneys Association

Wichita Women Attorneys Association

Women Lawyers Association of Jefferson County (Kentucky)

Women's Bar Association of Massachusetts

Women Lawyers Association of Michigan

Minnesota Women Lawyers

Mississippi Women Lawyers Association

Northern Nevada Women Lawyers Association

New Hampshire Women's Bar Association

Women in Law Section, New York State Bar Association

New York City Recruitment Association (NYCRA)

North Carolina Association of Women Attorneys

Ohio Women's Bar Association

Rhode Island Women's Bar Association

South Carolina Women Lawyers Association

Young Lawyers Section; State Bar of South Dakota

Houston Association of Women Lawyers

Texas Women Lawyers

Women Lawyers of Utah

Washington Women Lawyers

Washington State Supreme Court Gender and Justice Commission

Association for Women Lawyers (Wisconsin)

Women's Bar Association of the District of Columbia

Hispanic Bar Association–District of Columbia

## National Groups

ALPS

Boss Lady, Esq.

Empowering Women in Law Leadership

Fearless Women's Network

Girl Attorney

International Bar Association

JAMS

Law Mamas

Law School Memes for Edgy T14s

Lawyer Moms of America

Military Spouse JD Network

Mothers Esquire

Ms. Esquire

National Association for Law Placement (NALP)

National Association of Women Judges

National Association of Women Lawyers

National Bar Association

National Conference of Women's Bar Associations

National Personal Injury Lawyers Association

Perfectly Paralegal

Professional Development Consortium

The Purple Campaign

Women in Law—UTexas List Serve

Women Owned Law

\*If other organizations also sent the Survey to their members/networks, thank you! and please send an email to [camron@womenlawyersonguard.org](mailto:camron@womenlawyersonguard.org) to be added to our list.

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**Women Lawyers On Guard Inc.** (WLG), a 501 (c)(3) tax-exempt organization, is a national network of women and men harnessing the power of the law to protect and defend equality, justice and equal opportunity for all. We match volunteers with the legal needs of other non-profits that share our mission, sign onto amicus briefs, and work to address sexual misconduct and harassment, women's health, gender pay equity, and other salient issues in the legal profession or impacting women and families.

**Women Lawyers On Guard Action Network, Inc.**, a 501 (c)(4) tax-exempt organization, actively advocates in support of its mission, particularly on issues impacting women, lawyers and families.

**Nextions LLC** is a leading consulting and research firm for innovative leadership and inclusion solutions in the workplace. It develops presentations, workshops, and keynote addresses using cutting edge research developed in-house, as well as research produced through other organizations, providing a unique experience that is tailored to each organization's particular needs.

***Dedicated to those persons who have spoken up,  
those who can't, those who have endured,  
and those who are enduring.***

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**WOMEN LAWYERS ON GUARD INC.**

P.O. Box 100551

Arlington, VA 22210

Visit us at: [www.womenlawyersonguard.org](http://www.womenlawyersonguard.org)

***"It's not just a  
women's issue."***



# PLENARY 3

# **REPORT OF INVESTIGATION INTO ALLEGATIONS OF SEXUAL HARASSMENT BY GOVERNOR ANDREW M. CUOMO**



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Cleary Gottlieb Steen & Hamilton LLP

**August 3, 2021**

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## EXECUTIVE SUMMARY

We, the investigators appointed to conduct an investigation into allegations of sexual harassment by Governor Andrew M. Cuomo, conclude that the Governor engaged in conduct constituting sexual harassment under federal and New York State law. Specifically, we find that the Governor sexually harassed a number of current and former New York State employees by, among other things, engaging in unwelcome and nonconsensual touching, as well as making numerous offensive comments of a suggestive and sexual nature that created a hostile work environment for women. Our investigation revealed that the Governor's sexually harassing behavior was not limited to members of his own staff, but extended to other State employees, including a State Trooper on his protective detail and members of the public. We also conclude that the Executive Chamber's culture—one filled with fear and intimidation, while at the same time normalizing the Governor's frequent flirtations and gender-based comments—contributed to the conditions that allowed the sexual harassment to occur and persist. That culture also influenced the improper and inadequate ways in which the Executive Chamber has responded to allegations of harassment.<sup>1</sup>

### The Governor's Sexually Harassing Conduct

The Governor's sexually harassing conduct, established during our investigation and described in greater detail in the factual findings of this Report, includes the following:

- *Executive Assistant #1.*<sup>2</sup> Since approximately late 2019, the Governor engaged in a pattern of inappropriate conduct with an executive assistant ("Executive Assistant #1"), who is a woman. That pattern of conduct included: (1) close and intimate hugs; (2) kisses on the cheeks, forehead, and at least one kiss on the lips; (3) touching and grabbing of Executive Assistant #1's butt during hugs and, on one occasion, while taking selfies with him; and (4) comments and jokes by the Governor about Executive Assistant #1's personal life and relationships, including calling her and another assistant "mingle mamas,"<sup>3</sup> inquiring multiple times about whether she had cheated or would cheat on her husband, and asking her to help find him a girlfriend. These offensive interactions, among others, culminated in an incident at the Executive Mansion in November 2020 when the Governor, during another close hug with

---

<sup>1</sup> As set forth below in the Relevant Law section, discrimination in the workplace on the basis of sex or gender and retaliation for complaints about such discrimination violate Title VII of the Civil Rights Act of 1964, Section 1983 (42 U.S.C. § 1983), and New York State Human Rights Law (N.Y. Exec. Law § 290, *et seq.*).

<sup>2</sup> Many of the individuals we interviewed during our investigation expressed concern and fear over retaliation and requested that, to the extent possible, their identities not be disclosed. Thus, we have sought to anonymize individuals as much as possible, while ensuring the Report's findings and the bases for our conclusions can be fully understood. We have not anonymized individuals whose identities are already publicly known, individuals whose conduct is implicated in the sexual harassment and retaliation allegations, or those who did not raise any concerns about retaliation. In certain instances, we have named individuals in one context but sought to anonymize them in others where, in our judgment, the specific identity was not necessary to understand the context.

<sup>3</sup> Executive Assistant #1 Tr. 95:9–16; Alyssa McGrath Tr. 50:15–52:3. Where on-the-record testimony was taken of witnesses, we cite to the page and line numbers of the transcripts. This Report also includes information obtained from interviews conducted, as well as documents collected during the investigation, some of which are attached to an Appendix and cited to as Exhibits ("Ex.").

Executive Assistant #1, reached under her blouse and grabbed her breast. For over three months, Executive Assistant #1 kept this groping incident to herself and planned to take it “to the grave,”<sup>4</sup> but found herself becoming emotional (in a way that was visible to her colleagues in the Executive Chamber) while watching the Governor state, at a press conference on March 3, 2021, that he had never “touched anyone inappropriately.”<sup>5</sup> She then confided in certain of her colleagues, who in turn reported her allegations to senior staff in the Executive Chamber.

- *Trooper #1.* In early November 2017, the Governor briefly met a New York State Trooper (“Trooper #1”), a woman, at an event on the Robert F. Kennedy Bridge (the “RFK Bridge,” also known as the Triborough Bridge). After meeting Trooper #1, he spoke with a senior member of his protective detail (“Senior Investigator #1”) about seeking to have Trooper #1 join the Protective Services Unit (“PSU”), the unit of the New York State Police that is in charge of protecting the Governor and works in close vicinity of the Governor. Trooper #1 was then hired into the PSU, despite not meeting the requirement to have at least three years of State Police service to join the PSU. In an email to Trooper #1 shortly after the RFK Bridge event, Senior Investigator #1 noted, attaching a vacancy notice with a two-year service requirement (as opposed to three years), “Ha ha they changed the minimum from 3 years to 2. Just for you.”<sup>6</sup>

After Trooper #1 joined the PSU, the Governor sexually harassed her on a number of occasions, including by: (1) running his hand across her stomach, from her belly button to her right hip, while she held a door open for him at an event; (2) running his finger down her back, from the top of her neck down her spine to the middle of her back, saying “hey, you,”<sup>7</sup> while she was standing in front of him in an elevator; (3) kissing her (and only her) on the cheek in front of another Trooper and asking to kiss her on another occasion, which she deflected; and (4) making sexually suggestive and gender-based comments, including (a) asking her to help him find a girlfriend and describing his criteria for a girlfriend as someone who “[c]an handle pain,”<sup>8</sup> (b) asking her why she wanted to get married when marriage means “your sex drive goes down,”<sup>9</sup> and (c) asking her why she did not wear a dress. Trooper #1 found these interactions with the Governor not only offensive and uncomfortable, but markedly different from the way the Governor interacted with members of the PSU who were men, and she conveyed these incidents contemporaneously to colleagues. Several other PSU Troopers corroborated Trooper #1’s allegations, including some

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<sup>4</sup> Executive Assistant #1 Tr. 182:23–24, 187:8–13.

<sup>5</sup> *New York Gov. Andrew Cuomo COVID-19 Press Conference Transcript March 3: Addresses Sexual Harassment Allegations*, Rev (March 3, 2021), <https://www.rev.com/blog/transcripts/new-york-gov-andrew-cuomocovid-19-press-conference-transcript-march-3-addresses-sexual-harassment-allegations>.

<sup>6</sup> Ex. 1 (November 17, 2017 email).

<sup>7</sup> Trooper #1 Tr. 87:20–88:4.

<sup>8</sup> *Id.* at 103:14–19.

<sup>9</sup> *Id.* at 85:12–14.

who had personally witnessed some of the touching and comments as well as the gender-based difference in the way the Governor treated Troopers.

- *Charlotte Bennett*. In a series of conversations in 2020 with an aide, Charlotte Bennett, the Governor made inappropriate comments, including, among many other things: (1) telling Ms. Bennett, in talking about potential girlfriends for him, that he would be willing to date someone who was as young as 22 years old (he knew Ms. Bennett was 25 at the time); (2) asking her whether she had been with older men; (3) saying to her during the pandemic that he was “lonely” and “wanted to be touched”;<sup>10</sup> (4) asking whether Ms. Bennett was monogamous; (5) telling Ms. Bennett, after she told him that she was considering getting a tattoo for her birthday, that if she decided to get a tattoo, she should get it on her butt, where it could not be seen; (6) asking whether she had any piercings other than her ears; and (7) saying that he wanted to ride his motorcycle into the mountains with a woman. These comments by the Governor—as evidenced contemporaneously in numerous text exchanges Ms. Bennett had with others—followed and coincided with discussions she previously had with the Governor about her having been a survivor of sexual assault and made her extremely uncomfortable. They made her so uncomfortable that, following a series of exchanges with the Governor in June 2020, Ms. Bennett reported the interactions to the Governor’s Chief of Staff. While the Executive Chamber moved Ms. Bennett to a different position where she would not need to interact with the Governor in response to Ms. Bennett’s allegations, the Executive Chamber did not report the allegations at the time to the Governor’s Office of Employee Relations (“GOER”), the State agency tasked with conducting harassment investigations for State agencies, and did not otherwise conduct any formal investigation. Instead, the Executive Chamber’s senior staff sought to implement a practice whereby individual staff members who were women were not to be left alone with the Governor.
- *State Entity Employee #1*. In September 2019, the Governor attended an event in New York City sponsored by a New York State-affiliated entity. Following a speech by the Governor, he posed for pictures with other attendees, including with an employee of that State-affiliated entity (“State Entity Employee #1”), who was a woman. While the picture was being taken, the Governor put his hand on State Entity Employee #1’s butt, tapped it twice, and then grabbed her butt. State Entity Employee #1 was “shocked”<sup>11</sup> at the time, and discussed it with a number of friends, family, and co-workers. Following the advice of a friend, she also contemporaneously memorialized the Governor’s inappropriate touching.<sup>12</sup>
- *Virginia Limmiatis*. In May 2017, Virginia Limmiatis attended a conservation event in upstate New York on behalf of her employer (“Energy Company”) at which the Governor spoke. After the event, Ms. Limmiatis stood in a rope line to meet with the

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<sup>10</sup> Bennett Tr. 166:20–167:9; Ex. 2; Ex 3.

<sup>11</sup> State Entity Employee #1 Tr. 44:3–17.

<sup>12</sup> Ex. 4 (email dated the day after the incident with the Governor).

Governor, along with other attendees. She wore a shirt that had the name of the Energy Company written across the chest. When the Governor reached Ms. Limmiatis, he ran two fingers across her chest, pressing down on each of the letters as he did so and reading out the name of the Energy Company as he went. The Governor then leaned in, with his face close to Ms. Limmiatis's cheek, and said, "I'm going to say I see a spider on your shoulder,"<sup>13</sup> before brushing his hand in the area between her shoulder and breasts (and below her collarbone). Ms. Limmiatis was shocked, and immediately informed a number of other attendees of what had happened. Ms. Limmiatis came forward in this investigation after she heard the Governor state, during the March 3, 2021 press conference, that he had never touched anyone inappropriately.<sup>14</sup> As Ms. Limmiatis testified to us, "He is lying again. He touched me inappropriately. I am compelled to come forward to tell the truth . . . I didn't know how to report what he did to me at the time and was burdened by shame, but not coming forward now would make me complicit in his lie, and I won't do it."<sup>15</sup>

- *Lindsey Boylan*. During the period in which Lindsey Boylan served as Chief of Staff to the CEO of the Empire State Development Corporation ("ESD") and later as Deputy Secretary for Economic Development and Special Advisor to the Governor, the Governor, among other things, engaged in the following harassing conduct on the basis of her gender: (1) commented on her appearance and attractiveness, including comparing her to a former girlfriend and describing her as attractive; (2) paid attention to her in a way that led her supervisor at ESD to say that the Governor had a "crush"<sup>16</sup> on her and to ask her whether she needed help in dealing with the Governor's conduct; (3) physically touched her on various parts of her body, including her waist, legs, and back; (4) made inappropriate comments, including saying to her once on a plane, words to the effect of, "let's play strip poker";<sup>17</sup> and (5) kissed her on the cheeks and, on one occasion, on the lips. Our investigation identified corroboration for Ms. Boylan's allegations, including ones the Governor and the Executive Chamber denied. Following Ms. Boylan's public allegation of sexual harassment against the Governor in December 2020 (at a time when she was running for public office), the Governor and the Executive Chamber actively engaged in an effort to discredit her, including by disseminating to the press confidential internal documents that painted her in a negative light and circulating among a group of current and former Executive Chamber employees (although not ultimately publishing) a proposed op-ed or letter disparaging Ms. Boylan that the Governor personally participated in drafting.

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<sup>13</sup> Limmiatis Tr. 32:11–16.

<sup>14</sup> *New York Gov. Andrew Cuomo COVID-19 Press Conference Transcript March 3: Addresses Sexual Harassment Allegations*, Rev (Mar. 3, 2021), <https://www.rev.com/blog/transcripts/new-york-gov-andrew-cuomocovid-19-press-conference-transcript-march-3-addresses-sexual-harassment-allegations>.

<sup>15</sup> Limmiatis Tr. 58:11–18.

<sup>16</sup> Zemsky Tr. 28:12–20.

<sup>17</sup> Boylan Tr. 126:9–10; Zemsky Tr. 33:14–37:14.

- *Alyssa McGrath.* In his interactions with another executive assistant, Alyssa McGrath, the Governor made inappropriate comments and engaged in harassing conduct, including: (1) regularly asking about her personal life, including her marital status and divorce; (2) asking whether Ms. McGrath would tell on Executive Assistant #1 if she were to cheat on her husband—and whether Ms. McGrath herself planned to “mingle” with men—on the two women’s upcoming trip to Florida, and then calling the two women “mingle mamas”;<sup>18</sup> and (3) staring down her loose shirt and then commenting on her necklace (which was inside her shirt) when Ms. McGrath looked up.
- *Kaitlin.* The Governor met Kaitlin (whose last name has not been publicly reported) at a fundraising event on December 12, 2016. He had pictures taken with her in a dance pose (as the photographs from the event show), which made Kaitlin uncomfortable.<sup>19</sup> Nine days later, the Executive Chamber reached out to Kaitlin to hire her to work with the Governor. Kaitlin was hired and approved to receive a salary of \$120,000 (which was so high that it was laughed at during Kaitlin’s interview for the position). During the year she worked at the Executive Chamber, the Governor: (1) instructed her to act like a “sponge” to soak up knowledge, then proceeded to call her by the name “sponge,” which she found to be embarrassing, condescending, and demeaning;<sup>20</sup> (2) asked about how certain members of his senior staff, known as the “mean girls”<sup>21</sup> were treating her; (3) commented on her appearance on a number of occasions, including saying that an outfit she wore made her look like a “lumberjack”<sup>22</sup> and commenting on her not being “ready”<sup>23</sup> for work if she was not wearing makeup or was not dressed nicely; and (4) on one occasion, asked her to look up car parts on eBay on his computer, which she had to bend over to do, while wearing a skirt and heels, as the Governor sat directly behind her in his office, which made her feel uncomfortable. Kaitlin’s colleagues at the State agency she moved to after she left the Executive Chamber witnessed and corroborated the impact that her experiences at the Executive Chamber had on her, including becoming visibly distressed whenever she had to return to the Executive Chamber’s offices for work.
- *Ana Liss.* During the time that Ana Liss worked as an aide in the Executive Chamber from 2013 to 2015, the Governor: (1) addressed her almost exclusively as “sweetheart” or “darling”;<sup>24</sup> (2) on occasion, kissed her on the cheeks and hand, touched and held her hands, and slid his hand around her lower waist; (3) commented

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<sup>18</sup> Alyssa McGrath Tr. 50:13–52:3.

<sup>19</sup> Ex. 5 (photographs from event).

<sup>20</sup> Kaitlin Tr. 77:14–17, 78:2–10.

<sup>21</sup> *Id.* at 71:11–15.

<sup>22</sup> *Id.* at 83:20–24.

<sup>23</sup> *Id.* at 86:18–23.

<sup>24</sup> Liss Tr. 92:4–9.

on how she looked “lovely”;<sup>25</sup> and (4) asked whether she had a boyfriend. Ms. Liss noted that these interactions were, in her view, inappropriate. She did not complain about or raise these incidents while employed in the Executive Chamber because, she found, “[F]or whatever reason, in his office the rules were different. It was just, you should view it as a compliment if the Governor finds you aesthetically pleasing enough, if he finds you interesting enough to ask questions like that. And so even though it was strange and uncomfortable and technically not permissible in a typical workplace environment, I was in this mindset that it was the twilight zone and . . . the typical rules did not apply.”<sup>26</sup>

- *State Entity Employee #2*. On March 17, 2020, a then-Director at New York State’s Department of Health (“State Entity Employee #2”), who is also a doctor, participated in a press conference with the Governor, during which she performed a live COVID-19 nasal swab test on the Governor. As they were preparing for the press conference (outside the presence of the press), the Governor requested that State Entity Employee #2 not put the swab up his nose “so deep that you hit my brain.”<sup>27</sup> State Entity Employee #2 replied that she would be “gentle but accurate”<sup>28</sup> in conducting the swab test, to which the Governor responded, “[G]entle but accurate, I’ve heard that before.”<sup>29</sup> State Entity Employee #2 felt that the Governor intended to convey a “joke of an implied sexual nature.”<sup>30</sup> Then, at the press conference, in front of the press and cameras, the Governor stated, “Nice to see you, Doctor—you make that gown look good.”<sup>31</sup> State Entity Employee #2 found the Governor’s comments offensive and that they would not have been made to an accomplished physician who was a man.
- *Anna Ruch*. On September 14, 2019, at the wedding party of one of the Governor’s senior aides, the Governor approached a guest, Anna Ruch, shook her hand, and then quickly moved his hands to her back, touching her bare skin where there was a cutout in her dress. Ms. Ruch, feeling uncomfortable, grabbed the Governor’s wrist and removed his hand from her back. At that point, the Governor remarked, “Wow, you’re aggressive,” after which the Governor cupped her face in his hands and said, “can I kiss you?” Without waiting for a response, and as Ms. Ruch tried to move and turn her face away, the Governor kissed her left cheek. Pictures taken by Ms. Ruch’s friend captured the Governor’s kiss and Ms. Ruch’s uncomfortable reaction.<sup>32</sup>

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<sup>25</sup> Liss Tr. 102:14–19.

<sup>26</sup> *Id.* at 80:11–22.

<sup>27</sup> State Entity Employee #2 Tr. 159:3–6.

<sup>28</sup> *Id.* at 159:14–17.

<sup>29</sup> *Id.* at 159:18–20.

<sup>30</sup> *Id.* at 160: 23–161:2.

<sup>31</sup> *Andrew Cuomo New York May 17 COVID-19 Press Conference Transcript*, Rev (May 17, 2020), <https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-may-17-covid-19-press-conference-transcript>.

<sup>32</sup> Ex. 6 (photographs).

Ms. Ruch immediately informed friends of what had happened and how upset she was at the Governor's physical contact.<sup>33</sup>

### **The Governor's Testimony**

In his testimony, the Governor denied inappropriately touching Executive Assistant #1, Trooper #1, State Entity Employee #1, or Ms. Limmiatis in the way they described, and he generally denied touching anyone inappropriately. The Governor did state that he often hugs and kisses people, mostly on the cheek and sometimes on the forehead. While he admitted that he "may"<sup>34</sup> have kissed certain staff members on the lips, without remembering who (at least one other staff member admitted in testimony that the Governor had in fact kissed her on the lips),<sup>35</sup> the Governor testified that he had not kissed Executive Assistant #1 or Ms. Boylan.<sup>36</sup> With respect to Executive Assistant #1, the Governor testified that he did regularly hug her, but claimed that it was Executive Assistant #1 who was the "initiator of the hugs," while he was "more in the reciprocal business."<sup>37</sup> He testified that he "would go along" with tight hugs that Executive Assistant #1 initiated because he did not "want to make any one feel awkward about anything."<sup>38</sup>

With respect to his conversations with Ms. Bennett, the Governor testified that he had "tread[ed] very lightly, because with a victim of sexual assault—and she was clearly fragile and in a delicate place—[he] was very careful" in his conversations with her.<sup>39</sup> He denied saying he would be willing to date "anyone over 22,"<sup>40</sup> saying anything related to age differences in relationships, stating that he was "lonely" and wanted to be "touched,"<sup>41</sup> talking about "monogamy,"<sup>42</sup> discussing a potential tattoo on the butt,<sup>43</sup> or discussing riding into the mountains in his motorcycle with a woman. He variously described those conversations as not having happened or having been misinterpreted by Ms. Bennett. The Governor asserted in his testimony that Ms. Bennett, because of her experience as a sexual assault survivor, "processed what she

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<sup>33</sup> Interviews of other women who have worked in the Executive Chamber revealed that a number of them had interactions with the Governor that they considered to be inappropriate or that made them uncomfortable. As those women did not wish to come forward publicly and did not experience the pattern that some of the employees described above endured, we have not specifically summarized each of these women's experiences and instead have included representative conduct in the factual findings below.

<sup>34</sup> Andrew Cuomo Tr. 218:19–222:3.

<sup>35</sup> Annabel Walsh, a former staff member, testified that she recalled having kissed the Governor on the lips on occasion and that she did not find the kisses uncomfortable. Walsh Tr. 103:21–105:25.

<sup>36</sup> Andrew Cuomo Tr. 222:4–223:15.

<sup>37</sup> *Id.* at 381:7–382:10.

<sup>38</sup> *Id.* at 383:17–19.

<sup>39</sup> *Id.* at 271:13–17.

<sup>40</sup> *Id.* at 297:8–15.

<sup>41</sup> *Id.* at 303:4–304:24.

<sup>42</sup> *Id.* at 308:16–22.

<sup>43</sup> *Id.* at 314:3–315:24.



heard through her own filter,” and that “it was often not what was said and not what was meant.”<sup>44</sup>

The Governor did not dispute that he sometimes commented on staff members’ appearance and attire (although generally only to compliment), and stated that, being “old fashioned,” he sometimes used terms of endearment such as “honey,” “darling,” or “sweetheart.”<sup>45</sup> He also did not dispute that he gave regular hugs and kisses on the cheek and forehead. But he did dispute the way in which those actions had been interpreted by the complainants. Moreover, in his testimony, the Governor suggested that the complainants were—and must be—motivated by politics, animosity, or some other reason. He also expressed his view that this investigation itself—and the investigators conducting the investigation—were politically motivated, an assertion that we saw in the documentary evidence and other witnesses’ testimony was part of the planned response to the investigation almost as soon as it commenced.

Where the Governor made specific denials of conduct that the complainants recalled clearly, as discussed in greater detail below in the factual findings, we found his denials to lack credibility and to be inconsistent with the weight of the evidence obtained during our investigation. We also found the Governor’s denials and explanations around specific allegations to be contrived. For example, he testified that: Executive Assistant #1 was the one who initiated the hugs, not him; Ms. Bennett was the one who raised the topic of potential girlfriends, not him; and he called Executive Assistant #1 and Ms. McGrath “mingle mamas,” but he never talked to them about whether they cheated on their spouses.<sup>46</sup> The Governor’s blanket denials and lack of recollection as to specific incidents stood in stark contrast to the strength, specificity, and corroboration of the complainants’ recollections, as well as the reports of many other individuals who offered observations and experiences of the Governor’s conduct.

### **Impact of the Governor’s Conduct on the Complainants**

As for the impact of the Governor’s conduct on the complainants, each complainant found his conduct to be some combination of humiliating, uncomfortable, offensive, or inappropriate. Executive Assistant #1 described her response to the Governor’s intimate hugs as follows: “I felt that he was definitely taking advantage of me. The fact that he could tell I was nervous. He could tell that I wasn’t saying anything because he had gotten away with it before.”<sup>47</sup> Ms. Bennett summarized her reaction to one of the inappropriate conversations the Governor had with her as follows: “I was scared and I was uncomfortable . . . . But I was really . . . focused almost just on the question he was asking me, because . . . otherwise I would have been like really freaking out.”<sup>48</sup> In a text exchange with a close friend contemporaneously with one conversation with the Governor, Ms. Bennett texted, “Something just happened and I can’t even type it out . . . GOING TO BURST INTO TEARS . . . . Yes, [I’m] like shaking . . . I’m so

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<sup>44</sup> *Id.* at 255:23–256:2.

<sup>45</sup> *Id.* at 242:22–243:3.

<sup>46</sup> *Id.* at 371:14–372:8, 373:24–374:9.

<sup>47</sup> Executive Assistant #1 Tr. 114:23–115:4.

<sup>48</sup> Bennett Tr. 173:24–174:16.

upset and so confused.”<sup>49</sup> For those who worked in State government, the Governor’s conduct adversely impacted their work environment and the professional and personal fulfillment they each sought from their jobs. As Trooper #1 put it, in describing her reaction to the Governor running his hand across her stomach, “I felt . . . completely violated because to me . . . that’s between my chest and my privates.”<sup>50</sup> She continued, “But, you know, I’m here to do a job.”<sup>51</sup> As Ms. Boylan described her interactions with the Governor, “[I]t was deeply humiliating on some level. . . . I was really senior and I had worked my whole life to get to a point where I would be taken seriously and I wasn’t being taken seriously and I worked so hard to be some little doll for the Governor of New York, and that was deeply humiliating.”<sup>52</sup>

### **The Culture of the Executive Chamber That Contributed to the Harassment**

The complainants also described how the culture within the Executive Chamber—rife with fear and intimidation and accompanied by a consistent overlooking of inappropriate flirtations and other sexually suggestive and gender-based comments by the Governor—enabled the above-described instances of harassment to occur and created a hostile work environment overall. As Ms. Bennett described the culture, “It was extremely toxic, extremely abusive. If you got yelled at in front of everyone, it wasn’t any special day . . . . It was controlled largely by his temper, and he was surrounded by people who enabled his behavior . . . .”<sup>53</sup> As a result, when the Governor said inappropriate things, Ms. Bennett said, “I was uncomfortable, but I also was acutely aware that I did not want him to get mad.”<sup>54</sup> Executive Assistant #1 felt similarly: “I think that he definitely knew what he was doing and it was almost as if he would do these things and know that he could get away with it because of the fear that he knew we had.”<sup>55</sup> In describing the dichotomy between fear and flirtation, Ms. Boylan said, “That was his light—I would say that was his ‘if he-liked-you’ toxicity. For most people, when you’re around, you saw the ‘if-he-hated you’ toxicity.”<sup>56</sup>

Ms. McGrath summarized the impact of the culture within the Executive Chamber as follows:

[W]hat makes it so hard to describe every single inappropriate incident is the culture of the place. On the one hand, he makes all this inappropriate and creepy behavior normal and like you should not complain. On the other hand, you see people get punished and screamed at if you do anything where you disagree with him or his

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<sup>49</sup> Ex. 7 (June 5, 2020 text exchange between Ms. Bennett and a friend regarding a conversation with the Governor) .

<sup>50</sup> Trooper #1 Tr. 92:7–12.

<sup>51</sup> *Id.* at 94:9–15.

<sup>52</sup> Boylan Tr. 91:12–23.

<sup>53</sup> Bennett Tr. 82:7–16.

<sup>54</sup> *Id.* at 173:24–174:4.

<sup>55</sup> Executive Assistant #1 Tr. 79:20–80:5.

<sup>56</sup> Boylan Tr. 80:7–10.

top aides. I really just wanted to go to work and be recognized for my work and nothing else.<sup>57</sup>

Even the State Troopers in the PSU developed an understanding that they could not upset the Governor without severe consequences. As Trooper #1 noted, she knew—as did many other Troopers we interviewed—of “horror stories about people getting kicked off the detail or transferred over like little things” that upset the Governor.<sup>58</sup> As she put it, “Everyone knows he’s very vindictive.”<sup>59</sup>

### **The Executive Chamber’s Improper and Retaliatory Response to Allegations of Harassment**

The evidence obtained in our investigation revealed that the complainants’ fears of retaliation were justified. In response to Ms. Boylan’s allegation of sexual harassment, first made in a tweet on December 13, 2020, the Executive Chamber engaged in a series of responsive actions that were intended to discredit and disparage Ms. Boylan. Among other things, senior staff within the Executive Chamber—along with a group of outside advisors—engaged in a series of retaliatory actions, including: (1) disseminating to the press previously confidential and privileged files that related to complaints that had been made against Ms. Boylan prior to her departure from the Executive Chamber; and (2) preparing a proposed op-ed, originally drafted by the Governor, that contained personal and professional attacks on Ms. Boylan and then sharing (both written drafts and the substance) with a number of current and former Executive Chamber employees. Those involved have justified these actions as necessary to respond to what they viewed as misleading statements made by Ms. Boylan about the reasons for her departure, and an appropriate response to what they believed were improper political and retaliatory motives for her allegations. However, the confidential internal documents were released to reporters only after Ms. Boylan made allegations of sexual harassment against the Governor, and we do not find credible the claim that they were released only to rebut other statements Ms. Boylan had made days earlier about the manner in which she departed the Executive Chamber.<sup>60</sup> As for the draft letter attacking Ms. Boylan, although it was never actually published (in part because, as the evidence revealed, many who reviewed it found that it constituted victim shaming that they found inadvisable), its substance was shared with a significant number of current and former Executive Chamber employees who were not otherwise aware of the information in it.<sup>61</sup> As set

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<sup>57</sup> Alyssa McGrath Tr. 199:17–200:2.

<sup>58</sup> Trooper #1 Tr. 93:24–94:3.

<sup>59</sup> *Id.* at 139:8–10.

<sup>60</sup> As discussed in greater detail below, those involved in the decision to disseminate the internal documents relating to Ms. Boylan have stated that they consulted with certain counsel (including the Director of GOER) on that decision, and the Executive Chamber has asserted privilege over the substance of certain of those communications. However, we understand from the testimony of the Director of GOER that he was never shown the documents themselves and simply provided generic disclosure advice. Volforte Tr. 134:2–24. None of the witnesses we interviewed recalled any discussions or considerations of whether disclosing the files might constitute retaliation.

<sup>61</sup> Senior staff also pressured former employees to surreptitiously record telephone conversations with, respectively, Ms. Boylan and Kaitlin (who had tweeted in support of Ms. Boylan), potentially in the hopes of obtaining additional information to use against any women who might speak out. As the recordings were not helpful to the Executive Chamber (Melissa DeRosa, the Secretary to the Governor, admitted, “I did not think it went well,” DeRosa Tr.

forth in greater detail below, we conclude that the responses to Ms. Boylan’s public allegation of sexual harassment against the Governor constituted unlawful retaliation, in that it was conduct that would “dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>62</sup>

Similarly, when Ms. Bennett reported interactions with the Governor that had made her so uncomfortable that she said she no longer wanted to interact with him, the Executive Chamber’s senior staff did not report it to GOER—nor did they conduct any investigation, even though both the Governor’s Chief of Staff at the time, Jill DesRosiers, and Special Counsel at the time, Judy Mogul, found Ms. Bennett to be credible. Ms. DesRosiers and Ms. Mogul also found Ms. Bennett’s June 2020 allegations—including that the Governor seemed to be “grooming” her,<sup>63</sup> asked her if she had been with an older man, asked about age differences in partners, asked her to find him a girlfriend, said that he would be fine with someone as young as 22, told her to get her tattoo on her butt where it could not be seen, said he was lonely and wanted to be touched, said he wanted to ride his motorcycle into the mountains with a woman, and called her Daisy Duke—to be sufficiently serious to implement an informal protocol to try to protect the Governor from being alone with young women on the Executive Chamber staff. Nonetheless, they decided that no report to GOER or investigation was warranted. They rationalized this decision by citing to Ms. Bennett’s statement that she did not “want to make waves” and the view that she had “acted before anything happened.”<sup>64</sup> But the allegations involved sexually suggestive conversations, and any claim to not see that in the Governor’s comments we find to be not credible. In fact, Ms. Bennett plainly had felt so uncomfortable about it that she specifically reported it (despite all the attendant risks), and asked to be moved so that she would no longer have to interact with the Governor. Such circumstances warranted a report to GOER and an investigation, and Ms. Bennett’s desire not to make waves (driven, as she has testified and as shown by contemporaneous texts, by fear of the Governor and retaliation) is not determinative even under the Executive Chamber’s own policies. The New York State Employee Handbook (the “Employee Handbook”) clearly states:

An employee with supervisory responsibility has a duty to report any discrimination that they observe or otherwise know about. A supervisor who has received a report of workplace discrimination has a duty to report it to GOER, or in accordance with the employing agency’s policy, even if the individual who complained requests that it not be reported.<sup>65</sup>

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620:23–25), senior staff testified that they destroyed the recordings. The former employees who made the recordings produced copies of the recordings to us.

<sup>62</sup> *Hicks v. Baines*, 593 F.3d 159, 169 (2d Cir. 2020). The New York State Employee Handbook, which applied to the Executive Chamber, correctly recited the legal standard for retaliation in prohibiting “any action, more than trivial, that would have the effect of dissuading a reasonable person from making or supporting an allegation of discrimination.” Ex. 8 at 39 (New York State Employee Handbook (May 2020)).

<sup>63</sup> Ex. 2 (handwritten notes from Ms. Mogul from conversation with Ms. Bennett, noting “blatant example of grooming”).

<sup>64</sup> Ex. 2.

<sup>65</sup> Ex. 8 at 41–42 (Employee Handbook).

As discussed below, we find that the Executive Chamber failed to comply with its own internal policies in the way it handled Ms. Bennett’s complaint.

### **Assessments of the Governor’s Conduct by Those Familiar with the Executive Chamber**

Although certain current and former members of the Executive Chamber did not take issue with the Chamber’s culture and expressed surprise at the harassment allegations that have emerged publicly, many recognized a particularly “toxic” and “emotionally abusive” environment within the Executive Chamber under Governor Cuomo’s administration. In fact, in discussions among themselves after certain of the sexual harassment allegations had become public, a number of current and former senior staff members recognized the impact that the culture had in enabling the alleged harassment. One former senior staff member expressed to us the shock and dismay she felt at the “abuse” individuals in the Executive Chamber endured, as well as deep discomfort with the example of leadership that was being set by the Governor’s inner circle of advisors.

In a text exchange between another former senior staff member and a current senior staff member of the administration after Ms. Bennett’s allegations became public, a former staff member noted, “What’s crazy is if you or I did what is alleged we’d be fired on the spot no questions asked . . . and it would be the right thing too,” to which the current staff member answered, “that’s the damn truth.”<sup>66</sup> The two continued the next day, after discussing Ms. Boylan’s allegations: “The admin knows its true!!” / “Yes they are already at true equals resign. Our side have lost their way.”<sup>67</sup> And on February 28, 2021, after the Governor’s response to Ms. Bennett’s allegations saying that he was “trying to be a mentor to her,” the former senior staff member wrote: “I believe her 100% . . . [a]nd his stmt was gross. Trying to mentor . . . [y]ou creep.”<sup>68</sup> That same former senior staff member noted on March 2, 2021, “Hopefully when this is all done people will realize the culture—even outside the sexual harassment stuff—is not something you can get away with . . . you can’t berate and terrify people 24/7.”<sup>69</sup> On March 8, 2021, another senior staff member wrote to herself the following:

I’m disgusted that Andrew Cuomo—a man who understands subtle power dynamics and power plays better than almost anyone in the planet—is giving this loopy excuse of not knowing he made women feel uncomfortable. Either he knew exactly what he was doing (likely) or he is so narcissistic that he thought all women wanted these kinds of questions (crazy excuse even to write it). . . . There are several orders of victims in this issue: first and foremost the women who experienced these things with him. Second though, and unrecognized are the staff. We are almost uniformly good people who killed ourselves . . . to accomplish his agenda—for his political

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<sup>66</sup> Ex. 9.

<sup>67</sup> Ex. 10.

<sup>68</sup> Ex. 11.

<sup>69</sup> Ex. 12; *see also* Ex. 13.

glory, and for the feeling that he would make decisions with public service as his driving goal. I feel cheated out of that.<sup>70</sup>

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During the course of our investigation, we interviewed dozens of individuals, who were comprised of complainants, current and former members of the Executive Chamber, State Troopers, other State employees, and others who interacted regularly with the Governor. We have reviewed thousands of documents, including emails, texts, and pictures. We also took sworn testimony from the complainants, as well as the Governor, his senior staff and other key advisers, and other potentially relevant witnesses.

Based on the investigation, and as set forth in greater detail below, we reach the conclusion that the Governor sexually harassed a number of State employees through unwelcome and unwanted touching, as well as by making numerous offensive and sexually suggestive comments. We also conclude that such behavior by the Governor was part of a pattern that extended to his interactions with women outside of State government, and was enabled and facilitated by a culture within the Executive Chamber of secrecy, loyalty to the Governor, and fear, as well as the normalization of inappropriate comments and interactions by the Governor. Finally, we conclude that the Executive Chamber's response to a number of the sexual harassment allegations violated its internal policies and that its response to one complainant's sexual harassment allegation constituted unlawful retaliation.

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<sup>70</sup> Ex. 14 (redacted diary entry of senior staff member).

## BACKGROUND OF THE INVESTIGATION

On March 1, 2021, the Office of the Governor of the State of New York (the “Executive Chamber”) made a referral pursuant to N.Y. Executive Law section 63(8) (“Section 63(8)”) for the New York State Attorney General (“NYAG”), Letitia James, to select independent lawyers to investigate “allegations of and circumstances surrounding sexual harassment claims made against the Governor” (the “Referral”).<sup>71</sup>

In this section, we set forth the legal authority under Section 63(8) for this investigation, as well as the steps we<sup>72</sup> took to conduct a full, fair, and independent investigation.

### **I. Legal Authority Under N.Y. Executive Law § 63(8)**

Section 63(8) permits the NYAG, with the approval of the Governor and when directed by the Governor, to “inquire into matters concerning the public peace, public safety and public justice.”<sup>73</sup> Section 63(8) grants the NYAG, and any deputy or officer so designated by the NYAG, a broad scope of investigative powers. For example, a deputy or other officer designated by the NYAG may subpoena witnesses, compel their attendance, examine them under oath, and require any relevant books, records, or other materials to be turned over, if (1) the Governor empowered the NYAG to inquire into a matter of “public peace, public safety and public justice,” as interpreted in the usual and ordinary sense of those phrases,<sup>74</sup> and (2) there is a “reasonable relation” between the subpoena and “the proper discharge of the executive function” by the Governor.<sup>75</sup>

### **II. Summary of the Investigative Procedure**

The NYAG appointed the investigative team on March 8, 2021, pursuant to the Referral. The NYAG deputized Joon H. Kim, Jennifer Kennedy Park, Abena Mainoo, and Rahul Mukhi of Cleary Gottlieb Steen & Hamilton LLP (“Cleary Gottlieb”) and Anne L. Clark and Yannick Grant of Vladeck, Raskin & Clark, P.C. (“Vladeck”) as Special Deputies to the First Deputy Attorney General to conduct the investigation. A number of other attorneys from Cleary

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<sup>71</sup> Ex. 15 (March 1, 2021 referral letter).

<sup>72</sup> For the avoidance of doubt, “we” and “us,” as used throughout this Report (unless otherwise specified) refers to the Special Deputies and Special Assistants to the First Deputy Attorney General, as appointed for the purposes of this Section 63(8) investigation by the NYAG.

<sup>73</sup> N.Y. Exec. Law § 63(8).

<sup>74</sup> *Matter of Di Brizzi (Proskauer)*, 303 N.Y. 206, 214 (1951).

<sup>75</sup> See *Matter of Sigety v. Hynes*, 38 N.Y.2d 260, 266 (1975). Investigations under Section 63(8) have included investigations into New York’s nursing home industry, see *Sigety*, 38 N.Y.2d at 263, New York’s industry for private proprietary homes for adults, see *Matter of Friedman v. Hi-Li Manor Home for Adults*, 42 N.Y.2d 408, 415–16 (1977) (finding the Deputy Attorney-General had authority to issue subpoenas for the investigation and the subpoena was not overbroad), and “the relationship between organized crime and any unit of Government anywhere in the state,” *Di Brizzi*, 303 N.Y. at 221.



Gottlieb and Vladeck were appointed as Special Assistants to the First Deputy Attorney General to assist with the investigation.<sup>76</sup>

Over the course of our investigation, we issued over 70 subpoenas for documents and other information, and received over 74,000 documents.

We also interviewed 179 individuals and took testimony under oath from 41 of them.<sup>77</sup> These individuals included women who have made allegations of sexual harassment or other inappropriate conduct against the Governor, current and former members of the Executive Chamber, current and former members of the New York State Police (including PSU), Governor Cuomo, and other individuals who we believed could have relevant information.

We received communications from the general public through a tip line consisting of an email address, voice mailbox, and text message line created for the investigation.<sup>78</sup> In total, we received approximately 280 potential tips from members of the public. We reviewed and tracked each potentially relevant communication and took appropriate action, including following up on individuals who had provided potentially relevant information.<sup>79</sup>

On March 9, 2021, in conjunction with our fact-finding work, we provided notice to the Executive Chamber of its obligation to preserve all documents potentially relevant to the investigation.<sup>80</sup>

We also made efforts to protect the confidential and sensitive nature of our investigation and its independence during the investigation. Cleary Gottlieb and Vladeck established internal information barriers and other policies to limit access to substantive information regarding the investigation to members of the investigative team and necessary staff. Further, while Section 63(8) required us to periodically report to the Office of the NYAG,<sup>81</sup> and we consulted on issues relating to the Office's practices and procedures, we made all substantive decisions regarding how to conduct the investigation, as well as all decisions regarding the analysis and conclusions reached in this Report, independently.

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<sup>76</sup> Special Assistants to the First Deputy Attorney General who assisted in the investigation included Andrew Weaver, Avion Tai, Soo Jee Lee, Lorena Michelen, Ye Eun (Charlotte) Chun, Hyatt Mustefa, Lilianna Rembar (law clerk), and Nikkisha Z. Scott from Cleary Gottlieb and Ezra Cukor and Emily Miller from Vladeck.

<sup>77</sup> For certain individuals, we both conducted an interview and took the testimony of the individual.

<sup>78</sup> AG Independent Investigation, <https://www.agindependentinvestigation.com/> (last accessed July 22, 2021).

<sup>79</sup> Much of the information provided to us by members of the public was outside the scope of our investigation, and some of the information was referred as appropriate to the Office of the NYAG for further consideration.

<sup>80</sup> Prior to that, the NYAG had also sent a preservation notice on March 1, 2021.

<sup>81</sup> See N.Y. Exec. Law § 63(8) ("Each deputy or other officer appointed or designated to conduct such inquiry shall make a weekly report in detail to the attorney-general . . .").

## FACTUAL FINDINGS

As noted above, we interviewed, and reviewed the records related to, individuals who have made allegations, publicly or otherwise, of sex-based harassment or other related misconduct by Governor Cuomo, as well as potential witnesses to such allegations, including Governor Cuomo.

### **I. Findings Related to Allegations of Governor Cuomo's Misconduct**

A number of individuals have made allegations of improper conduct by Governor Cuomo, as detailed below. These individuals include several current or former members of the Executive Chamber, employees of other State agencies and State-affiliated entities, and members of the public. We summarize below our factual findings with respect to the complainants' allegations.

#### **A. Former and Current State Employees**

##### **i. Executive Assistant #1**

Executive Assistant #1 works in the Executive Chamber and has provided administrative assistance to various members of the Executive Chamber.<sup>82</sup> Executive Assistant #1's responsibilities have included, among other things, assisting the Governor in managing incoming and outgoing telephone calls, taking dictation, drafting and editing documents, and performing other similar administrative tasks, including at the Executive Mansion on the weekend.<sup>83</sup>

#### **Interactions with the Governor**

Over the course of Executive Assistant #1's employment in the Executive Chamber, the Governor engaged in conduct that demonstrated an increasing familiarity and intimacy with Executive Assistant #1. The Governor's behavior ranged from playful banter about Executive Assistant #1's potential romantic relationships to looking through Executive Assistant #1's social media posts and asking about the marital status and social and dating lives of Executive Assistant #1 and her friend, Alyssa McGrath, who also served as an executive assistant in the Executive Chamber.<sup>84</sup>

As described in greater detail below, over time, the Governor's behavior toward Executive Assistant #1 escalated to more intimate physical contact, including regular hugs and kisses on the cheek (and at least one kiss on the lips), culminating in incidents where the Governor grabbed Executive Assistant #1's butt while they took a selfie in the Executive Mansion, and where the Governor, during a hug, reached under Executive Assistant #1's blouse and grabbed her breast.

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<sup>82</sup> Executive Assistant #1 Tr. 14:3–6, 19:9–25.

<sup>83</sup> *Id.* at 21:6–22:25, 102:21–103:5.

<sup>84</sup> In her testimony, Ms. McGrath corroborated much of Executive Assistant #1's sworn testimony. Ms. McGrath's own allegations regarding Governor Cuomo are detailed later in the Report.

*Development of Relationship and Suggestive Comments.* When Executive Assistant #1 first began to work in the Executive Chamber, one of the Governor’s long-term executive assistants commented to her, after looking Executive Assistant #1 “up and down,” that the Governor would “steal” Executive Assistant #1 from her assigned supervisor.<sup>85</sup> Executive Assistant #1 interpreted this to mean that: “I was a young female, how she looked at me she must have thought I was attractive and the Governor was going to see me and think that I was attractive and want to pull me in to do work for him.”<sup>86</sup> The first day Executive Assistant #1 met the Governor (and after Executive Assistant #1 had introduced herself to the Governor earlier), he walked by her desk on his way out of the office, turned around, and looked Executive Assistant #1 up and down before saying, “Nice to meet [you].”<sup>87</sup> Executive Assistant #1 testified that she felt that the Governor would look her up and down on a regular basis.<sup>88</sup>

While Executive Assistant #1 had been formally assigned to assist other members of the Executive Chamber during her time as an executive assistant, she also began to assist the Governor more directly and at the Executive Mansion starting in or around November 2019.<sup>89</sup>

Executive Assistant #1 testified that the Governor commented on Executive Assistant #1’s appearance and clothing, including telling her she “looked good for [her] age and [for] being a mother” (she is in her early 30s), “it’s about time that you showed some leg” when she wore a dress, and “I don’t like your hair like that” when she wore her hair up.<sup>90</sup> During his testimony, the Governor denied making such comments and that he would “never say” such comments.<sup>91</sup> The Governor in turn testified that he found Executive Assistant #1 to be “very chatty,” “affectionate,” “friendly,” “flirtatious,” and “outgoing.”<sup>92</sup>

On one occasion, when Executive Assistant #1 was working at the Executive Mansion on a weekend, she commented that it was warm in the room.<sup>93</sup> The Governor suggested in response that Executive Assistant #1 take off her zip-up hoodie, which she had been wearing on top of a light tank top.<sup>94</sup> When Executive Assistant #1 replied that she could not take off her hoodie because it would be inappropriate, the Governor again asked that she take off the hoodie.<sup>95</sup> A

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<sup>85</sup> Executive Assistant #1 Tr. 99:5–17. The long-term executive assistant did not specifically recall making such a comment, but stated that if she had, it would have been based on Executive Assistant #1’s competence.

<sup>86</sup> *Id.* at 99:18–25.

<sup>87</sup> *Id.* at 100:19–101:21.

<sup>88</sup> *Id.* at 77:16–23.

<sup>89</sup> *Id.* at 21:6–22:25, 76:23–24.

<sup>90</sup> *Id.* at 74:14–76:15.

<sup>91</sup> Andrew Cuomo Tr. 375:16–377:10.

<sup>92</sup> *Id.* at 364:4–14.

<sup>93</sup> Executive Assistant #1 Tr. 76:23–77:12.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

colleague of Executive Assistant #1 was present and corroborated the incident. Governor Cuomo denied any recollection of this interaction.<sup>96</sup>

The Governor also regularly engaged in banter and friendly conversation with Executive Assistant #1 regarding her marital status, personal life, and relationships. On one occasion, while Executive Assistant #1 was assisting him in his office in the Executive Mansion, the Governor asked Executive Assistant #1 whether she had ever had a boyfriend while married.<sup>97</sup> Executive Assistant #1 replied that she had not.<sup>98</sup> The Governor then asked whether Executive Assistant #1 had kissed or “fooled around” with anyone other than her husband.<sup>99</sup> Executive Assistant #1 continued to answer in the negative until the Governor moved on to another topic.<sup>100</sup> In or around November 2020, while the two were in his office at the Capitol, the Governor again asked Executive Assistant #1, “[H]ave you ever had sex with anyone other than your husband?”<sup>101</sup> Executive Assistant #1 responded she had not.<sup>102</sup> On occasions when Executive Assistant #1 was working on a weekend for the Governor, he would also say things like, “I hope your husband isn’t mad that you’re here today,” or ask Executive Assistant #1 about the status of her marriage.<sup>103</sup>

The Governor’s comments became increasingly suggestive, including one in or around late 2019 or early 2020, when the Governor said to Executive Assistant #1 something to the effect of, “If you were single, the things I would do to you.”<sup>104</sup> Later, in or around January or February 2020, he asked Executive Assistant #1 about the status of Ms. McGrath’s divorce proceedings.<sup>105</sup> Executive Assistant #1 responded that she was trying to keep Ms. McGrath preoccupied, and showed the Governor a photograph of her and Ms. McGrath on Executive Assistant #1’s Instagram account “going out” in Saratoga Springs.<sup>106</sup> In response, the Governor commented that he wished he could also “go out” and socialize with the two women, but that it would be difficult for him to do as a public figure.<sup>107</sup> In his testimony, the Governor denied making this statement and said he may have instead said he would love to go to Saratoga Springs because it is beautiful.<sup>108</sup>

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<sup>96</sup> Andrew Cuomo Tr. 378:9–379:8.

<sup>97</sup> Executive Assistant #1 Tr. 89:6–20.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 89:21–25.

<sup>100</sup> *Id.* at 89:25–90:7.

<sup>101</sup> *Id.* at 90:8–19.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 87:19–88:7.

<sup>104</sup> *Id.* at 88:2–18.

<sup>105</sup> *Id.* at 84:12–85:19.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* Ms. McGrath confirmed she had heard about this exchange from Executive Assistant #1. Alyssa McGrath Tr. 105:18–106:11.

<sup>108</sup> Andrew Cuomo Tr. 396:10–21.

In early 2020, Executive Assistant #1 and Ms. McGrath were assisting the Governor in preparing “State of the State” books when the Governor engaged the two women in a conversation about a trip to Florida that the two women planned to take together in April.<sup>109</sup> The Governor asked Ms. McGrath, who was separated from her husband at the time, whether she planned to go and “mingle” with men during the Florida trip.<sup>110</sup> The Governor then asked Ms. McGrath whether she would “tell on” Executive Assistant #1 if Executive Assistant #1 cheated on her husband while in Florida.<sup>111</sup> The Governor proceeded to refer to both women as “mingle mamas” for the remainder of the day.<sup>112</sup> A March 2, 2020, text message from Ms. McGrath to Executive Assistant #1 also references “mingle mama.”<sup>113</sup> The Governor admitted in his testimony that he had called Executive Assistant #1 and Ms. McGrath “mingle mamas,” but testified that it was in response to Executive Assistant #1 and Ms. McGrath stating that they were “single and ready to mingle.”<sup>114</sup>

On a handful of occasions after he had broken up with his long-term partner, the Governor told Executive Assistant #1 that he was single and lonely, and asked whether she knew anyone who could be his girlfriend, while commenting that he would have to date someone in her late 30s or early 40s due to concerns about how dating someone younger might look to the public.<sup>115</sup> Executive Assistant #1 told him that she was sorry to hear that he was lonely, and “just [sat] there and listen[ed].”<sup>116</sup> The Governor denied having had this conversation,<sup>117</sup> although a number of people have informed us that the Governor talked to them about finding a girlfriend.<sup>118</sup>

With respect to these type of personal conversations, Governor Cuomo generally denied the most suggestive of the comments—such as wishing he could “go out” with Executive Assistant #1 and Ms. McGrath<sup>119</sup> or telling Executive Assistant #1 that it was “about time” she showed off her legs<sup>120</sup>—and testified that it was Executive Assistant #1 who volunteered information about her social and marital life, and that he participated only to go along with her

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<sup>109</sup> Executive Assistant #1 Tr. 95:9–97:23. Executive Assistant #1 recalled the interaction occurring sometime around January 2020, *id.* at 96:2–11, while Ms. McGrath recalled the interaction occurring in late February. Alyssa McGrath Tr. 51:5–10.

<sup>110</sup> *Id.* at 50:22–52:3.

<sup>111</sup> Executive Assistant #1 Tr. 95:9–20; Alyssa McGrath Tr. 51:21–52:3. Ms. McGrath responded jokingly with something like, “What happens in Florida stays in Florida.” *Id.* at 51:21–52:3.

<sup>112</sup> *Id.* at 52:1–3.

<sup>113</sup> Ex. 16 (“What did he write lol mingle mama [emoji]”).

<sup>114</sup> Andrew Cuomo Tr. 371:14–372:8.

<sup>115</sup> Executive Assistant #1 Tr. 85:22–87:4. As noted earlier, Executive Assistant #1 is in her early thirties. *See id.* at 76:12–15.

<sup>116</sup> *Id.* at 87:5–10.

<sup>117</sup> Andrew Cuomo Tr. 374:10–375:15.

<sup>118</sup> *See, e.g.,* Bennett Tr. 167:24–168:25; Cohen Tr. 150:4–151:19; Trooper #1 Tr. 103:11–19.

<sup>119</sup> Andrew Cuomo Tr. 396:13–21.

<sup>120</sup> *Id.* at 377:4–10.

conversations.<sup>121</sup> Executive Assistant #1 denied that this was the case, and specifically noted that she only spoke about her romantic relationships when the Governor asked, rather than volunteering such information. As noted elsewhere in the report, Ms. McGrath corroborated Executive Assistant #1's recounting of these types of conversations generally, as do many others who have told us about questions from the Governor about personal lives and relationship statuses—and the specific conversations in which Ms. McGrath and Executive Assistant #1 were both participants or about which Executive Assistant #1 informed Ms. McGrath soon after the conversation.

*Physical Contact by Governor Cuomo.* Executive Assistant #1 testified that the Governor touched her on several occasions. Some of the touching occurred as part of general interactions involving hugs, greetings, and taking photographs (although often more aggressive than commonplace physical contact), while other incidents involved intentional touching and grabbing of private parts, including the butt and the breast.

At the annual Executive Chamber employee holiday party in 2018, for example, the Governor approached Ms. McGrath and Executive Assistant #1 and suggested that the three of them take a photograph.<sup>122</sup> The Governor took a similar photograph with the two women at the annual holiday party in 2019 as well.<sup>123</sup> At the 2019 holiday party, before taking the photograph, the Governor kissed Ms. McGrath on the forehead and kissed Executive Assistant #1 on the cheek, then posed for a photograph with his hands firmly around both women's ribcages, just below their breasts.<sup>124</sup>

In or around the end of 2019, on the first day Executive Assistant #1 was working at the Executive Mansion alone with the Governor, Governor Cuomo gave Executive Assistant #1 a private tour of the Mansion.<sup>125</sup> As the Governor and Executive Assistant #1 were looking at photographs during the tour at one point, Governor Cuomo "almost pushed his hand along [Executive Assistant #1's] butt," but in a way that was not clear whether he had intended to do so.<sup>126</sup>

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<sup>121</sup> See, e.g., *id.* at 394:13–396:9.

<sup>122</sup> Alyssa McGrath Tr. 91:14–92:17; Ex. 17 (photograph of Executive Assistant #1 and Ms. McGrath with the Governor at 2018 holiday party); Ex. 18 (same); Ex. 19 (same). Ms. McGrath testified that she was surprised that the Governor had approached them, as there were many people at the party. Alyssa McGrath Tr. 94:3–9. Executive Assistant #1 was not assisting the Governor on a regular basis at the time of the photograph. Executive Assistant #1 Tr. 155:13–157:5.

<sup>123</sup> Executive Assistant #1 Tr. 157:11–160:24. An Executive Chamber staff member noted that she believed Executive Assistant #1 and Ms. McGrath had wanted a picture with the Governor at the party and were proud of the ones that were taken.

<sup>124</sup> Ex. 20 (photograph of Executive Assistant #1 and Ms. McGrath with the Governor at 2019 holiday party); Ex. 21 (same); Ex. 22 (photograph of Ms. McGrath and the Governor at 2019 holiday party); Ex. 23 (photograph of Executive Assistant #1 and Ms. McGrath with the Governor at 2019 holiday party).

<sup>125</sup> Executive Assistant #1 Tr. 93:11–95:3. Executive Assistant #1 recalled that, during this tour, Governor Cuomo noted a photograph in the living room of an attractive woman wearing a tight red dress and said something like, "I remember her, she was a real . . . firecracker." *Id.* at 93:23–14.

<sup>126</sup> *Id.* at 94:15–95:3.

As Executive Assistant #1 continued to provide assistance to the Governor at the Executive Mansion throughout 2020, the Governor began to request a hug from Executive Assistant #1 “almost every time” before she left the Mansion.<sup>127</sup> Over time, the hugs felt “closer and tighter,” to the point where:

I knew I could feel him pushing my body against his and definitely making sure that he could feel my breasts up against his body. And was doing it in a way that I felt was obviously uncomfortable for me and he was maybe trying to get some sort of personal satisfaction from it.<sup>128</sup>

Executive Assistant #1 could feel the Governor’s hands running up and down her back during these hugs as well.<sup>129</sup>

During these close hugs, Executive Assistant #1 tried to lean her lower back away from the Governor’s pelvic area, because she “didn’t want any part of [her] body near his pelvic area” and “didn’t want anything to do with whatever he was trying to do at that moment.”<sup>130</sup> And, when the Governor hugged her, he sometimes also kissed her.<sup>131</sup> Most of the kisses were on her cheek—but, on at least one occasion in early 2020, the Governor quickly turned his head and kissed her on the lips.<sup>132</sup> On another occasion, during another hug, the Governor began to rub his hands on Executive Assistant #1’s lower back and said something like, “Does that feel good?”<sup>133</sup> Executive Assistant #1 recalled freezing in place and not knowing what to say in response.<sup>134</sup>

Governor Cuomo denied any recollection of kissing Executive Assistant #1 on the lips.<sup>135</sup> He testified, “I feel confident saying I’ve never kissed [Executive Assistant #1] on the lips,” on the basis that he said he had had very limited interactions with her overall.<sup>136</sup> Although the Governor testified that he did regularly hug Executive Assistant #1, he described her as “an affectionate person” and “a hugger” who was the “initiator of the hugs,” while he was “more in

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<sup>127</sup> *Id.* at 108:3–23.

<sup>128</sup> *Id.* at 111:9–15.

<sup>129</sup> *Id.* at 113:7–15.

<sup>130</sup> *Id.* at 112:11–113:6. The close and intimate hugs are something that other individuals have told us the Governor has done. Karen Hinton, an associate of the Governor from the time that the Governor was Secretary of Housing and Urban Development, has spoken publicly and told us about an incident in December 2000 when the Governor embraced her in a hotel room in a way that felt overly close and intimate.

<sup>131</sup> *Id.* at 108:18–23.

<sup>132</sup> *Id.* at 108:18–110:15.

<sup>133</sup> *Id.* at 114:7–20. Governor Cuomo denied any recollection of saying this. Andrew Cuomo Tr. 386:8–11.

<sup>134</sup> Executive Assistant #1 Tr. 114:7–20.

<sup>135</sup> Andrew Cuomo Tr. 384:25–385:12.

<sup>136</sup> *Id.* at 222:4–24, 224:22–25.



the reciprocal business.”<sup>137</sup> He testified that he “would go along” with tight hugs that Executive Assistant #1 initiated because he did not “want to make anyone feel awkward about anything.”<sup>138</sup>

Executive Assistant #1 testified that although she noticed that the Governor did not hug or kiss her while they were around other people or in the Capitol, she initially tried to justify his behavior as merely being friendly.<sup>139</sup> She also stated that she was generally a friendly and outgoing person, and interacted that way with the Governor as well.<sup>140</sup> When the Governor kissed her on the lips or hugged her closely and aggressively, however, Executive Assistant #1 found that unwelcome and would try to pull away in the manner described above.<sup>141</sup> Executive Assistant #1 testified that she did not act more forcefully in response because she believed if she said anything in response to the Governor’s unwanted advances—or even slapped him—she would be escorted out by the State Police and likely fired from her job.<sup>142</sup> The inappropriate interactions with the Governor left Executive Assistant #1 so nervous that she sometimes left with hives on her neck, a symptom she usually experiences when stressed or nervous.<sup>143</sup> The Governor also recalled seeing Executive Assistant #1 with “blotches” on her neck, which he believed was caused by her nervousness at taking dictation from him.<sup>144</sup> Executive Assistant #1 further testified that she felt the Governor understood that she was uncomfortable: “I felt that [the Governor] was definitely taking advantage of me. He was taking advantage. The fact that he could tell that I was nervous. He could tell that I wasn’t saying anything because he had gotten away with it before.”<sup>145</sup>

On December 31, 2019, Executive Assistant #1 was assisting the Governor in his office at the Executive Mansion when the Governor asked her to take a “selfie” photograph with him.<sup>146</sup> Governor Cuomo stood next to Executive Assistant #1, on her left, as she took a selfie with her right hand.<sup>147</sup> As Executive Assistant #1 held up the camera, the Governor moved his hand to grab her butt cheek and began to rub it.<sup>148</sup> The rubbing lasted at least five seconds.<sup>149</sup>

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<sup>137</sup> *Id.* at 381:5–384:13. Governor Cuomo also testified that Executive Assistant #1 had told him that “she was Italian and Italians are very affectionate people.” *Id.* at 381:7–11.

<sup>138</sup> *Id.* at 381:23–383:19.

<sup>139</sup> Executive Assistant #1 Tr. 109:17–110:7.

<sup>140</sup> *Id.* at 165:19–23 (“I also thought that is one of [the] reasons why the Governor would like me working for him. Because I wasn’t so stoic and stiff. That I would laugh. I would joke back.”).

<sup>141</sup> *Id.* at 110:16–113:6.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 115:12. Executive Assistant #1 testified that, on one of these occasions, she ran into a member of the Executive Mansion’s staff after leaving the Governor’s office while feeling wide-eyed and while her hives were still present. *Id.* at 115:13–116:9. Executive Assistant #1 recalled that the staff member asked whether she was okay. *Id.* We were not able to corroborate this interaction from interviews of Executive Mansion staff.

<sup>144</sup> Andrew Cuomo Tr. 400:14–402:3.

<sup>145</sup> Executive Assistant #1 Tr. 114:23–115:4.

<sup>146</sup> *Id.* at 119:4–120:18.

<sup>147</sup> *Id.* at 120:24–121:15.

<sup>148</sup> *Id.* at 119:4–120:18, 121:17–122:14.

<sup>149</sup> *Id.* at 121:16–122:14.

Executive Assistant #1 was shaking so much during this interaction that her initial selfies with the Governor were very blurry.<sup>150</sup> At the Governor's suggestion, the two of them then sat down and took one more selfie, with the Governor's hands around Executive Assistant #1's waist.<sup>151</sup> The Governor then told Executive Assistant #1 to send the photograph to Ms. McGrath, and directed Executive Assistant #1 not to share the photograph with anyone else.<sup>152</sup>

Immediately following this interaction, Executive Assistant #1 left the Executive Mansion and called Ms. McGrath.<sup>153</sup> Executive Assistant #1 testified that she was uncomfortable and "wanted to tell [Ms. McGrath] so bad what happened," but felt that she could not and was afraid to say anything specific.<sup>154</sup> Instead, Executive Assistant #1 told Ms. McGrath that the Governor "was wild today," and said that the Governor had asked her to not share the photograph other than with Ms. McGrath.<sup>155</sup>

Executive Assistant #1 testified that she was terrified she would lose her job if she shared what had happened and it reached the ears of the Governor's senior staff.<sup>156</sup> She stated:

[T]he way he was so firm with [me] that I couldn't show anyone else that photo, I was just terrified that if I shared what was going on that it would somehow get around. And if Stephanie Benton or Melissa [DeRosa] heard that, I was going to lose my job. Because I knew that I certainly was going to be the one to go.<sup>157</sup>

Ms. McGrath, who received the photograph from Executive Assistant #1, confirmed in her testimony and through contemporaneous text messages that she received the photograph and was informed by Executive Assistant #1 that she was not to share the photograph with anyone else.<sup>158</sup> The Governor testified that he recalled taking a selfie with Executive Assistant #1, but said that

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<sup>150</sup> *Id.* at 119:4–120:18, 121:11–122:14. Executive Assistant #1 testified that she deleted the blurry photographs immediately because, when the Governor asked to see the photographs, she was embarrassed by how blurry they were and did not want him to see how nervous she was. *Id.* at 123:3–10. She cooperated with our efforts to attempt to recover the deleted photographs, but we were ultimately unable to retrieve them.

<sup>151</sup> *Id.* at 119:4–120:18, 122:18–123:2.

<sup>152</sup> *Id.* at 120:3–18. We obtained a copy of the selfie taken while Governor Cuomo and Executive Assistant #1 were sitting. Ex. 24. We also received the text exchange after the photo was sent. Ex. 25 (Ms. McGrath responding with, "Um where is my pic!! / I'm officially jealous!!!! / I need to be photoshopped in to the right of him [emoji]" / "Love this so much"). Executive Assistant #1 testified that she did not know why the Governor wanted her to send the photograph to Ms. McGrath, but guessed that the Governor "wanted to make [Ms. McGrath] jealous" or "wanted to see what her reaction was." Executive Assistant #1 Tr. 123:20–124:4.

<sup>153</sup> Executive Assistant #1 Tr. 127:2–128:18.

<sup>154</sup> *Id.* at 127:2–128:18.

<sup>155</sup> *Id.* Ms. McGrath recalled that Executive Assistant #1 said during the conversation that she was "extremely uncomfortable, extremely nervous," and shaking, and that she had needed to take multiple pictures because they were blurry. Alyssa McGrath Tr. 128:2–20.

<sup>156</sup> Executive Assistant #1 Tr. 128:8–18.

<sup>157</sup> *Id.*

<sup>158</sup> Alyssa McGrath Tr. 130:8–17. A text message from Executive Assistant #1 to Ms. McGrath on January 4, 2020, stating, "He brought up the selfie and definitely only supposed to stay between you and me" is attached as Ex. 26.

the selfie had been at her request, as he testified he does not like to take selfies.<sup>159</sup> The Governor also testified that Executive Assistant #1 was the one who had wanted to send the photograph to Ms. McGrath to make her jealous.<sup>160</sup> Notably, however, we learned during our interviews that Governor Cuomo had asked two other women in the Executive Chamber, on separate occasions, to take a selfie with him and then instructed each woman to send the selfie to a different woman in the Executive Chamber. The Governor denied that his hand had been on Executive Assistant #1's butt during the selfie, and that he had asked Executive Assistant #1 to not share the selfie with anyone, contrary to the testimony of Executive Assistant #1 and contemporaneous text messages between her and Ms. McGrath.<sup>161</sup>

In late 2020, the Governor asked Executive Assistant #1 to compare heights with him and had her put her back against his front, rested his head on Executive Assistant #1's head, and commented to everyone in the room that he was a head taller than Executive Assistant #1.<sup>162</sup> Executive Assistant #1 testified that she felt uncomfortable during the interaction, in part because the Governor's stomach was on her back and she did not "want any part of his pelvic area to be near me."<sup>163</sup> The Governor denied this interaction ever occurred.<sup>164</sup>

On November 16, 2020, Stephanie Benton, the Director of the Governor's Offices, asked Executive Assistant #1 to assist the Governor at the Executive Mansion.<sup>165</sup> The Blackberry PIN messages<sup>166</sup> that the PSU uses to announce visitors to the Executive Mansion confirm that Executive Assistant #1 was called to the Executive Mansion and arrived there on November 16.<sup>167</sup> As Executive Assistant #1 finished her assignment and prepared to leave the Governor's personal office, on the second floor in the Mansion, and return to the Capitol, the Governor pulled Executive Assistant #1 in for a close hug.<sup>168</sup>

Executive Assistant #1 was conscious that the door to the Governor's office (facing out into the hallway on the second floor) was open at the time.<sup>169</sup> Executive Assistant #1 stepped

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<sup>159</sup> Andrew Cuomo Tr. 390:6–392:22.

<sup>160</sup> *Id.* at 390:6–13, 392:23–393:8.

<sup>161</sup> *Id.* at 392:10–18, 393:22–394:2.

<sup>162</sup> Executive Assistant #1 Tr. 82:15–84:11.

<sup>163</sup> *Id.*

<sup>164</sup> Andrew Cuomo Tr. 378:4–8.

<sup>165</sup> Executive Assistant #1 Tr. 139:13–140:12. Executive Assistant #1 did not remember the exact date of the incident, but recalled that it was around when she was tasked with photographing a document, and provided a copy of the photograph to us that was dated November 16, 2020.

<sup>166</sup> BlackBerry PIN messages are messages that are sent from a Blackberry device to another Blackberry device using proprietary technology designed for Blackberry devices. Moore Tr. 89:9–23. While the Executive Chamber transitioned from Blackberry devices to iPhones in late 2019, Governor Cuomo and certain senior staff have retained their Blackberry devices. *Id.* at 84:23–85:10, 87:6–24.

<sup>167</sup> *See* Ex. 27.

<sup>168</sup> Executive Assistant #1 Tr. 141:7–146:15. The timing of specifically when the Governor closed the door relative to when he grabbed Executive Assistant #1's breast (whether it was immediately before or after grabbing the breast) is a factual point on which Executive Assistant #1's recollection has varied. *Id.* at 152:3–14, 215:22–216:10.

<sup>169</sup> *Id.* at 142:16–143:5.

away from the Governor and said, “You’re going to get us in trouble,” to which the Governor replied, “I don’t care,” and slammed the door shut.<sup>170</sup> Executive Assistant #1 testified that the Governor’s demeanor at the time “wasn’t like ‘ha ha,’ it was like, ‘I don’t care.’ . . . It was like in this—at that moment he was sexually driven. I could tell and the way he said it, I could tell.”<sup>171</sup>

The Governor then returned to Executive Assistant #1 and slid his hand up her blouse, and grabbed her breast, “cupp[ing her] breast” over her bra.<sup>172</sup> Executive Assistant #1 testified:

I mean it was—he was like cupping my breast. He cupped my breast. I have to tell you it was—at the moment I was in such shock that I could just tell you that I just remember looking down seeing his hand, seeing the top of my bra and I remember it was like a little even the cup—the kind of bra that I had to the point I could tell you doesn’t really fit me properly, it was a little loose, I just remember seeing exactly that.<sup>173</sup>

In response, Executive Assistant #1 pulled away from the Governor and said, “You’re crazy.”<sup>174</sup> She testified:

At that moment it was so quick and he didn’t say anything and I just remember thinking to myself, oh my God, and I remember stopping and him not saying anything and I remember I walked out and he didn’t say anything and I didn’t say anything.

I remember walking down the stairs, escorting myself out the front door, going back to my car, taking a deep breath and saying to myself, okay, everything that just happened I have to now pretend like it didn’t just happen. Go back to the Capitol and sit at my desk and continue with my afternoon.

And I remember thinking to myself who—I knew what just went on, I knew and he knew too that was wrong. And that I in no way, shape or form invited that nor did I ask for it. I didn’t want it. I feel like I was being taken advantage of . . . .<sup>175</sup>

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<sup>170</sup> *Id.* at 143:6–144:8.

<sup>171</sup> *Id.* at 144:10–13.

<sup>172</sup> *Id.* at 143:6–19, 149:11–150:5.

<sup>173</sup> *Id.* at 149:19–150:4.

<sup>174</sup> *Id.* at 143:18–144:13, 152:7–14.

<sup>175</sup> *Id.* at 145:5–146:11.

After taking some time in her car to collect herself, Executive Assistant #1 returned to work at the Capitol.<sup>176</sup>

Governor Cuomo denied having ever touched Executive Assistant #1's breasts.<sup>177</sup> He testified: "To touch a woman's breast who I hardly know, in the Mansion, with ten staff around, with my family in the Mansion, to say 'I don't care who sees us.' . . . I would have to lose my mind to do such a thing."<sup>178</sup> Executive Assistant #1's allegations are that the incident occurred in the smaller of the Governor's private offices on the second floor, which connects to his larger office and bedroom and away from the Mansion's first-floor common areas, and is separated from the second floor common area by doors;<sup>179</sup> nor was there any evidence that there were "ten" Mansion staff in the vicinity of his second-floor office that day. Indeed, our understanding is that the total number of Mansion staff potentially on the premises at any given time would have included groundskeepers, chefs, and others who may not all be there at one time—nor would they be in the vicinity of his private second-floor office.

Executive Assistant #1 explained that she had not responded more forcefully or told anyone about the incident because she, among other things, feared losing her job.<sup>180</sup> She testified:

If I push him or if I try like—people say after the fact now that has been said in the paper, people that know that, why didn't you slap him. I'm [not] going to assault the [G]overnor. I would be taken away by the state police officers and I would be the one that would get in trouble and I would be the one to lose my job, not him. . . .

I feel like I was being taken advantage of and at that moment that's when I thought to myself okay, I can't tell anyone. Who am I going to tell[?] My supervisor was Stephanie Benton, Stephanie Benton was the Governor's right-hand person and if I told her I was going to be asked to go somewhere else or transferred to [another] agency.

And the sad part of this whole thing, I actually like my job. I was proud to work, especially during this pandemic. I generally enjoy working with my colleagues . . . that was an opportunity of a lifetime for me.<sup>181</sup>

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<sup>176</sup> *Id.* at 144:14–145:17.

<sup>177</sup> Andrew Cuomo Tr. 398:16–19.

<sup>178</sup> *Id.* at 398:24–399:17.

<sup>179</sup> Executive Assistant #1 Tr. 142:24–143:5. We have reviewed a floorplan of the Executive Mansion and confirmed visually, on a visit, that the private offices are in fact separated from the common areas by doors.

<sup>180</sup> *Id.* at 144:21–145:4, 145:18–146:15.

<sup>181</sup> Executive Assistant #1 Tr. 144:21–146:8.

The Governor, Ms. Benton, and Melissa DeRosa (Secretary to the Governor) also testified that Executive Assistant #1 told each of them that her job was her “dream job” and that she “get[s] up every morning loving to come to work.”<sup>182</sup>

### **Executive Assistant #1’s Hesitation to Report Governor Cuomo’s Conduct**

Executive Assistant #1 repeatedly testified that she felt she had to tolerate the Governor’s physical advances and suggestive comments because she feared the repercussions if she did not.<sup>183</sup> She did not feel she could tell anyone, including her colleagues and her direct supervisors.<sup>184</sup> In addition, the Governor had specifically told her—with respect to the selfie they took together—that she was not to share it or tell anyone about it other than Ms. McGrath.<sup>185</sup> Executive Assistant #1 testified that she needed the income (including the overtime pay received from working on weekends), particularly as she was going through a divorce and was focused on not risking losing her job.<sup>186</sup>

Executive Assistant #1’s hesitance to report the Governor’s conduct was also informed by her observation of the Executive Chamber’s reactions to other women’s allegations against the Governor. In mid-to-late December 2020, Executive Assistant #1 personally witnessed what she felt were the Executive Chamber’s efforts to discredit the allegations of Ms. Boylan against the Governor, including by repeatedly describing Ms. Boylan as “crazy” and by trying to get Ms. Boylan’s personnel files to the press.<sup>187</sup> Executive Assistant #1 recalled that Ms. DeRosa, Richard Azzopardi (the Senior Deputy Communications Director and Senior Advisor to the Governor at the time), and at times Linda Lacewell (the Superintendent of the Department of Financial Services) would be in Ms. DeRosa’s office during that period.<sup>188</sup> They described Ms. Boylan as crazy and having a political agenda, and talk about shutting down Ms. Boylan’s allegations quickly.<sup>189</sup> On or around December 13, 2020,<sup>190</sup> while Executive Assistant #1 was assisting the Governor at the Capitol, she observed that Mr. Azzopardi was asked to retrieve a box from Beth Garvey, Senior Counsel and Senior Advisor to the Governor at the time, which Executive Assistant #1 helped carry from the Counsel’s Office to the Front Office in the

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<sup>182</sup> Andrew Cuomo Tr. 369:11–16; Benton Tr. 421:7–18; DeRosa Tr. 851:25–852:13. Governor Cuomo and Ms. Benton testified that Executive Assistant #1 told them—possibly around November 2020—that, following her separation from her husband, she was concerned about money and wanted to keep her job and be considered for overtime shifts. Benton Tr. 421:19–422:7; Andrew Cuomo Tr. 365:11–370:10.

<sup>183</sup> See, e.g., Executive Assistant #1 Tr. 111:21–112:10, 144:21–146:15.

<sup>184</sup> *Id.* 145:22–146:15.

<sup>185</sup> *Id.* at 120:3–18.

<sup>186</sup> *Id.* at 146:6–15, 190:8–23.

<sup>187</sup> *Id.* at 128:19–133:15.

<sup>188</sup> *Id.* at 129:13–19.

<sup>189</sup> *Id.*

<sup>190</sup> See *infra* Factual Findings, Section II.A (describing Executive Chamber’s efforts to respond to Ms. Boylan’s December 13, 2020 tweet alleging sexual harassment by the Governor).

Capitol.<sup>191</sup> From the context of the discussions happening around that time, Executive Assistant #1 understood that the box contained documents relating to Ms. Boylan.<sup>192</sup>

Separately, in mid- or late December 2020, in the days immediately following Ms. Boylan's tweets alleging sexual harassment against the Governor, Executive Assistant #1 spoke with the Governor on two occasions during which he apparently referenced his conduct toward her. In the first instance, Executive Assistant #1 was assisting the Governor with dictation in his office at the Capitol when he looked up at her and asked her not to "talk about anything to anyone else," because "people talk around here" and he could "get in a lot of trouble."<sup>193</sup> Executive Assistant #1 testified that she understood the Governor's comment as "feeling [her] out about what [she] might say or what [she] might not say" and took his statement as a threat, and she feared that she would get in trouble if she spoke up about his conduct.<sup>194</sup> Executive Assistant #1 recalled responding to the Governor with something like, "I don't say anything. I don't say a word."<sup>195</sup> On a different occasion, on an early morning after sexual harassment allegations against the Governor had been made public, the Governor called the office's main line and Executive Assistant #1 picked up.<sup>196</sup> The Governor asked her how she felt he was being treated in the midst of these allegations.<sup>197</sup> Executive Assistant #1 testified that she did not want to upset or disagree with the Governor, and so said she was sorry he was going through this and said she was sure it was hard.<sup>198</sup> Executive Assistant #1 testified that the Governor thanked her and asked for her to get someone on the phone.<sup>199</sup>

However, things changed for Executive Assistant #1 as she read Ms. Bennett's allegations in late February, and—ultimately—as she heard the Governor's statement during his March 3 press conference that he had never touched anyone inappropriately. Following the publication in the New York Times on February 27, 2021 of Ms. Bennett's allegations of misconduct by the Governor,<sup>200</sup> Executive Assistant #1 testified:

I was going to take this to the grave. There were conversations about Charlotte, that—could people believe her, did she have any ulterior

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<sup>191</sup> Executive Assistant #1 Tr. 129:22–130:19.

<sup>192</sup> *Id.* at 120:22–130:7. Executive Assistant #1 also recalled assisting Mr. Azzopardi with finding Wite-Out. *Id.* at 130:8–19. A review of Ms. Boylan's documents that were released to the press showed that the files had been redacted by hand. Executive Assistant #1 also recalled that Ms. DeRosa and others were on calls with Judy Mogul and Steve Cohen that day. *Id.* at 133:2–10. At one point, Executive Assistant #1 was asked to leave for the day. *Id.* at 131:8–20.

<sup>193</sup> *Id.* at 134:22–136:11.

<sup>194</sup> *Id.* at 134:22–136:6, 138:15–23.

<sup>195</sup> *Id.* at 135:16–17.

<sup>196</sup> *Id.* at 133:23–134:21.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> See Jesse McKinley, *Cuomo Is Accused of Sexual Harassment by a 2nd Former Aide*, N.Y. Times (Feb. 27, 2021, last updated Mar. 16, 2021), <https://www.nytimes.com/2021/02/27/nyregion/cuomo-charlotte-bennett-sexual-harassment.html>.



motive, and I couldn't be part of those conversations anymore, because what she was saying was the truth. Those things actually did happen to me as well.<sup>201</sup>

She further testified:

[A]ny time he touched me I felt like it was inappropriate. He was my boss, let alone the Governor of the State of New York, so I definitely felt he abused his power and definitely knew that he had this presence about him, very intimidating, no one ever told him that he was wrong nor were you told to do so. He definitely knew what he was doing was inappropriate. So any time that he would do something to me he knew that at the end of the day if I told anyone, nothing was going to happen to him. If anyone, it was going to happen to me.<sup>202</sup>

Executive Assistant #1 also testified:

I remember being a young girl standing at the bus stop with my grandmother and looking at the Capitol and saying one day, Grandma, I'm going to work in there. That she would be proud of me.

. . . And I really do enjoy my work. I do enjoy my job. I did and I have, and what's happened to me is unfortunate and I don't think fair to me. And I definitely knew that not only did he tell me not to say anything or share anything with anyone and it was definitely also known that if you say something[,] odds are you are going to be the one to go and I liked my job.<sup>203</sup>

On March 3, 2021, Executive Assistant #1 was at her desk in the Capitol when she—and other colleagues—watched on their computers the Governor give a press conference, from down the hall, during which he stated that he had never touched anyone inappropriately.<sup>204</sup> Executive Assistant #1 found herself becoming emotional.<sup>205</sup> Two other executive assistants (“Executive Assistants #2 and #3”) noticed Executive Assistant #1 become visibly emotional after watching the press conference.<sup>206</sup> Executive Assistant #2 asked Executive Assistant #1 whether she was okay, and Executive Assistant #1 confided in her two colleagues about some of the inappropriate

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<sup>201</sup> Executive Assistant #1 Tr. 182:23–183:6.

<sup>202</sup> *Id.* at 183:6–19.

<sup>203</sup> *Id.* at 181:22–182:12.

<sup>204</sup> *Id.* at 182:13–22; *see also Cuomo: I Never Touched Anyone Inappropriately*, NBC News NOW (Mar. 3, 2021), <https://www.youtube.com/watch?v=GYmmpg-3Xew>.

<sup>205</sup> Executive Assistant #1 Tr. 183:6–9, 184:18–20.

<sup>206</sup> *Id.* at 183:6–9, 184:5–22.

contact the Governor had had with her.<sup>207</sup> Both Executive Assistants #2 and #3 told us that, earlier on March 1, during a conversation about Ms. Bennett’s allegations, Executive Assistant #1 had told them some details about how the Governor had touched her and had had inappropriate conversations with her.

Executive Assistant #3 informed us that Executive Assistant #1 was someone who was generally well liked and was someone who “loves her job and is good at it.” Both Executive Assistants #2 and #3 were upset at seeing Executive Assistant #1 in distress, and they both told her that they would support her. Other witnesses also described noticing a general change in Executive Assistant #1’s demeanor in March 2021. One witness in particular noted that Executive Assistant #1 had previously been bubbly and outgoing, but was now noticeably more reserved and somber.

On Saturday, March 6, 2021, three days after the press conference during which the Governor denied touching anyone inappropriately and during which Executive Assistant #1 had a visible emotional reaction to the Governor’s remarks, Executive Assistant #1 was “on call” to provide assistance to the Governor at the Executive Mansion.<sup>208</sup> That morning, Ms. Benton called Executive Assistant #1 and asked whether Executive Assistant #1 was “on duty” for the weekend shift, which Executive Assistant #1 confirmed.<sup>209</sup> Executive Assistant #1 did not hear back from Ms. Benton, but learned later that evening (at a birthday party for Ms. McGrath) that one of the other executive assistants (Executive Assistant #3) had been called to the Executive Mansion instead of her.<sup>210</sup> She also learned—and Executive Assistant #2 and #3 confirmed to us—that Ms. Benton specifically asked Executive Assistant #3 not to tell Executive Assistant #1 that Executive Assistant #3 had been called instead of her.<sup>211</sup>

Our review of BlackBerry PIN messages between the Governor and Ms. Benton also show that Ms. Benton informed the Governor on March 6 that Executive Assistant #1 was “on call” that day, and the Governor specifically instructed Ms. Benton to ask for Executive Assistant #3 to come to the Executive Mansion instead of Executive Assistant #1.<sup>212</sup> In its production of these PIN messages, the Executive Chamber redacted portions of the exchange as reflecting communications to and from internal counsel, but noted that the subject of the communications was the sexual harassment allegations raised against the Governor at the time. Executive Assistant #3 also informed us that the work she did that day for the Governor involved the sexual harassment allegations that had been made against him. Specifically, she informed us that she was asked, among other things, to type up handwritten notes the Governor had drafted in response to Ms. Bennett and Karen Hinton’s allegations of sexual harassment against him. Both the Governor and Ms. Benton testified that Executive Assistant #3 was the best among the

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<sup>207</sup> *Id.* at 183:6–9, 184:18–186:24.

<sup>208</sup> *Id.* at 187:3–7.

<sup>209</sup> *Id.* at 104:20–105:22.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 104:20–105:22, 106:17–23.

<sup>212</sup> See Ex. 28 (Blackberry PIN messages between Ms. Benton and “Mark.2,” i.e., the Governor— “[Executive Assistant #1] is on call today. Want her now?” / “[Executive Assistant #3’s] better?” / “I called [Executive Assistant #3]. She can do. I’m telling her to head there now.”).

Executive Assistants in terms of dictation and typing, and speculated that that could have been the reason for the switch.<sup>213</sup>

During the birthday party for Ms. McGrath later that evening, Executive Assistant #1 shared with Executive Assistant #2 that the Governor had grabbed Executive Assistant #1 and reached up her shirt. Executive Assistant #1 continued to be distraught throughout the party, and Executive Assistant #2 told her to come to her house that weekend. The following day, on Sunday, March 7, 2021, Executive Assistant #1, her boyfriend, and Executive Assistant #3 went to Executive Assistant #2's house, where Executive Assistant #2's boyfriend, who works for the Federal Bureau of Investigation, suggested that Executive Assistant #1 speak with his friend, a lawyer. The group gathered at Executive Assistant #2's house and then went to the office of the lawyer, whom Executive Assistant #1 ultimately retained.

Executive Assistants #2 and #3 also felt that, under the Employee Handbook, they were obligated to report what Executive Assistant #1 had told them within the Executive Chamber. On the morning of March 8, 2021, the two women called Ms. Mogul, who also dialed in Beth Garvey, at the time the Special Counsel and Senior Advisor to the Governor. On the call, Executive Assistants #2 and #3 explained that the Governor had touched Executive Assistant #1 many times, had kissed her forcibly, and had put his hand up her shirt. The two women also mistakenly reported that the Governor had pushed Executive Assistant #1 up against a wall, which Executive Assistant #1 had not said and which she denies.<sup>214</sup> Executive Assistants #2 and #3 also told Ms. Mogul—prior to Ms. Garvey joining the call—that they believed Executive Assistant #1 and that they were very concerned.<sup>215</sup> Ms. Mogul told the two women that she was sorry and that they “did the right thing” by reporting what they had heard. The call was brief, lasting only about three to four minutes.<sup>216</sup>

The next day, on March 9, the Times Union published an article describing the allegations of an anonymous current aide in the Executive Chamber, who was alleging that the Governor had groped her while at the Executive Mansion.<sup>217</sup> Executive Assistant #1 testified that she had not communicated with the press in advance of the March 9 article about her allegations and that she had been shocked at the publication of the Times Union article.<sup>218</sup>

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<sup>213</sup> Andrew Cuomo Tr. 407:10–408:12; Benton Tr. 396:16–398:10.

<sup>214</sup> Executive Assistant #1 Tr. 191:21–192:12; Mogul Tr. 381:7–14 (testifying that to her recollection Executive Assistant #1's colleagues reported that the Governor “had forcefully thrown her up against the wall and put his hand under her shirt and felt her breast.”)

<sup>215</sup> Mogul Tr. 381:15–24.

<sup>216</sup> *Id.* at 384:7–10.

<sup>217</sup> See Brendan J. Lyons, *Female Aide said Cuomo aggressively groped her at Executive Mansion*, Times Union (Mar. 10, 2021, updated Mar. 11, 2021), <https://www.timesunion.com/news/article/Female-aide-said-Cuomo-aggressively-groped-her-at-16015863.php>.

<sup>218</sup> Executive Assistant #1 Tr. 193:12–194:2.

Executive Assistant #1 subsequently did speak with the Times Union about her interactions with the Governor, which the Times Union published on April 7, 2021.<sup>219</sup>

On March 11, Ms. Garvey, who had been recently appointed Acting Counsel to the Governor, filed a report with GOER on behalf of Executive Assistant #1, noting that Executive Assistants #2 and #3 had contacted her and Ms. Mogul to report that Executive Assistant #1 had told them about inappropriate conduct by the Governor.

## Assessment

We found Executive Assistant #1 to be credible both in demeanor and in the substance of her allegations. The experiences she had with the Governor were difficult for her to recount, but she did so with care and seriousness. She testified about what she could recall with specificity and she credibly noted things that she did not recall. She did not overstate or seek to exaggerate the allegations, but simply recounted the incidents she remembered. Her reaction to the March 3, 2021 statement by the Governor that he had never touched anyone inappropriately was one that her colleagues observed and one that corroborates her testimony that the Governor had in fact touched her inappropriately. Executive Assistants #2 and #3 believed she was credible and corroborated her reaction to the Governor's March 3, 2021 public statement responding to the sexual harassment allegations. Executive Assistant #1's allegations about conversations about her personal life, marital status, and finding the Governor a girlfriend are consistent with the experiences of many other witnesses, including other complainants, and many of her interactions with the Governor are independently corroborated by text exchanges with and the testimony of Ms. McGrath.

Governor Cuomo denied a number of Executive Assistant #1's allegations, but we found that his denials lacked persuasiveness, were devoid of detail, and were inconsistent with many witnesses' observations of his behavior toward Executive Assistant #1 and other women in the Executive Chamber. In particular, we found that the Governor's testimony that Executive Assistant #1 was the one who offered personal information about herself without prompting and that she was the "initiator" of the close hugs—and that he was "more in the reciprocal business" of returning such hugs<sup>220</sup>—was not credible, based on a multitude of witnesses, including the Governor himself and members of his senior staff, who reported numerous instances in which the Governor initiated physical contact with another person or asked personal questions without prompting.

While certain witnesses within the Executive Chamber raised questions about whether Executive Assistant #1 welcomed the Governor's conduct toward her, based on their view of Executive Assistant #1's personality, we did not find that her outgoing personality—something that she acknowledged about herself—undermined her allegations that the Governor touched and spoke to her in an unwelcome and offensive way.

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<sup>219</sup> Brendan J. Lyons, *In her own words: Woman describes Cuomo's alleged groping at mansion*, Times Union (Apr. 7, 2021), <https://www.timesunion.com/news/article/cuomo-alleged-groping-victim-mansion-incident-16078748.php>.

<sup>220</sup> Andrew Cuomo Tr. 381:25–382:10.

## **ii. Trooper #1**

Trooper #1 is a current member of the PSU, the unit of the State Troopers charged with protecting the Governor.<sup>221</sup> Trooper #1 has been working for the New York State Police since March 2015.<sup>222</sup> She became a Trooper in the PSU in January 2018.<sup>223</sup>

### **Brief Meeting with the Governor and Transfer to PSU**

The circumstances under which Trooper #1 was transferred to the PSU, as well as statements by witnesses involved in her transfer, indicate that after meeting Trooper #1 briefly, the Governor played a role in having her hired for the PSU, even though she did not meet the minimum requirements for joining that unit at the time.<sup>224</sup> On November 4, 2017, while working as a State Trooper in New York City, Trooper #1 received a call from her supervisor to go to an event on the Robert F. Kennedy Bridge (“RFK Bridge,” also known as the Triborough Bridge) to assist with a press conference for the Governor, including by escorting the Governor’s motorcade.<sup>225</sup> Trooper #1 and a PSU Senior Investigator (“Senior Investigator #1”) subsequently located the Governor’s car and led the car to Randall’s Island (which is under parts of the RFK Bridge).<sup>226</sup> According to Trooper #1, her car and the Governor’s car stopped on Randall’s Island, and the Governor and Senior Investigator #1 exited their respective cars, at which point Trooper #1 also exited the car she was in.<sup>227</sup> Trooper #1 said that she met the Governor and that she and the Governor engaged in small talk for a few minutes.<sup>228</sup>

Following her conversation with the Governor, Senior Investigator #1 approached Trooper #1 and told her that the Governor “wanted her on the detail tomorrow.”<sup>229</sup> The next day, the Senior Investigator sent Trooper #1 an email with the subject line “what did you say to him?????” and wrote that there was talk of “drafting” Trooper #1.<sup>230</sup> Trooper #1 and Senior Investigator #1 continued to communicate with each other about Trooper #1 joining the PSU.<sup>231</sup> Later in November 2017, Senior Investigator #1 communicated to Trooper #1 that she was not yet eligible to apply for the PSU due to a mandatory minimum requirement to have served as a State Trooper for three or more years, which Trooper #1 had not yet satisfied.<sup>232</sup>

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<sup>221</sup> Trooper #1 Tr. 23:18–21.

<sup>222</sup> *Id.* at 15:13–15.

<sup>223</sup> *Id.* at 33:15–24.

<sup>224</sup> *Id.* at 20:23–26:22.

<sup>225</sup> *Id.* at 19:20–20:10.

<sup>226</sup> *Id.* at 22:3–7.

<sup>227</sup> *Id.* at 22:5–7.

<sup>228</sup> *Id.* at 22:8–21.

<sup>229</sup> *Id.* at 22:21–23:3.

<sup>230</sup> Ex. 29 (email from Senior Investigator #1 to Trooper #1 dated November 5, 2017).

<sup>231</sup> Trooper #1 Tr. 23:9–26:11.

<sup>232</sup> *Id.* at 23:21–24:5.

Shortly after that, Trooper #1 received a call from Senior Investigator #1, who asked her to submit an abstract and transfer memorandum to serve as her application for the PSU.<sup>233</sup> Senior Investigator #1 told Trooper #1 that the minimum requirement for troopers in the PSU had been changed from three years to two years specifically for Trooper #1.<sup>234</sup> On November 17, 2017, Senior Investigator #1 forwarded her an email “canvas” for a Trooper position in the PSU, which stated that the position required only two years of experience.<sup>235</sup> In forwarding the canvas, Senior Investigator #1 stated in an email to Trooper #1, “Ha ha, they changed the minimum from 3 years to 2. Just for you.”<sup>236</sup> Trooper #1 subsequently submitted her transfer memorandum and abstract, interviewed for the PSU role,<sup>237</sup> and was hired as a Trooper in the PSU effective January 2018.<sup>238</sup> Trooper #1 initially worked at the Governor’s residence in Mount Kisco, New York, but in April 2019 was moved to a role on the Governor’s travel team, serving as the Governor’s driver on occasion.<sup>239</sup>

Senior Investigator #1 recalled the events relating to her hiring consistently with Trooper #1, noting that the requirements had been changed specifically to accommodate the hiring of Trooper #1 and that the Governor had been involved in the decision to hire her. Senior Investigator #1 stated that he suggested to the Governor that the PSU hire Trooper #1. Senior Investigator #1 stated that he did so because he was impressed with Trooper #1’s performance at the event and because the PSU was seeking to increase diversity in the PSU, including having more women in the PSU. Senior Investigator #1 said that after he learned that Trooper #1 did not meet the requirements to be on the PSU, he told Trooper #1 that he was not able to hire her. Sometime after that, according to Senior Investigator #1, the Governor asked him what had happened with Trooper #1, and Senior Investigator #1 explained that she did not have enough experience. Senior Investigator #1 subsequently received a call from a high-level staff member within the Executive Chamber who instructed him to “hire the female trooper from the bridge” and stated, with respect to the policy, “we are making adjustments for her.” Senior Investigator #1 subsequently asked Trooper #1 to apply, as reflected in the November 17, 2017 email he sent her.

When asked about his involvement in Trooper #1’s transfer, the Governor recited several times that he “was on constant alert to recruit more women, Blacks, and Asians to the state police detail.”<sup>240</sup> He stated that he recalled meeting two women who were Troopers, including Trooper #1, at the RFK Bridge event and that he encouraged the State Police to talk to both

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<sup>233</sup> *Id.* at 24:11–15, 28:5–21.

<sup>234</sup> *Id.* at 24:11–18.

<sup>235</sup> *Id.* at 25:5–16, 26:5–11.

<sup>236</sup> Ex. 1 (email from Senior Investigator #1 to Trooper #1 dated November 5, 2017 attaching PSU Transfer Canvas). We were able to obtain a copy of that email during our investigation, although it was not provided to us by the State Troopers despite our request for all documents relating to requirements or changes in requirements for joining the PSU.

<sup>237</sup> Trooper #1 Tr. 28:7–31:2.

<sup>238</sup> *Id.* at 33:15–24.

<sup>239</sup> *Id.* at 34:19–24, 41:3–15.

<sup>240</sup> Andrew Cuomo Tr. 424:16–18, 430:9–22.

women about joining the PSU to increase diversity.<sup>241</sup> He testified that he was not, at any point, aware of any minimum requirements for serving on the PSU, although he noted that if there were any such requirements he would not support them because they would interfere with the need for greater diversity in the PSU.<sup>242</sup>

The Governor's statement that he supported Trooper #1's transfer to the PSU to increase diversity among PSU members is corroborated by Senior Investigator #1's statement that diversity was an important factor in PSU recruitment generally and Trooper #1's recruitment specifically. However, the Governor's statement that he encouraged the PSU to hire two women who were at the RFK Bridge event or that he did not single out Trooper #1 was inconsistent with Senior Investigator #1's recounting of the event. Senior Investigator #1 told us that although there was at least one additional woman (who was also a Trooper) present at the RFK Bridge event, he does not remember that Trooper speaking with the Governor. Nor did Senior Investigator #1 recall the Governor or anyone from the Executive Chamber speaking to him about hiring the second woman. To the contrary, Senior Investigator #1 stated that shortly after the event, the second Trooper remarked to him, "oh, you recruited [Trooper #1], but not me."

### **Interactions with the Governor After Joining PSU**

Trooper #1 described the Governor's behavior toward her after she joined the PSU as generally "flirtatious" and "creepy."<sup>243</sup> She did not observe the Governor acting in a similar way with State Troopers who were men.<sup>244</sup>

Trooper #1 described a series of interactions—both comments and physical touching—that she found to be inappropriate and offensive. Trooper #1's testimony made clear that, although the Governor's conduct made her uncomfortable, she did not feel she could safely report or rebuff the conduct because, based on her experience and discussions with others in the PSU, she feared retaliation and believed her career success hinged on whether the Governor liked her. She explained, "[w]ithin the PSU, it's kind of known that the Governor gives the seal of approval who gets promoted and who doesn't within PSU."<sup>245</sup> She further explained that members of the PSU gave her pointers on how to keep the Governor happy, which included, "always have an answer, don't tell him no and whatever he wants, make it happen . . . ."<sup>246</sup>

*Offensive Comments by the Governor.* One of the first inappropriate interactions with the Governor occurred in September 2018, when Trooper #1 spoke to the Governor outside of his Mount Kisco residence.<sup>247</sup> Trooper #1 testified that she mentioned to the Governor that she was going to Albany the following weekend for her sister's wedding.<sup>248</sup> The Governor then offered

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<sup>241</sup> *Id.* at 425:19–427:11.

<sup>242</sup> *Id.* at 430:1–5.

<sup>243</sup> Trooper #1 Tr. 76:7, 19–22, 81:20–22.

<sup>244</sup> *Id.* at 76:11–14.

<sup>245</sup> *Id.* at 73: 22–25.

<sup>246</sup> *Id.* at 45:8–10.

<sup>247</sup> *Id.* at 76:22–77:7, 78:6–9.

<sup>248</sup> *Id.* at 77:7–10.



to give her a tour of the Mansion, “unless it [was] against protocols,” and then “snickered” and walked away.<sup>249</sup> Trooper #1 stated that she understood the Governor’s reference to protocols and the way he said it to be suggestive.<sup>250</sup> This interaction made Trooper #1 uncomfortable.<sup>251</sup>

Later, on August 13, 2019, the Governor asked Trooper #1 questions about her attire while she was driving him to an event.<sup>252</sup> Specifically, the Governor asked her, “why don’t you wear a dress?”<sup>253</sup> Trooper #1 replied that it was because she wears a gun and would not have anywhere to put the gun if she wore a dress.<sup>254</sup> According to Trooper #1, the Governor then asked her why she wore dark colors.<sup>255</sup> At that point, the Detail Commander, who was also in the Governor’s car, interjected and noted that PSU members wear business attire.<sup>256</sup>

After she left the car, Trooper #1 testified she received a PIN from the Detail Commander that said, “stays in the truck,” which Trooper #1 understood to mean that she should not repeat conversations that occurred in the Governor’s car.<sup>257</sup> Trooper #1 noted that before she received this PIN, she had already told the Trooper in the tail car (the car that follows the car with the Governor) about the conversations in the Governor’s car, including saying, “[O]h my god, can you believe the Governor asked me why I don’t wear a dress?”<sup>258</sup> She testified that after she received the PIN message, she realized she “messed up” by telling the Trooper in the tail car about the conversations in the Governor’s car, and stated that the PIN message “silenced” her.<sup>259</sup>

This was not the only occasion on which the Governor commented on Trooper #1’s attire. Trooper #1 said that another time, when she was wearing a suit, the Governor commented that she looked like an “Amish person” and joked that her suit jacket was too big.<sup>260</sup> Trooper #1, reflecting on the interaction, said she thought that it could have been interpreted as a suggestion that she wear “tighter clothes.”<sup>261</sup>

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<sup>249</sup> *Id.* at 77:12–15. One Trooper told us that Trooper #1 once mentioned that the Governor had offered her a private tour of the Mansion, but his recollection was that this happened when Trooper #1 was at the Mansion.

<sup>250</sup> *Id.* at 77:15–78:4.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 57:25–58:17.

<sup>253</sup> *Id.* at 58:12–13.

<sup>254</sup> *Id.* at 58: 13–15. Another Trooper we interviewed recalled Trooper #1 relaying to him this incident, and how she had tried to diffuse the situation by making a joke about where she would put her gun if she were wearing a dress.

<sup>255</sup> *Id.* at 58:15–17.

<sup>256</sup> *Id.* at 58:17–20.

<sup>257</sup> *Id.* at 59:7–16. The Detail Commander said he did not recall the Governor asking Trooper #1 about her attire; nor did he recall sending a PIN with such a message. Straface Tr. 149:20–150:8.

<sup>258</sup> Trooper #1 Tr. 59:19–23.

<sup>259</sup> *Id.* at 59:7–23, 60:7–8.

<sup>260</sup> *Id.* at 128:9–20.

<sup>261</sup> *Id.* at 128:18–20.

On another occasion, the Governor asked Trooper #1 why she would want to get married, noting that “it always ends in divorce, and you lose money, and your sex drive goes down.”<sup>262</sup> Trooper #1 was uncomfortable, in particular with the reference to her sex drive, and did not want to engage with his comment, so she instead spoke about the positive aspects of marriage, before the conversation concluded soon thereafter.<sup>263</sup>

The Governor once invited Trooper #1 to go “upstairs” at the Executive Mansion in Albany.<sup>264</sup> She stated that she was at the time working on the lower level of the command center (which is on the level below the Mansion), and that it was unclear whether the Governor was inviting her “upstairs” to the first floor of the Mansion or “upstairs” to the second floor, where the Governor’s bedroom is.<sup>265</sup> Trooper #1 stated that she declined the Governor’s offer.<sup>266</sup> Trooper #1 testified that this type of incident “happened so frequent[ly] and it was . . . normalized.”<sup>267</sup>

The Governor also once discussed age differences in relationships with Trooper #1 after he had ended his long-term relationship.<sup>268</sup> After asking Trooper #1’s age (late 20s), the Governor responded, “You’re too old for me.”<sup>269</sup> Trooper #1 said that the Governor then asked her what age difference between the Governor and a romantic partner would be acceptable to the public, to which Trooper #1 responded, “Probably older than your daughters.”<sup>270</sup> Feeling uncomfortable, Trooper #1 tried to deflect the conversation by joking about becoming the Governor’s matchmaker and asked what the requirements were.<sup>271</sup> According to Trooper #1, the Governor responded that for a girlfriend, he was looking for someone who “can handle pain.”<sup>272</sup> The Governor then asked Trooper #1 what “the guys” were saying about his recent breakup.<sup>273</sup>

In December 2019, Trooper #1 attended a holiday party with another Trooper, who was also a woman and was a close friend of Trooper #1.<sup>274</sup> After the party, the Governor asked Trooper #1 which PSU members she was close with and she identified the woman with whom she had attended the party.<sup>275</sup> According to Trooper #1, the Governor in response instructed her

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<sup>262</sup> *Id.* at 85:8–14. At least two PSU Troopers we spoke with recalled that Trooper #1 later told them about this comment.

<sup>263</sup> *Id.* at 85:17–19.

<sup>264</sup> *Id.* at 79:25–80:13.

<sup>265</sup> *Id.* at 80:24–81:12.

<sup>266</sup> *Id.* at 80:19.

<sup>267</sup> *Id.* at 80:4–9.

<sup>268</sup> *Id.* at 102:22–104:2.

<sup>269</sup> *Id.* at 102:24–103:4.

<sup>270</sup> *Id.* at 103:3–8.

<sup>271</sup> *Id.* at 103:11–18.

<sup>272</sup> *Id.* at 103:18–19.

<sup>273</sup> *Id.* at 103:19–104:6.

<sup>274</sup> *Id.* at 82:4–17.

<sup>275</sup> *Id.* at 84:3–23.

not to tell this friend anything the Governor said to her.<sup>276</sup> According to Trooper #1, the Governor then said, “as a matter of fact, don’t tell anyone about our conversations.”<sup>277</sup>

Over the course of her tenure on the PSU, Trooper #1 began to notice that the Governor sought her out at events. For example, at the opening of the Moynihan Train Hall in January 2021, the Governor sought her out specifically to wish her a happy new year.<sup>278</sup> In another instance, the Governor sought Trooper #1 out at an event in October or November 2020, which she found to be unusual because she was standing next to a photographer from the New York Post whom she felt the Governor would not want to have been photographed by.<sup>279</sup> The Governor’s attention towards Trooper #1 drew notice from other PSU members. Trooper #1 said that at the Moynihan Train Hall event, another Trooper approached her and said, “Oh, as soon as he sees you, like he’s in a good mood,” or “[H]e[] beeline[d] right towards you.”<sup>280</sup> Trooper #1 further explained, “it’s kind of just . . . a known thing if [the Governor] sees a good-looking female, it . . . puts him in a good mood.”<sup>281</sup>

The Governor stated that he did not recall inviting Trooper #1 for a tour of the Mansion, inviting her upstairs at the Mansion, talking to Trooper #1 about finding him a girlfriend, or talking to Trooper #1 about age differences in relationships.<sup>282</sup> The Governor testified that he did not recall ever talking to Trooper #1 about her clothing.<sup>283</sup> Governor Cuomo stated that he has spoken to Trooper #1 about the fact that she is married or is about to get married, but he denied making any of the comments about marriage that Trooper #1 alleged he made, including the comment about marriage leading to a reduced sex drive.<sup>284</sup>

*Unwelcome Physical Contact.* Over time, Governor Cuomo escalated his inappropriate behavior to unwelcome touching of different parts of Trooper #1’s body. The first time Trooper #1 recalls being touched in an unwelcome way by the Governor is when Trooper #1 was at the Governor’s New York City office and was escorting him upstairs in the elevator with Senior Investigator #1.<sup>285</sup> She stated that, as is typical when riding the elevator with the Governor, she stood in front of the door, and the Governor stood behind her.<sup>286</sup> As Trooper #1, Senior Investigator #1, and the Governor were riding the elevator up, the Governor placed his finger on

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<sup>276</sup> *Id.* at 84:23–25. The Trooper friend told us that Trooper #1 did, in fact, tell her about this comment by the Governor.

<sup>277</sup> *Id.* at Tr. 84:25–85:4.

<sup>278</sup> *Id.* at 107:8–108:10.

<sup>279</sup> *Id.* at 108:18–109:12.

<sup>280</sup> *Id.* at 112:15–17.

<sup>281</sup> *Id.* at 112:18–21.

<sup>282</sup> Andrew Cuomo Tr. 438:6–17, 441:20–442:12.

<sup>283</sup> *Id.* at 441:2–5.

<sup>284</sup> *Id.* at 439:18–441:1.

<sup>285</sup> Trooper #1 Tr. 87:8–88:8.

<sup>286</sup> *Id.* at 87:16–18.

the top of her neck and ran his finger down the center of her spine midway down her back, and said to Trooper #1, “Hey, you.”<sup>287</sup>

Trooper #1 also testified about a time when the Governor kissed her during the summer of 2019.<sup>288</sup> Trooper #1 was stationed outside the Mt. Kisco residence and approached the Governor in the driveway to ask if he needed anything.<sup>289</sup> At this point, the Governor responded, “Can I kiss you?”<sup>290</sup> Trooper #1 testified, “I remember just freezing, being—in the back of my head, I’m like, oh, how do I say no politely because in my head if I said no, he’s going to take it out on the detail. And now I’m on the bad list.”<sup>291</sup> Unsure what to do, she replied, “Sure.”<sup>292</sup> The Governor then proceeded to kiss Trooper #1 on the cheek and said something to the effect of, “oh, I’m not supposed to do that” or “unless that’s against the rules.”<sup>293</sup>

Another member of the PSU observed the interaction and corroborated the kiss in an interview with us. After the incident, he joked to Trooper #1 that the Governor had never asked to kiss him.<sup>294</sup> Trooper #1 also informed a friend and colleague on the PSU about the incident shortly afterward.<sup>295</sup> Trooper #1 found the kiss to be unwelcome and sought the advice of her colleague on what to do.<sup>296</sup> The colleague (another woman who had been subjected to flirtatious comments from the Governor) suggested that the next time the Governor asked to kiss her, Trooper #1 should say that she was sick.<sup>297</sup> Trooper #1 stated that in mid-to-late October 2019, the Governor again asked to kiss her, this time at an event at the Low Memorial Library.<sup>298</sup> Trooper #1 stated that, at this event, the Governor approached her window while she was in the driver’s seat of the tail car and asked if he could kiss her.<sup>299</sup> Trooper #1, following her friend’s

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<sup>287</sup> *Id.* at 87:20–88:2. Senior Investigator #1, who allegedly was present in the elevator, was distracted by his phone and had not seen the interaction, although he did recall that Trooper #1 talked about it after the incident. *Id.* at 88:17–89:6. Trooper #1 testified that she got out of the elevator on the 39<sup>th</sup> floor, walked downstairs to the 38<sup>th</sup> floor, and discussed the incident with the Trooper sitting at the desk on the 38<sup>th</sup> floor, who agreed with her that the incident had been “creepy.” *Id.* at 88:7–14. The Trooper who Trooper #1 thought was sitting on the desk on the 38<sup>th</sup> floor did not recall this conversation, although he said it was possible it happened. Two other witnesses said that Trooper #1 told them about this incident after it occurred.

<sup>288</sup> *Id.* at 96:16–97:15.

<sup>289</sup> *Id.* at 96:24–97:3.

<sup>290</sup> *Id.* at 97:3–4.

<sup>291</sup> *Id.* at 97:4–9.

<sup>292</sup> *Id.* at 97:10–11.

<sup>293</sup> *Id.* at 97:11–14.

<sup>294</sup> *Id.* at 97:17–22. Specifically, the PSU member told us that he recalled joking that he had been on the PSU for years and the Governor had not said “hello” to him, while Trooper #1 received a kiss from the Governor in a matter of months. The PSU member said that he did not make any comment about the kiss while the Governor was present, because, he believed, he could have been thrown off the detail for doing so. He told us that after news of the sexual harassment allegations broke, he thought of this incident with Trooper #1.

<sup>295</sup> *Id.* at 97:23–98:2.

<sup>296</sup> *Id.* at 97:23–98:9.

<sup>297</sup> *Id.* at 98:2–8.

<sup>298</sup> *Id.* at 98:22–99:20.

<sup>299</sup> *Id.* at 99:11–20.

suggestion, told the Governor she was sick.<sup>300</sup> She said that the Governor looked at her “almost in disgust that [she] had denied him,” and then walked away.<sup>301</sup>

On September 23, 2019, while providing security assistance for an event in Belmont, Long Island as a member of the travel team, Trooper #1 held the door open for the Governor as he left the event.<sup>302</sup> As the Governor walked by Trooper #1, he ran the palm of his left hand across her stomach in the direction opposite the direction that he was walking.<sup>303</sup> The center of the Governor’s hand was on Trooper #1’s belly button, and he pushed his hand back to her right hip where she kept her gun.<sup>304</sup> A Senior Investigator (“Senior Investigator #2”) who was walking behind the Governor saw the Governor touch Trooper #1 in the stomach, and a number of PSU members recalled hearing about this incident from Trooper #1 after it happened.<sup>305</sup> In her testimony, Trooper #1 described the way in which the Governor touched her stomach as follows: “I felt . . . the palm of his hand on my bellybutton and . . . pushed back toward my right hip where my gun is . . . I would say [the bellybutton] was probably in . . . the center of his palm.”<sup>306</sup>

The conduct made Trooper #1 feel “completely violated because to me, like that’s between my chest and my privates.”<sup>307</sup> Although she was upset by the conduct, Trooper #1 did not feel she could do anything about it, explaining, “I felt completely violated. But, you know, I’m here to do a job.”<sup>308</sup> Trooper #1 spoke to Senior Investigator #2 about it that day and the next day as they were “both still in shock about what happened.”<sup>309</sup> She also spoke with another PSU Trooper who is a woman about how the Governor had touched her and that Trooper “thought it was disgusting. We were creeped out.”<sup>310</sup>

Senior Investigator #2 fully corroborated Trooper #1’s account.<sup>311</sup> He told us he checked in with her later in the day and asked whether she wanted to do anything about the incident.<sup>312</sup> Trooper #1 told Senior Investigator #2 that she did not want to report the incident.<sup>313</sup> She

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<sup>300</sup> *Id.* at 99:20–21.

<sup>301</sup> *Id.* at 99:20–23.

<sup>302</sup> *Id.* at 90:8–15.

<sup>303</sup> *Id.* at 90:13–91:5. One PSU member who remembered hearing about this event from Trooper #1 said that he heard that the Governor asked Trooper #1 when he put his hand on her stomach if she was pregnant, which Trooper #1 denied. *Id.* at 96:13–15.

<sup>304</sup> *Id.* at 90:23–91:3.

<sup>305</sup> *Id.* at 92:13–16. One PSU member said that Trooper #1 told her about this incident the same day it happened.

<sup>306</sup> *Id.* at 91:22–92:8.

<sup>307</sup> *Id.* at 92:7–10.

<sup>308</sup> *Id.* at 94:12–15.

<sup>309</sup> *Id.* at 92:20–93:3.

<sup>310</sup> *Id.* at 94:9–10.

<sup>311</sup> *Id.* at 91:5–7.

<sup>312</sup> *Id.* at 92:19–93:10.

<sup>313</sup> *Id.*

explained that this was because (1) she was new to the travel team; (2) the Detail Commander (the head of the PSU at the time and someone who was viewed as loyal to the Governor) was with her when the Governor had quizzed Trooper #1 about her attire and had done nothing; and (3) she had heard that other PSU officers had been punished over insignificant instances in which they had upset the Governor.<sup>314</sup> She was concerned that if she raised any issues about the Governor's conduct, she or Senior Investigator #2 would be punished for speaking out against the Governor.<sup>315</sup> She explained:

[F]rom my point of view, I'm a trooper, newly assigned to the travel team. Do I want to make waves? No. And also, in the back of my mind, you know, [Detail Commander] had already previously witnessed me being asked why I don't wear a dress. So if the detail commander is basically okay with that behavior, you know, [Detail Commander] never even checked on me or even said anything to me after that, other than stays in truck, don't repeat. I wasn't even trying to put [Senior Investigator #2] in a position where—you know, I've heard horror stories about people getting kicked off the detail or transferred over like little things, like I'm not—I had no plans to report it.<sup>316</sup>

Trooper #1 told us that, even now, she remains fearful of speaking out about her experiences with the Governor. She said,

I feel like they [PSU leadership] don't even want to ask because nobody wants to be in the line of fire of the Governor. Everyone knows he's very vindictive . . . I'm nervous that the Governor's going to know I spoke out, and I'm going to be retaliated against, you know . . . And everybody, for the most part, gets promoted because they're in the good graces of the Governor. So if they stay quiet or give him information, they'll get promoted, or something good will happen to them. That's just like the culture again in PSU.<sup>317</sup>

She also explained that she was worried about “exposing myself and . . . my privacy.”<sup>318</sup> However, she ultimately decided to speak out because “at the end of the day, if I could help

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<sup>314</sup> *Id.* at 93:10–94:3.

<sup>315</sup> *Id.* at 93:9–96:2. For example, Trooper #1 had heard that “back in the day, there was a senior who again asked the Governor, Hey, do you have any plans later? And the Governor was like, Don't ask me what I plan on doing later . . . And the senior was basically bounced out of the truck to like the tail com which is basically the person who works the radio in the tail car and transferred out . . . It's just not something I was trying to explore.” *Id.* at 95:5–17. The other PSU Troopers we interviewed corroborated the general belief that PSU members had been transferred or otherwise punished for doing or saying things that upset the Governor.

<sup>316</sup> *Id.* at 93:10–94:3.

<sup>317</sup> *Id.* at 139:5–140:6.

<sup>318</sup> *Id.* at 131:23–132:3.

validate these women, I think that's more important than . . . my own, you know personal life . . . ."<sup>319</sup>

During his testimony, the Governor stated that he does recall hugging Trooper #1<sup>320</sup> and said that he may have kissed her on the cheek at a Christmas party.<sup>321</sup> However, he denied that he has ever purposely touched Trooper #1 on her stomach<sup>322</sup> or run his fingers down Trooper #1's back.<sup>323</sup>

### **PSU and Executive Chamber's Misleading Press Response Regarding Trooper #1**

In December 2020, the New York State Police received a press inquiry about the circumstances of Trooper #1's transfer to the PSU. The Times Union requested that the New York State Police "provide the date that [Trooper #1] joined the governor's security detail and her current status."<sup>324</sup> The reporter explained that he was "[t]rying to pinpoint how she was picked to get on the detail" as he understood "that around the time she was appointed to the detail the requirement for four years on the job was changed to three."<sup>325</sup> Although—as discussed above and as corroborated by the contemporaneous documents, Trooper #1 had in fact been allowed to join the PSU before meeting the time requirement for service as a Trooper to be eligible to join the PSU (three years)—the State Police (after consultation with the Executive Chamber) drafted a statement denying any exception being made for Trooper #1 and taking offense at the question even being asked.<sup>326</sup> The response stated, with no mention of the Governor's role in bringing Trooper #1 onto the PSU and the fact that Trooper #1 had not met the three-year requirement, that:

[Trooper #1] joined the Protective Services Unit in January 25, 2018, along with another Trooper with the same exact amount of experience. Since June of 2012, State Police has required three years of Division service in order to qualify for appointment to the PSU.<sup>327</sup> Her assignment was based on her performance while assisting the PSU at an event in November of 2017. A Senior Investigator on the detail was impressed by her work and attitude, and recommended her as a possibility to fill an opening on the unit. PSU conducted a standard review of her work as a Trooper, which

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<sup>319</sup> *Id.* at 132:3–7.

<sup>320</sup> Andrew Cuomo Tr. 435:15–19.

<sup>321</sup> *Id.* at 435:23–25.

<sup>322</sup> *Id.* at 438:1–5.

<sup>323</sup> *Id.* at 437:12–20.

<sup>324</sup> Ex. 30 (email chain between William Duffy and Brendan Lyons dated Dec. 18, 2020).

<sup>325</sup> *Id.*

<sup>326</sup> Ex. 31 (email chain between William Duffy, Kevin Bruen, Vincent Straface, and Kristin Lowman dated Dec. 18, 2020).

<sup>327</sup> Although the State Police accurately states that the requirement is 3 years, it fails to acknowledge that at the time of her appointment, she had not actually met that requirement.



included interviews with her supervisors, who praised her work and agreed that she would be a good candidate for PSU . . . Any suggestion that [Trooper #1]’s assignment to the PSU and subsequent promotion was based on anything other than her hard work and abilities is false. Such a suggestion an insult to [Trooper #1] and the New York State Police.<sup>328</sup>

During her testimony, Ms. DeRosa recalled the Times Union’s inquiry about Trooper #1. She testified that her view was that the inquiry itself was sexist, leading to a heated exchange between Ms. DeRosa and Casey Seiler, the editor of the Times Union.<sup>329</sup> Ms. DeRosa testified that she yelled at him, saying, “you guys are trying to reduce her hiring to being about looks. That’s what men do.”<sup>330</sup> Ms. DeRosa testified that the Governor overheard her “getting animated” in her office during her conversation with Mr. Seiler.<sup>331</sup> Ms. DeRosa testified that after she explained the situation to the Governor, the Governor called Mr. Seiler himself.<sup>332</sup> Ms. DeRosa stated that the Governor told Mr. Seiler not to get mad at Ms. DeRosa for being animated, as “this is one of the topics that sends [Ms. DeRosa] off a cliff.”<sup>333</sup> Ms. DeRosa testified that the Times Union ultimately decided not to write on the subject.<sup>334</sup> As noted above, despite Ms. DeRosa’s accusations of sexism, the Governor’s call to Mr. Seiler, and the State Police’s official response, the truth was, as Trooper #1 informed us and as the documents and other witnesses confirmed, Trooper #1 in fact had been allowed to transfer to the PSU (after meeting briefly with the Governor and at the Governor’s urging) even though she did not meet the three-year service requirement for the PSU. And then the Governor proceeded to engage in a pattern of sexually harassing conduct toward her.

## Assessment

We found Trooper #1 to be credible in demeanor and in the substance of her allegations. Her allegations were corroborated by others who witnessed certain of the relevant conduct and contemporaneous documents, as well as accounts of interactions she had had with the Governor that she provided to a number of her colleagues at the time. We found the level of detail and consistency in her account, and the circumstances of Trooper #1’s allegations to be credible and supported by the other evidence we found in the investigation.

Trooper #1’s allegations concerning her hiring were substantiated by Senior Investigator #1, who was involved in her transfer to the PSU, as well as by contemporaneous documents. We did not find evidence to substantiate the Governor’s claim that he had suggested on the day he

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<sup>328</sup> Ex. 31 (email chain between William Duffy, Kevin Bruen, Vincent Straface, and Kristin Lowman dated Dec. 18, 2020).

<sup>329</sup> DeRosa Tr. 102:23–105:22.

<sup>330</sup> *Id.* at 103:19–21.

<sup>331</sup> *Id.* at 105:16–22.

<sup>332</sup> *Id.* at 106:4–7.

<sup>333</sup> *Id.* at 106:9–12.

<sup>334</sup> *Id.* at 104:6–8.

met Trooper #1 that the Senior Investigator #1 recruit two Troopers who were women.<sup>335</sup> To the contrary, although he recognized that diversity was a goal that the PSU was pursuing at the time, Senior Investigator #1 stated that there was in fact another State Trooper who was a woman at the RFK Bridge event that day that he thought was good, and he recalled that she later joked that only Trooper #1 had been asked to join the PSU.

Trooper #1's allegations concerning her interactions with the Governor were also corroborated by numerous other witnesses. Notably, some of Trooper #1's more serious allegations, including the unwelcome touching in September 2019 on the stomach, were witnessed by other State Troopers and were discussed with a number of other State Troopers who recall having those discussions with her and being disturbed by them. Compared to that, the Governor's testimony about his involvement in her transfer to the PSU (where he answered many questions with a generalized statement about his emphasis on diversity in the PSU) and his blanket denials of any of the offensive conversations and physical contact lacked credibility.<sup>336</sup>

Importantly, Trooper #1 had no desire to make her allegations public or to bring them to anyone's attention. In fact, we first reached out to Trooper #1 after we heard from others some of what she had experienced. She felt and continues to feel great fear and anxiety that she will be retaliated against for disclosing these incidents of inappropriate conduct by the Governor. She provided the information about these relevant incidents only because she was required to provide truthful information in response to our inquiries (including following a subpoena for testimony) and because she concluded it was the right thing to do in light of the other allegations by women that have been made against the Governor.

### **iii. Charlotte Bennett**

Charlotte Bennett began working in the Executive Chamber in January 2019.<sup>337</sup> Her first role was as a briefer, which involved organizing and researching materials on relevant topics for the Governor.<sup>338</sup> In May 2019, Ms. Bennett was assigned to also serve as an executive assistant to the Governor.<sup>339</sup> In this role, Ms. Bennett assisted the Governor in administrative tasks, including managing telephone calls, taking dictation, and for a period of time, traveling with the Governor.<sup>340</sup> She testified that around the same time, she was promoted to the role of Senior Briefer.<sup>341</sup> As an executive assistant to the Governor and a Senior Briefer, Ms. Bennett was often in frequent contact with the Governor, which provided an unusual level of access to the Governor for a non-senior staff member of the Executive Chamber.

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<sup>335</sup> Andrew Cuomo Tr. 425:19–426:8.

<sup>336</sup> *Id.* at 424:16–18, 430:9–22, 431:16–432:4.

<sup>337</sup> Bennett Tr. 12:21.

<sup>338</sup> *Id.* at 13:25–14:25.

<sup>339</sup> *Id.* at 61:2–9.

<sup>340</sup> *Id.* at 61:10–13; 164:2–5.

<sup>341</sup> *Id.* at 60:14–19.

Ms. Bennett stated that for the first part of her employment, she was based in the New York City office and sometimes worked in Albany.<sup>342</sup> After the outbreak of the COVID-19 pandemic, Ms. Bennett lived in a hotel and worked out of the Capitol building between March 23, 2020 and July 2020.<sup>343</sup> Ms. Bennett left her role in the Executive Chamber in the fall of 2020.<sup>344</sup>

## **Interactions with the Governor**

During Ms. Bennett's time in the Executive Chamber, she worked closely with the Governor in her role as both a briefer and as an executive assistant. In doing so, Ms. Bennett developed what she initially felt was a good personal relationship with the Governor, something that other witnesses commented on as well.

As set forth in greater detail below, over the course of her interactions, the Governor engaged in conversations with Ms. Bennett on a number of personal topics, including her preferences in romantic or sexual relationships, her history as a sexual assault survivor, and his own romantic relationship status and preferences. Governor Cuomo also made comments regarding Ms. Bennett's appearance at times. Ms. Bennett testified that she increasingly felt uncomfortable with the Governor's behavior and in June 2020, reported his behavior to certain senior staff in the Executive Chamber.

*Early Interactions.* Ms. Bennett testified that during her early interactions with the Governor in the summer of 2019, she did not feel as though he was behaving inappropriately and that, at the time, she saw him as a father figure.<sup>345</sup> Reflecting back on the interactions, Ms. Bennett testified that she now feels that some of the Governor's questions about her personal life, as well as the personal attention he was paying her, were inappropriate, but it was "not obvious to [her] until it escalated to the point [that] it did."<sup>346</sup>

Ms. Bennett's first substantive interaction with the Governor occurred on May 9, 2019.<sup>347</sup> Annabel Walsh, Director of Scheduling for the Governor at the time, had asked Ms. Bennett to meet with the Governor the previous day to determine whether she would be a good fit as an executive assistant for the Governor.<sup>348</sup> Ms. Bennett met with the Governor and Ms. Walsh, and he asked Ms. Bennett a series of introductory questions.<sup>349</sup> Ms. Bennett became an executive assistant to the Governor shortly thereafter.<sup>350</sup>

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<sup>342</sup> *Id.* at 17:22–25, 32:4–6, 33:17–25.

<sup>343</sup> *Id.* at 34:12–14.

<sup>344</sup> *Id.* at 234:11–235:9.

<sup>345</sup> *Id.* at 111:10–17.

<sup>346</sup> *Id.* at 111:10–112:2.

<sup>347</sup> *Id.* at 36:6–10.

<sup>348</sup> *Id.* at 36:16–22.

<sup>349</sup> *Id.* at 38:24–39:7.

<sup>350</sup> *Id.* at 39:20–24, 61:2–9.

On May 16, 2019, Ms. Bennett had a conversation with the Governor during which the Governor asked her about the length of her previous relationships and whether she “honored her commitments.”<sup>351</sup> That same day, she was in the Governor’s office when he asked her whether she knew the song, “Danny Boy.”<sup>352</sup> Ms. Bennett recalled that the Governor had a copy of the lyrics with him that he handed to her as he asked her to memorize the lyrics.<sup>353</sup> Ms. Bennett spent much of the day trying to memorize the lyrics to the song, and the Governor occasionally “would pop out” of the side door to his office that opened to Ms. Bennett’s cubicle and ask her to start singing the song.<sup>354</sup> That same day, Ms. Bennett sent a text message to a friend detailing the interaction. She wrote, “was with Gov when you texted. He asked me if I honored my commitments . . . asked me to name commitments. Asked[] me how long my relationships were . . . He’s making me learn the lyrics to Danny Boy. And keeps coming out to quiz me and I’ve failed every time.”<sup>355</sup> She also sent a text message to a member of her family, writing, “Sorry. Gov is in. Can’t talk rn . . . [h]e’s making me memorize the lyrics to Danny Boy. He keeps coming out to quiz me . . . .”<sup>356</sup>

The Governor then called Ms. Bennett into Ms. Benton’s office, where Ms. Benton and Ms. DeRosa were also present, and asked Ms. Bennett to sing “Danny Boy.”<sup>357</sup> Ms. Bennett testified that she began to recite the lyrics, and Governor Cuomo stopped her and asked her to sing the lyrics instead.<sup>358</sup> When Ms. Bennett resisted, the Governor began to sing the song, and Ms. Bennett attempted to join.<sup>359</sup> Ms. Bennett noted that Ms. DeRosa remarked that this was “hazing.”<sup>360</sup> Once Ms. Bennett returned to her cubicle, a colleague told Ms. Bennett that the Governor had been testing Ms. Bennett for her temperament, confidence, ability to handle herself, anxiety, and memory.<sup>361</sup>

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<sup>351</sup> *Id.* at 112:10–16, 129:9–15.

<sup>352</sup> *Id.* at 125:12–22.

<sup>353</sup> *Id.* at 125:20–25. One staff member recalled that earlier that day, the Governor was in the elevator with Dani Lever and the staff member when the Governor began to sing the song, “Danny Boy,” possibly as a play on Ms. Lever’s first name. The Governor then asked the staff member to print the lyrics to the song; the staff member printed the lyrics and handed them to Ms. Bennett because she was the executive assistant sitting outside of the Governor’s office at the time. Another junior staff member, who is a woman, also recalled the Governor asking her to sing “Danny Boy” with him.

<sup>354</sup> *Id.* at 126:7–16. A staff member who worked next to Ms. Bennett at the time testified that he saw Ms. Bennett with a print-out of the lyrics to Danny Boy, and she was mouthing the lyrics out and humming them while trying to memorize them. Vicinanza Tr. 147:16–148:21.

<sup>355</sup> Ex. 32 (text messages between Ms. Bennett and a friend dated May 16, 2019).

<sup>356</sup> Ex. 33 (text messages between Ms. Bennett and a family member dated May 16, 2019).

<sup>357</sup> Bennett Tr. 126:20–127:25.

<sup>358</sup> *Id.* at 127:6–10.

<sup>359</sup> *Id.* at 127:10–25.

<sup>360</sup> *Id.* at 126:23–127:2.

<sup>361</sup> *Id.* at 128:6–13. This was not the only time the Governor asked Ms. Bennett to sing for him or the Governor sang to her. On January 1, 2020, Ms. Bennett wrote to the individual who she had replaced as executive assistant, “[h]e just asked me to sing bohemian rhapsody so. We aren’t far off from a bedtime story.” The former executive assistant responded, “Good lord. The hazing never ends.” Ex. 34 (text messages between Ms. Bennett and a former coworker dated Jan. 1, 2020). In addition, on October 4, 2019, the Governor began a telephone call with

Beginning in the summer of 2019, Ms. Bennett began speaking to the Governor about her gym habits and he asked her on occasion how many pushups she could do.<sup>362</sup> On August 9, 2019, Ms. Bennett sent a text message to her parents reporting that the Governor had invited Ms. Bennett to “lift [weights] together in his mansion gym” and that the Governor “started asking what I lift, etc. how many pushups I can do.”<sup>363</sup> That same day, Ms. Bennett posted to her Instagram story with the caption, “The governor invited me to lift weights with him. Life complete. He challenged me to a push-up competition.”<sup>364</sup> Ms. Bennett also wrote to her parents that the Governor had asked her “do you have a bf [boyfriend]” and when she replied no, the Governor replied, “[T]hat’s why. [Y]ou could beat them all up.”<sup>365</sup> On October 14, 2019, the Governor asked Ms. Bennett to do pushups in front of him, and she did approximately 20 pushups in his office.<sup>366</sup> Later that day, she sent a text message to her parents and wrote, “Did the pushups for him today . . . And I just kept going until he told me to stop and didn’t slow down. He said ok stop stop . . . and he was like ok I’m intimidated. Not many women can do pushups like that. Actually, not many MEN can do pushups like that.”<sup>367</sup>

On one occasion, the Governor persistently asked Ms. Bennett what people were saying about the size of his hands.<sup>368</sup> Ms. Bennett testified that she understood the Governor was attempting to get her to say something about the size of his genitals.<sup>369</sup> Ms. Bennett explained how difficult it was for her to navigate the situation, as she was uncomfortable and wanted to change the topic, but she also wanted to avoid angering the Governor. She explained:

[H]e wouldn’t let it go and kept asking and talking about the size of his hands and was like kind of engaging me in this what became very uncomfortable interaction in which I was more scouring my brain for like a positive thing people had said to him about this job and it turned into him sticking to this point and like pointedly joking and asking me and talking about his hands and the size of them . . . [It] just like became him trying to get me to admit something sexually; what do people say about that kind of trying to get me to say more . . . I really was just trying to like thread this needle of not making him angry but also maintaining my—what I

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Ms. Bennett by singing verses from “Do You Love Me?” by the Contours and asking whether she knew the song. Ex. 35 (transcript of conversation between Ms. Bennett and the Governor on Oct. 4, 2019). An excerpted portion of the audio of the call is also publicly available at <https://vimeo.com/582257128/adee5e6783>.

<sup>362</sup> Bennett Tr. 116:12–117:13. Ms. Benton testified that she once overheard the Governor and Ms. Bennett discuss how many pushups Ms. Bennett could do. Benton Tr. 291:8–21.

<sup>363</sup> Ex. 36 (text messages between Ms. Bennett and her parents dated Aug. 9, 2019).

<sup>364</sup> Ex. 37 (Instagram story by Ms. Bennett dated Aug. 9, 2019).

<sup>365</sup> Ex. 36 (text messages between Ms. Bennett and her parents dated Aug. 9, 2019).

<sup>366</sup> Bennett Tr. 117:23–118:2, 119:9–16. Ms. Bennett sent text messages about this incident to the executive assistant whom Ms. Bennett had replaced. *See* Ex. 38 (text messages between Ms. Bennett and a former coworker dated October 14, 2019).

<sup>367</sup> *See* Ex. 39 (text messages between Ms. Bennett and her parents dated Oct. 14, 2019).

<sup>368</sup> Bennett Tr. 132:25–133:19.

<sup>369</sup> *Id.* at 135:15–19.

see as appropriate behavior. Like I'm not crossing this boundary with you but I'm also not looking to get into a fight with you and losing my job.<sup>370</sup>

Sometime in or around November 2019, the Governor commented on Ms. Bennett's hair, which she had worn in a bun that day.<sup>371</sup> Although the Governor typically greeted her when she greeted him in the morning, when she greeted him that day, he asked about or commented why she was wearing her hair in a bun and said nothing else.<sup>372</sup> At the end of the day, the Governor asked Ms. Bennett again why she was wearing her hair in a bun.<sup>373</sup> Ms. Bennett said that she became angry and yelled "you don't like my bun?!" and yelled to the other assistants, "he doesn't like my bun."<sup>374</sup> After the Governor had left the office for the day, another colleague ("Staffer #1") went to Ms. Bennett to chat, and Ms. Bennett described what the Governor had said about her hairstyle.<sup>375</sup> Ms. Bennett stated that the Governor referred to her as "bun" for the next month.<sup>376</sup>

Ms. Bennett remembered overhearing, at some point in 2019, Ms. Benton talking to the Governor and saying that she would be completing the sexual harassment training on behalf of the Governor.<sup>377</sup> Ms. Bennett testified that she did not "remember the particular details of [Ms. Benton's] comments but it was a very obvious and jarring moment" for her.<sup>378</sup> When this allegation by Ms. Bennett was made public in February 2021, the Executive Chamber issued a statement that Ms. Benton "categorically denies the exchange . . . this is not true."<sup>379</sup> But in her sworn testimony, Ms. Benton admitted that she was the one who signed the 2019 sexual harassment training attestation form for the Governor, after they both claimed the Governor reviewed the training material.<sup>380</sup> The Governor also testified that he does not specifically recall

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<sup>370</sup> *Id.* at 133:9–134:23.

<sup>371</sup> *Id.* at 136:15–25.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 137:2–9.

<sup>374</sup> *Id.* at 137:15–138:5.

<sup>375</sup> Ms. Bennett also texted another colleague in the Executive Chamber that the Governor had only spoken to her twice that day and that "both times it was to tell me he didn't like how I did my hair . . ." Ex. 40 (text messages between Ms. Bennett and Staffer #5 dated Nov. 18, 2019).

<sup>376</sup> Bennett Tr. 138:8–9. Ms. Bennett testified that she had told a number of individuals about this incident at the time. At least three witnesses recalled hearing about the incident prior to the publication of this allegation.

<sup>377</sup> *Id.* at 20:10–21:14.

<sup>378</sup> *Id.* at 21:5–14.

<sup>379</sup> Norah O'Donnell *et al.*, *Cuomo Accuser Alleges a Staffer Took Sexual Harassment training for the Governor*, CBS News (Mar. 6, 2021), <https://www.cbsnews.com/news/cuomo-accuser-charlotte-bennett-sexual-harassment-training-staffer/>.

<sup>380</sup> Andrew Cuomo Tr. 22:22–25, 28:15–30:4; Benton Tr. 103:16–25, 105:22–106:18; *see also* Ex. 41 (2019 attestation form with the Governor's name). A review of the signature on the attestation form shows that the signature looks different from the Governor's signature on official documents. *See, e.g.*, Executive Order No. 211, *Declaration of a State Wide Disaster Emergency Due to Gun Violence* (July 6, 2021), <https://www.governor.ny.gov/sites/default/files/2021-07/EO%20211.pdf>.

taking the sexual harassment training any year other than 2019.<sup>381</sup> In response to our request for all certifications or records of completion of training for the Governor from January 1, 2013 to the present, the Executive Chamber has only been able to produce that one attestation form for 2019 for the Governor.

During his testimony, the Governor denied many of Ms. Bennett’s allegations about their early interactions, including that he had required Ms. Bennett to learn and perform “Danny Boy”;<sup>382</sup> that he had made comments about the size of his hands;<sup>383</sup> and that he had criticized Ms. Bennett’s hair or called her “bun.”<sup>384</sup> The Governor acknowledged, however, that he and Ms. Bennett had discussed having a “push up competition.” He testified, “there was one time where I said because she got up to a very high number and I said ‘Well, how do you—you’re doing the pushup wrong. How do you do a pushup? . . . [S]he did [a] push up. And she did nose to floor. I remember that because I was a little intimidated.’”<sup>385</sup> Other than that, the Governor denied remembering any interactions with her prior to about January 2020, even though the contemporaneous texts—and testimony from many witnesses—establish that the Governor and Ms. Bennett frequently interacted before January 2020.<sup>386</sup> The Governor also testified that he did not recall ever singing any part of a song to Ms. Bennett, including “Do You Love Me?” by the Contours, going so far as to say “I don’t even know that song.”<sup>387</sup> However, a call that Ms. Bennett recorded for dictation purposes from October 4, 2019 begins with the Governor singing the chorus to that song several times to Ms. Bennett before beginning dictation.<sup>388</sup>

*January 19, 2020 Conversation.* Ms. Bennett testified that, on January 19, 2020, she had a long conversation with the Governor in the Executive Mansion pool house after she was sent there to drop off a speech for the Governor.<sup>389</sup>

During the conversation, Ms. Bennett and the Governor discussed in detail her history as a survivor of sexual assault.<sup>390</sup> Ms. Bennett recalled that the conversation began when the Governor asked her to “tell [him] something,” and Ms. Bennett responded by discussing how hard the staff were working.<sup>391</sup> Ms. Bennett then told the Governor that his signing of sexual assault legislation, “Enough is Enough,” in 2015 changed her life.<sup>392</sup> Ms. Bennett disclosed to the Governor that she had been sexually assaulted in college, that she had a difficult experience

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<sup>381</sup> Andrew Cuomo Tr. 16:1–17:8.

<sup>382</sup> *Id.* at 272:3–13. The Governor stated that Danny Boy is a song that “we sing as a group” and that he might have asked her to Google the words to Danny Boy for him. *Id.*

<sup>383</sup> *Id.* at 507:7–12.

<sup>384</sup> *Id.* at 277:10–23.

<sup>385</sup> *Id.* at 275:8–24.

<sup>386</sup> *Id.* at 258:17–259:20.

<sup>387</sup> *Id.* at 273:5–274:10.

<sup>388</sup> See Ex. 35 (transcript of conversation between Ms. Bennett and the Governor on October 4, 2019).

<sup>389</sup> Bennett Tr. 140:2–12, 142:6–150:19.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 142:23–143:7.

<sup>392</sup> *Id.* at 143:11–13.



reporting the assault, and that the experience motivated her to work in politics.<sup>393</sup> Ms. Bennett testified that the Governor then asked her several questions about her experience, including about the details of her assault, and commented, “well, some people have it much worse.”<sup>394</sup> Ms. Bennett testified that at one point, the Governor asked her if she knew what a “cone of silence” was and discussed with her that someone close to him had also been sexually assaulted.<sup>395</sup> She further testified that the Governor advised her not to pursue work related to sexual assault as a career.<sup>396</sup> Ms. Bennett said that, at the time, although she found some of the Governor’s comments and questions to be insensitive, she appreciated that the Governor had taken an interest in her career.<sup>397</sup>

Ms. Bennett sent multiple contemporaneous text messages concerning the January 19, 2020 conversation with the Governor. For example, that day, she texted her mother, “Had a really long convo w gov today. Talked about career etc . . . 2 hours. Told him about SMART<sup>398</sup> . . . He responded so well. Really impressed. He had a lot to say and was very emotional and serious but also asked a lot of questions.”<sup>399</sup> Ms. Bennett similarly wrote to her father that same day, reporting “[h]ad a long chat w gov today though. I kinda hate that it helps, but it does. An hour or two w him shouldn’t erase all the bullshit but it helps. It was a long and emotional convo.”<sup>400</sup>

The Governor acknowledged having this conversation with Ms. Bennett; indeed, this is the first substantive interaction with Ms. Bennett that the Governor claimed he recalled.<sup>401</sup> Although his description of the interaction is largely consistent with Ms. Bennett’s, unlike Ms. Bennett, the Governor testified that Ms. Bennett provided details of her sexual assault unprompted.<sup>402</sup>

*May 2020 Conversation.* Ms. Bennett testified that the next notable interaction with the Governor happened in mid-May 2020, after she began working and living in Albany.<sup>403</sup> During this interaction, the Governor spoke with Ms. Bennett about her time in Albany and asked her

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<sup>393</sup> *Id.* at 143:15–144:18.

<sup>394</sup> *Id.* at 145:18–146:13.

<sup>395</sup> *Id.* at 144:23–145:7.

<sup>396</sup> *Id.* at 146:25–147:5.

<sup>397</sup> *Id.* at 143:15–24, 150:24–151:13.

<sup>398</sup> SMART is an organization Ms. Bennett founded as a student at Hamilton College to support survivors of sexual assault and harassment. See *Letter to the Editor: a message from SMART*, *The Spectator* (Mar. 31, 2021), <https://spec.hamilton.edu/letter-to-the-editor-a-message-from-smart-283fdde9d443>.

<sup>399</sup> See Ex. 42 (text messages between Ms. Bennett and her mother dated Jan. 19, 2020).

<sup>400</sup> See Ex. 43 (text messages between Ms. Bennett and her father dated Jan. 19, 2020). On January 28, 2020, Ms. Bennett texted the executive assistant whom she had replaced, writing, “things with gov have been so good,” referring to the January 19, 2020 conversation. See Ex. 44 (text messages between Ms. Bennett and former coworker dated Jan. 28, 2020); Bennett Tr. 152:13–16.

<sup>401</sup> Andrew Cuomo Tr. 258:13–259:20.

<sup>402</sup> Bennett Tr. 250:11–257:17.

<sup>403</sup> *Id.* at 153:2–4.

such questions as who she was “hitting on” and “who was hitting on [her].”<sup>404</sup> During this conversation, Ms. Bennett spoke with the Governor about a speech that she was giving at her *alma mater*, Hamilton College, regarding sexual assault.<sup>405</sup> While providing her feedback on her speech, the Governor pointed at her and repeated, “[Y]ou were raped, you were raped, you were raped and abused and assaulted.”<sup>406</sup> Ms. Bennett testified she became uncomfortable and that she felt the Governor was testing her.<sup>407</sup> Ms. Bennett attempted to change the subject by asking the Governor about the effect that dealing with the pandemic had had on him, and he became defensive.<sup>408</sup> The Governor told Ms. Bennett that he was unhappy and stressed, and that he wanted to find a lady and drive off on his motorcycle into the mountains with her.<sup>409</sup>

Later that day, Ms. Bennett sent text messages to Staffer #2 about the interaction. In those messages, Ms. Bennett wrote, “Asked if you were hitting on me . . . . Said, ‘you were raped. You were raped and abused. You were raped and abused and assaulted’ maybe 17 times in a row and wouldn’t stop. . . . The way he was repeating ‘you were raped and abused and attacked and assaulted and betrayed’ over and over again while looking me directly in the eyes was something out of a horror movie. It was like he was testing me.”<sup>410</sup> She reported in the same chain of text messages, “We talked about what celebrities he wanted. For his dream scenario. Which is to hop on the back of his bike w a lady and head for the mountains. And some other things . . . .”<sup>411</sup>

At Staffer #2’s suggestion, the two met each other at the Capitol later that day, and Ms. Bennett went through her conversation with the Governor in greater detail, including that Governor Cuomo and Ms. Bennett had spoken about her upcoming speech at Hamilton and that the Governor had dwelled on Ms. Bennett’s history as a survivor of sexual assault, repeatedly emphasizing that Ms. Bennett had been raped.

The Governor’s characterization of this interaction differs from Ms. Bennett’s. First, he denied that he asked about which staff members were dating or having sex with one another,<sup>412</sup> and said that he had asked her only who she was “hanging out with” because he was concerned that she was not spending time with the other staff members in Albany and wanted to encourage

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<sup>404</sup> *Id.* at 155:22–25. A former colleague of Ms. Bennett recalled hearing from Ms. Bennett that the Governor had asked her about office gossip, including who was dating each other in the Executive Chamber.

<sup>405</sup> *Id.* at 156:14–15.

<sup>406</sup> *Id.* at 157:19–158:2.

<sup>407</sup> *Id.* at 158:3–10.

<sup>408</sup> *Id.* at 160:8–14.

<sup>409</sup> *Id.* at 159:13–160:24.

<sup>410</sup> Ex. 45 (text messages between Ms. Bennett and Staffer #2 dated May 15, 2020).

<sup>411</sup> Ex. 45 (text messages between Ms. Bennett and Staffer #2 dated May 15, 2020). Staffer #2 stated that his reactions, including “WHAT THE FUCK” and “OH MY GOD,” were his reactions to Ms. Bennett having had the unusual opportunity to have a long, personal conversation with the Governor, rather than about the content of Ms. Bennett’s conversation with the Governor. We did not find Staffer #2 credible on this point, given the plain text of the documents and general credibility issues regarding Staffer #2, including his failure to recall many events reported by other witnesses.

<sup>412</sup> Andrew Cuomo Tr. 270:7–11.

her to socialize with them.<sup>413</sup> Second, although he testified that he had given Ms. Bennett advice about her speech, including advising her to say “I was raped at this school, but then I was violated a second time by the school when they victimized me a second time by denying my victimization,”<sup>414</sup> he denied that he said “you were raped” multiple times.<sup>415</sup> The Governor acknowledged, however, that Ms. Bennett was “disturbed” by this conversation and “visibly did not like” the suggestions that he had made.<sup>416</sup> The Governor further denied telling Ms. Bennett that he was “lonely,” explaining that, at the time, he was talking to people about the “concept of loneliness in COVID,” but was not referring to his own circumstances.<sup>417</sup> The Governor also denied that he told Ms. Bennett that he wanted to ride into the mountains on a motorcycle with a woman, although, he stated, he may have said to his staff at some point that he wanted to drive to the Adirondacks on his motorcycle and leave his staff members to “figure it out.”<sup>418</sup>

*June 5 and 6, 2020.* Ms. Bennett testified that she had several interactions with the Governor on June 5, 2020, during which the Governor made comments that made her feel extremely uncomfortable.

One interaction occurred while Ms. Bennett was taking dictation for the Governor.<sup>419</sup> Ms. Bennett recalled walking into the Governor’s office with Executive Assistant #2 who was assisting with the dictation with both wearing masks.<sup>420</sup> While he was dictating, the Governor paused to comment that Ms. Bennett looked like an alien from the movie *Predator* in her mask.<sup>421</sup> According to Ms. Bennett, the Governor then commented, “if I were investigated for sexual harassment, I would have to say I told her she looked like a monster,” and laughed.<sup>422</sup>

Ms. Bennett testified that, during a separate one-on-one interaction with the Governor that day, the Governor asked her how long it had been since she had hugged someone, and complained that he had not hugged anyone in a long time.<sup>423</sup> Ms. Bennett understood that the Governor did not seem to be asking about platonic hugs, because when she responded that Governor Cuomo could hug his daughters, he responded with something like, “No, no, not like

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<sup>413</sup> *Id.* at 264:9–24.

<sup>414</sup> *Id.* at 294:7–12.

<sup>415</sup> *Id.* at 298:16–299:12.

<sup>416</sup> *Id.* at 294:15–24.

<sup>417</sup> *Id.* at 303:20–25.

<sup>418</sup> *Id.* at 305:3–9.

<sup>419</sup> Bennett Tr. 163:21–164:6.

<sup>420</sup> *Id.* at 163:21–164:6.

<sup>421</sup> *Id.* at 164:16–23.

<sup>422</sup> *Id.* at 165:3–7.

<sup>423</sup> *Id.* at 166:25–167:20.

that—like a real hug.”<sup>424</sup> Ms. Bennett testified that the Governor then said he was lonely and that he wanted a girlfriend in Albany.<sup>425</sup>

In the same series of conversations, the Governor asked her if she had ever been with older men and whether she thought age mattered in relationships.<sup>426</sup> According to Ms. Bennett, while she was trying to figure out how to answer the Governor’s question, he cut her off and said, “I don’t think [age differences] matter.”<sup>427</sup> The Governor then said that he would have a relationship with someone who was “22 and up,” or “over the age of 22.”<sup>428</sup> Ms. Bennett noted that earlier that day she and the Governor had discussed the fact that she had recently turned 25.<sup>429</sup> The Governor also asked Ms. Bennett if her last relationship had been monogamous.<sup>430</sup> The Governor then explained to Ms. Bennett that she had trouble being monogamous in relationships (which was not something she herself had said) because of her past as a survivor of sexual assault, and that she required having “control” in relationships.<sup>431</sup>

At one point during this conversation, Ms. Bennett tried to change the topic by discussing a tattoo that she wanted to get for her birthday.<sup>432</sup> The Governor insisted that she get the tattoo on her butt rather than her shoulder, so that people would not see it if she were wearing a dress.<sup>433</sup> The Governor also asked Ms. Bennett about her piercings, and asked if she had piercings anywhere other than her ears.<sup>434</sup> Ms. Bennett described this conversation as “painfully awkward.”<sup>435</sup>

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<sup>424</sup> *Id.* at 167:2–9.

<sup>425</sup> *Id.* at 167:24–168:2. At some point during the summer of 2020, likely before June 29, 2020, Ms. Bennett shared with Staffer #2 that the Governor had said or done something that had made her very uncomfortable. Staffer #2 conveyed this information to Staffer #3. Staffer #2’s recollection was that the Governor had tasked Ms. Bennett with finding the Governor a girlfriend during the May 2020 conversation.

<sup>426</sup> *Id.* at 168:5–8. A Trooper with whom Ms. Bennett frequently interacted when she worked for the Governor said that Ms. Bennett once told him that the Governor joked about her finding the Governor a girlfriend, and asked Ms. Bennett if she had ever had a relationship with someone older.

<sup>427</sup> *Id.* at 168:9–14.

<sup>428</sup> *Id.* at 168:14–23. Another staff member of the Executive Chamber also recalled that Ms. Bennett told him, following her change in position to a health policy advisor role (which occurred in June 2020), that the Governor had told her that he would date a 22-year-old, which had made Ms. Bennett uncomfortable, and that Ms. Bennett had spoken to Ms. Mogul and Ms. DesRosiers about the comment, which resulted in Ms. Bennett being moved to the health policy position. This staff member reported to his supervisor that Ms. Bennett had had a conversation with the Governor in which the Governor said he would be willing to date considerably younger women and that Ms. Bennett had spoken to Ms. Mogul and Ms. DesRosiers about the conversation. His supervisor responded something along the lines of, “He shouldn’t have said that,” but did not indicate that she would take further action.

<sup>429</sup> *Id.* at 166:15–19.

<sup>430</sup> *Id.* at 169:2–10.

<sup>431</sup> *Id.* at 169:19–170:6.

<sup>432</sup> *Id.* at 171:14–21.

<sup>433</sup> *Id.* at 171:21–172:2. At least one other staff member recalled hearing about Ms. Bennett’s conversation with the Governor regarding her tattoo.

<sup>434</sup> *Id.* at 172:3–8.

<sup>435</sup> *Id.* at 172:8–10.

Ms. Bennett stated that during the June 5, 2020 interactions with the Governor, she was uncomfortable and afraid, saying:

I felt really uncomfortable, but I was sensitive to the fact that I was—I was scared and I was uncomfortable, but I also was acutely aware that I did not want him to get mad. I know him, I’ve seen his temper, I’ve heard it, I’ve worked with him for a year now, and I was trying my best to get through the conversation, and I was really like focused almost just on the question he was asking me, because I was—otherwise I would have been like really freaking out. But I was really like very low energy and a little bit like almost glum, because he mentioned it the next day that I was very low energy in this conversation and asked me why.<sup>436</sup>

Ms. Bennett sent a series of text messages to a friend throughout that day and on the following day detailing the interaction and describing how alarmed she was by the Governor’s statements. She reported to the friend, among other things, “[t]alked about age differences in relationships”<sup>437</sup>; “we talked about my relationships and why I am skeptical of monogamy and my past and my tattoos and his ex etc etc.”<sup>438</sup>; “[i]f I was fucking other ppl in in my recent relationships and how we talked about monogamy . . . [a]nd whether they hooked up w other ppl too or if it was just me”<sup>439</sup>; “[h]e said he was really lonely all alone can’t meet anyone work sucks for him right now he can’t even hug anyone. Who did I last hug”<sup>440</sup>; “[a]nything under 22 isn’t ok but other than that it’s fine . . . He said age doesn’t matter. Asked me if it made a diff for me”<sup>441</sup>; “[t]old me to put tattoo on my butt. Not my shoulder”<sup>442</sup>; and “[w]e had an entire conversation about how I have to control my relationships. And like control the situation. In order to feel safe and comfortable. Post rape.”<sup>443</sup> In text messages dated June 5, 2020, the day of this interaction, Ms. Bennett described the conversation with the Governor to the same friend as “the most explicit it could be” and wrote that she was “so upset and confused” and “shaking.”<sup>444</sup>

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<sup>436</sup> *Id.* at 173:24–174:16. One staff member recalled seeing Ms. Bennett upset in the office around this time and that Ms. Bennett told her that she was upset because Ms. Benton had yelled at her for being in the Governor’s office for too long. Ms. Bennett’s testimony was consistent with this account, and she recalled that, “The interaction with [the staff member] was very memorable because I felt like I don’t act like that in the office and things don’t rattle me quite—like Stephanie [Benton] could be mad at me and I wouldn’t be crying, you know.” *Id.* at 176:7–12. Although this staff member thought this interaction took place on June 12, 2020, based on Ms. Bennett’s text messages, it appears this interaction likely took place on June 5.

<sup>437</sup> Ex. 46 (text messages between Ms. Bennett and a friend dated June 5, 2020).

<sup>438</sup> Ex. 47 (text messages between Ms. Bennett and a friend dated June 6, 2020).

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> Ex. 48 (text messages between Ms. Bennett and a friend dated June 6, 2020).

<sup>444</sup> Ex. 46 (text messages between Ms. Bennett and a friend dated June 5, 2020). The next day, Ms. Bennett texted this friend, “I need to talk to Jill.” Ex. 49 (text messages between Ms. Bennett and a friend dated June 6, 2020).

The next day, which was a Saturday, Ms. Bennett was asked to come into the office.<sup>445</sup> Ms. Benton and Ms. DeRosa were in the office that day, but they left after Ms. Bennett arrived, leaving her alone in the office with the Governor.<sup>446</sup> Ms. Bennett testified that she was “freaking out,” that she had been left alone with the Governor.<sup>447</sup> The Governor called her into his office twice to ask her for help with his phone.<sup>448</sup> That day, according to Ms. Bennett, the Governor also asked her if she had found him a girlfriend yet, referencing their conversation from the previous day.<sup>449</sup> Ms. Bennett further testified that, as she was leaving, the Governor commented that Ms. Bennett, who was wearing long jean shorts, “look[ed] like Daisy Duke.”<sup>450</sup> Ms. Bennett sent a text message about the “Daisy Duke” comment to the friend with whom Ms. Bennett had been discussing the June 5, 2020 interaction.<sup>451</sup>

Ms. Bennett testified that she understood her June 5 conversations with the Governor to mean that the Governor was propositioning her for sex.<sup>452</sup> As a result, Ms. Bennett no longer wanted to be in a role that required her to work with him.<sup>453</sup>

The Governor denied some, but not all, of Ms. Bennett’s allegations about their conversations in June. Overall, he described all of his interactions with Ms. Bennett in the context of his learning of her sexual assault, stating “with Charlotte I tread very lightly, because with a victim of sexual assault—and she was clearly fragile and in a delicate place—I was very careful about those conversations . . . ”<sup>454</sup> He stated that he does not recall making a comment about Ms. Bennett looking like the alien from *Predator*, nor did he remember making a comment about a “sexual harassment investigation.”<sup>455</sup> He also denied saying that he would date anyone over 22, saying, “[m]y daughters are over 22 years old. It just doesn’t make any sense.”<sup>456</sup> He also testified that he did not talk with Ms. Bennett about her sex life and monogamy other than, as detailed below, asking her about her relationships with older men.<sup>457</sup>

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Ms. Bennett testified that this was a reference to Ms. DesRosiers, to whom Ms. Bennett intended to report her concerns about the Governor’s conduct and in fact ultimately did. Bennett Tr. 186:13–20.

<sup>445</sup> Bennett Tr. 179:23–180:4.

<sup>446</sup> *Id.* at 180:23–181:2, 181:9–13.

<sup>447</sup> *Id.* at 179:18–20, 182:5.

<sup>448</sup> *Id.* at 182:6–17.

<sup>449</sup> *Id.* at 184:3–5.

<sup>450</sup> *Id.* at 184:8–18.

<sup>451</sup> See Ex. 50 (text messages between Ms. Bennett and a friend dated June 6, 2020).

<sup>452</sup> Bennett Tr. 173:2–4, 202:11–20.

<sup>453</sup> *Id.* at 202:11–20.

<sup>454</sup> Andrew Cuomo Tr. 271:13–19.

<sup>455</sup> *Id.* at 306:20–307:10.

<sup>456</sup> Andrew Cuomo Tr. 297:8–13. The Governor’s youngest daughter was, in fact, 22 at the time of the Governor’s conversation with Ms. Bennett.

<sup>457</sup> *Id.* at 308:16–309:9.

Regarding some of the allegations, however, the Governor acknowledged that he had made statements similar to those described by Ms. Bennett, but disputed Ms. Bennett's characterization of his intent. For example, the Governor admitted that he asked Ms. Bennett whether she did or does "have relationships with older men," and said that Ms. Bennett did not respond to the question.<sup>458</sup> He said that he did so because he had heard rumors about Ms. Bennett's purported involvement with older individuals and wanted to "give her the opportunity to talk about" that without stating it directly.<sup>459</sup> He further stated that he did tell Ms. Bennett to "find him a good candidate [for a girlfriend]," but said it was in response to Ms. Bennett raising that she had seen multiple women on social media express an interest in dating him.<sup>460</sup> Regarding Ms. Bennett's allegation that the Governor told her to get a tattoo on her butt, the Governor stated that he did not use the word "butt," but that he did tell her to get the tattoo somewhere that people could not see it.<sup>461</sup> He stated that he did so because someone had previously told him that that was good advice to give sexual assault victims who wanted to get tattoos.<sup>462</sup> Finally, the Governor admitted that he referred to Ms. Bennett as "Daisy Duke" when she was wearing shorts in the office.<sup>463</sup> He said that he did so because he thought that it was inappropriate that she was wearing shorts (although he acknowledged that they were not short shorts), and wanted to comment on it without doing so directly, noting that he wanted to be "sensitive" because of her history of sexual assault.<sup>464</sup> The Governor also testified, that in his view, there was something "fragile" and "different" about Ms. Bennett,<sup>465</sup> and stated that "[s]he processed what she heard through her own filter. And it was often not what was said and not what was meant."<sup>466</sup>

## Reporting Governor Cuomo's Conduct

The following week, on June 10, 2020, distressed with the inappropriate and sexually suggestive conversations she had had with the Governor, Ms. Bennett reported his conduct to Ms. DesRosiers.<sup>467</sup> Ms. Bennett recalled that the conversation with Ms. DesRosiers was short and that she relayed to Ms. DesRosiers briefly what had happened, including that the Governor had asked her if she had slept with older men and told her that he would sleep with younger

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<sup>458</sup> *Id.* at 309:11–310:10.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 296:23–297:5.

<sup>461</sup> *Id.* at 315:20–25.

<sup>462</sup> *Id.* at 314:7–315:25.

<sup>463</sup> *Id.* at 278:5–9.

<sup>464</sup> *Id.* at 278:5–279:12.

<sup>465</sup> *Id.* at 281:21–283:5.

<sup>466</sup> *Id.* at 255:24–256:2.

<sup>467</sup> Bennett Tr. 202:21–203:10; Ex. 51 (text messages between Ms. Bennett and a friend dated June 10, 2020).



women.<sup>468</sup> Ms. DesRosiers did not ask follow up questions about what had happened.<sup>469</sup> Instead, Ms. DesRosiers told Ms. Bennett something to the effect of, “I’m sorry” and “that’s inappropriate,” and offered to find Ms. Bennett a new position.<sup>470</sup> Ms. Bennett told Ms. DesRosiers that she did not want to be in a role that required her to interact with the Governor; she was transferred to work in the health policy team that same week.<sup>471</sup> Ms. DesRosiers did not recall informing Ms. Bennett that she was protected from retaliation, nor explaining how Ms. Bennett could report the Governor’s conduct.<sup>472</sup>

Ms. Bennett’s text messages demonstrate that, going into the conversation with Ms. DesRosiers, she anticipated that she would be punished for reporting the Governor’s conduct and was fearful of the Governor’s reaction. She wrote to a friend prior to the conversation, “Basically I leave w[ith] a new job or no job.”<sup>473</sup> After the conversation with DesRosiers, Ms. Bennett reported to the same friend that she had told Ms. DesRosiers, “I didn’t want him to find out and get mad.”<sup>474</sup>

On June 29, 2020, Ms. Bennett disclosed to a group of Executive Chamber staff members that the Governor had been inappropriate with her.<sup>475</sup> We spoke to multiple staff members who recalled this conversation.<sup>476</sup> Staffer #3 recalled that Ms. Bennett explained to the group that the Governor had asked her about her sex life and asked other inappropriate personal questions, as well as bringing up her history as a sexual assault survivor. Staffer #3 also recalled that Ms. Bennett was visibly upset and crying during this conversation, and that everyone in the room was also upset and tried to console Ms. Bennett.

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<sup>468</sup> Bennett Tr. 202:23–25, 204:2–5. Ms. DesRosiers testified that she remembers from that first conversation that Ms. Bennett had an “exchange or interaction with the Governor that made her uncomfortable” and that “he had talked about being lonely.” DesRosiers Tr. 222:21–223:5.

<sup>469</sup> Bennett Tr. 203:23–204:10; DesRosiers Tr. 225:20–226:4. Ms. DesRosiers testified that she did not follow up and ask many questions because she would have felt more comfortable having this conversation with another person present, and that she intended to seek advice from counsel about how to proceed. DesRosiers Tr. 226:12–20. Although Ms. DesRosiers spoke to Ms. Mogul on June 10, 2020, she did not ask Ms. Bennett any other questions about her interactions with the Governor until almost three weeks later, when Ms. DesRosiers learned that Ms. Bennett told a group of staff members that the Governor had made her uncomfortable. *Id.* at 231:9–13, 241:9–15, 242:10–243:11, 246:3–8.

<sup>470</sup> Bennett Tr. 203:10–13, 204:7–8.

<sup>471</sup> *Id.* at 205:10–12, 207:21–208:20; DesRosiers Tr. 227:3–23. Some witnesses noted that Ms. Bennett had been interested in health policy work at the time. One witness saw Ms. Bennett around the time and Ms. Bennett said, regarding the job change, “Jill [DesRosiers] is amazing, Jill is so great.”

<sup>472</sup> DesRosiers Tr. 227:3–23.

<sup>473</sup> Ex. 51 (text messages between Ms. Bennett and a friend dated June 10, 2020).

<sup>474</sup> Ex. 51 (text messages between Ms. Bennett and a friend dated June 10, 2020). Around this same time, Ms. Bennett sent a text message to another friend, saying, “might be switching roles/jobs. Staying in the executive chamber but switching jobs. [A] specific person was maybe not so appropriate to me.” Ex. 52 (text messages between Ms. Bennett and a friend dated June 11, 2020).

<sup>475</sup> Bennett Tr. 109:7–110:5.

<sup>476</sup> Another staff member sent a text message to Ms. Bennett the next day, writing, “[t]hank you for telling me. i hope you feel safe to tell me more things in the future. whatever those things may be.” Ex. 53 (text messages between Ms. Bennett and a friend dated June 30, 2020).

The day after this conversation with Ms. Bennett, one of these staff members (“Staffer #4”) spoke to Ms. DesRosiers about Ms. Bennett’s allegations. On June 30, 2020, after Ms. DesRosiers learned from Staffer #4 that Ms. Bennett had told a group of Executive Chamber employees the Governor had been “making moves” on her, Ms. DesRosiers relayed this to Ms. DeRosa, who directed Ms. DesRosiers to “get Judy [Mogul] and figure out what’s going on.”<sup>477</sup> Ms. DesRosiers asked Ms. Bennett to have a follow-up conversation with Ms. DesRosiers and Ms. Mogul that same day.<sup>478</sup> Ms. DesRosiers asked Ms. Bennett to tell Ms. Mogul everything about Ms. Bennett’s interactions with the Governor, which Ms. Bennett did.<sup>479</sup> Ms. Bennett testified that Ms. DesRosiers and Ms. Mogul did not notify her about the process for making a complaint during this meeting, did not state that they intended to report what Ms. Bennett had told them, and did not tell Ms. Bennett that she had any protections from retaliation.<sup>480</sup> Later that day, Ms. Bennett texted a friend that she “[w]ent through every memorable convo I’ve ever had w the Governor E V E R” in the conversation with Ms. DesRosiers and Ms. Mogul.<sup>481</sup>

Ms. Mogul and Ms. DesRosiers, through their testimony and their detailed, contemporaneous handwritten notes, confirmed that Ms. Bennett told them about nearly all of the above-described incidents during the June 30, 2020 meeting.

As for Ms. Bennett’s early interactions with the Governor, Ms. Mogul’s and Ms. DesRosiers’s notes from the June 30, 2020 meeting state that the Governor “asked [Ms. Bennett] if [she] commit[s] to things”; that the Governor and Ms. Bennett discussed a “push up contest”; and that the Governor criticized Ms. Bennett’s hair when it was in a bun in a manner consistent with Ms. Bennett’s testimony.<sup>482</sup> Ms. Mogul’s and Ms. DesRosiers’s notes also reflect an understanding of Ms. Bennett’s long conversation with the Governor in January 2020 that is similar to what Ms. Bennett has described.<sup>483</sup> Ms. Mogul testified that she felt Ms. Bennett “had been credible” and described Ms. Bennett as “thoughtful and very sort of deliberate” as she described her interactions with the Governor.<sup>484</sup>

Ms. Mogul’s notes state that Ms. Bennett, during the June 30, 2020 meeting, described her May 15, 2020 interaction with the Governor as a “turning point.”<sup>485</sup> Ms. DesRosiers and Ms. Mogul noted that the Governor asked her that day whether she was interested in fellow Executive Chamber staff members and whether she was going to “get married” to one male staff

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<sup>477</sup> DeRosa Tr. 352:13–353:3; DesRosiers Tr. 242:14–244:11, 246:3–8.

<sup>478</sup> Bennett Tr. 215:13–17.

<sup>479</sup> *Id.* at 215:13–17.

<sup>480</sup> *Id.* at 218:11–21; DesRosiers Tr. 266:22–267:11.

<sup>481</sup> Ex. 54 (text messages between Ms. Bennett and a friend dated June 30, 2020).

<sup>482</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>483</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation). Among other things, the notes reflect that Ms. Bennett saw it as a “very personal conversation” that they discussed Ms. Bennett’s history of sexual assault, and that the Governor had referred to the “cone of silence.”

<sup>484</sup> Mogul Tr. 60:2–4, 104:2–3.

<sup>485</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation).

member.<sup>486</sup> Ms. Mogul and Ms. DesRosiers also both noted that Ms. Bennett told them that, during the May 15, 2020 interaction, the Governor complained to her that he “want[ed] to be touched,” that he was “lonely” and “looking for a girlfriend,” and that he wanted to “get on a motorcycle [and] take a woman into the mountains.”<sup>487</sup> Ms. Bennett also told Ms. Mogul and Ms. DesRosiers that the Governor “loudly and repeatedly” said to her, “you were raped! You were raped! You were raped!”<sup>488</sup> Ms. Bennett described to Ms. Mogul and Ms. DesRosiers at the time that the conversation “didn’t sit right” and that it “felt like a test” as if the Governor wanted to “get under [her] skin.”<sup>489</sup> Ms. DesRosiers testified that when Ms. Bennett was describing this interaction, Ms. Bennett got emotional and was “shaking a little bit.”<sup>490</sup>

Ms. Mogul’s and Ms. DesRosiers’s notes also describe Ms. Bennett’s extensive discussion with them about her interactions with the Governor on June 5 and 6, 2020 consistent with Ms. Bennett’s testimony. For example, Ms. Mogul’s notes read, “mask kept sliding into face—made a comment like predator—if someone asked me—if I were being investigated for sexual harassment—she looks like a predator.”<sup>491</sup> Both Ms. Mogul and Ms. DesRosiers noted that the Governor asked Ms. Bennett to “find [him] a girlfriend.”<sup>492</sup> The two further wrote that the Governor asked Ms. Bennett about age difference in relationships and that the Governor commented, “as long as they are over 22,” and both note that the Governor knew Ms. Bennett was 25.<sup>493</sup> Ms. DesRosiers and Ms. Mogul both wrote that he said to Ms. Bennett again that he was “lonely.”<sup>494</sup> Ms. Mogul also noted, as Ms. Bennett testified, that the Governor asked Ms. Bennett about her sexual and romantic life, writing:

[H]e asked me about how being sexually assaulted affected the way  
I was attracted to men . . . . [T]alked about monogamy - asked about  
recent hookups . . . . [H]e wanted to know who I had been seeing—

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<sup>486</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> DesRosiers Tr. 254:14–17.

<sup>491</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>492</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>493</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>494</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

if I was sleeping w/ other people if they were sleeping w/ other people.<sup>495</sup>

Both similarly wrote in their notes that Ms. Bennett told them she had talked with the Governor about tattoos, with Ms. DesRosiers writing, “[a]t some point of the conversation they discussed a tattoo that CB wanted . . . CB said she was going to get it on her back. CB said AC said you should get on chest or ass. JM said[,] he said ass? CB said no he said butt.”<sup>496</sup> Ms. Mogul and Ms. DesRosiers also wrote that the next day, June 6, 2020, the Governor asked Ms. Bennett again about finding him a girlfriend and told her that she looks like “Daisy Dukes.”<sup>497</sup>

At the time of the conversation, Ms. Bennett wrote to a friend that Ms. Mogul was “nice and she is very well respected and I really appreciated the way she went about it.”<sup>498</sup> Ms. Bennett testified that she no longer appreciates how Ms. Mogul handled the interaction, “mostly because it was just not how she’s legally required to handle this.”<sup>499</sup>

After the conversation with Ms. Bennett, Ms. Mogul spoke to the Governor and Ms. DeRosa about Ms. Bennett.<sup>500</sup>

Ms. Bennett testified that the next day, a staff member sent Ms. Bennett a copy of the Chamber’s Equal Employment Opportunity Policy (“EEO Policy”).<sup>501</sup> The staff member later told her that Ms. Mogul had asked him for a copy on that day.<sup>502</sup> Ms. Bennett said that after reading the policy, it seemed that this would have to be reported to GOER and an investigation conducted.

Ms. Bennett, concerned about the prospect of an investigation, followed up with Ms. Mogul and Ms. DesRosiers, and the three of them spoke again by phone.<sup>503</sup> Ms. Bennett told the two women that she had read the policy and was “afraid that there was going to need to be an investigation.”<sup>504</sup> Ms. Bennett stated that she was “terrified” at this point:

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<sup>495</sup> Mogul Tr. 98:15–23 (“she did tell me that he asked her about her sex life and the impact of the assault on her sex life.”); Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>496</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>497</sup> Ex. 2 (Ms. Mogul’s notes of June 30, 2020 conversation); Ex. 3 (Ms. DesRosiers’ notes of June 30, 2020 conversation).

<sup>498</sup> Ex. 54 (text messages between Ms. Bennett and a friend dated June 30, 2020).

<sup>499</sup> Bennett Tr. 220:25–221:10.

<sup>500</sup> Mogul Tr. 88:13–89:6. Ms. Mogul declined to reveal the substance of that conversation, citing privilege. *Id.* at 89:7–10.

<sup>501</sup> Bennett Tr. 222:17–21.

<sup>502</sup> *Id.* at 229:3–7.

<sup>503</sup> *Id.* at 222:17–223:2.

<sup>504</sup> Mogul Tr. 104:25–105:5.

I didn't think any person I had talked to at any point, as nice as they were, were going to protect me from anything at all at any point . . . Well, I certainly expected to lose my job, and that was a real possibility is what I told my parents. I was scared to even see [the Governor] in the hallway, which was a rare occurrence anyway. I was honestly—I was just terrified. I don't even—I feel like I sat next to senior staff as they worked and I have no concept of how far they'd go to protect him and didn't want to find out.<sup>505</sup>

According to Ms. Bennett, during the call, Ms. Mogul told her that the conduct Ms. Bennett described constituted “grooming” (a word Ms. Bennett used the previous day to describe the behavior)<sup>506</sup> but, according to Ms. Mogul, did not rise to the level of sexual harassment.<sup>507</sup> Ms. Mogul then told Ms. Bennett that it sounded like Ms. Bennett had a “friendship” with the Governor and complimented Ms. Bennett on stopping the relationship before something inappropriate happened.<sup>508</sup> Ms. Mogul said that because the conduct did not rise to the level of sexual harassment, Ms. Mogul was not required to escalate Ms. Bennett's complaint.<sup>509</sup> Ms. DesRosiers's contemporaneous notes of the conversation reflect a similar back-and-forth between Ms. Bennett and Ms. Mogul:

JM says (not exact) Ok I want to get your mind at ease. I am very familiar with the handbook. I have read through my notes and reviewed the law and it sounds like based on what you shared that while there were conversations that became too personal and uncomfortable that most of your interactions were appropriate and that once the conversations became uncomfortable you took control of the situation. And immediately, to go to JD to be moved out of the situation and that she moved you to do something else [*unclear*]. The conduct you described does not rise to the level of harassment and no further inquiry appears to be necessary at this time. Do you agree with what I just said?

CB. Yes. And it's a relief. I was worried that he AC [*crossed out*] would be mad he is a powerful person. But yes agree w/ what you described.

JM—and from what you described would you say that most of your interactions were positive and support and that you considered AC a friend[.]

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<sup>505</sup> Bennett Tr. 227:11–228:9.

<sup>506</sup> *Id.* at 223:3–224:10.

<sup>507</sup> *Id.* at 223:3–8.

<sup>508</sup> *Id.* at 223:3–23.

<sup>509</sup> *Id.* at 224:16–20.

CB—yes and I still consider him my friend.

JM—you are very courageous.<sup>510</sup>

Ms. Mogul confirmed that, based on what Ms. Bennett told her, she determined that a report to GOER was not necessary.<sup>511</sup> Ms. Bennett testified that during this conversation, she was trying to be as agreeable as possible and convey to the Governor and Executive Chamber that she was not a threat.<sup>512</sup>

Ms. Mogul testified that, aside from transferring Ms. Bennett to the health policy team, the Executive Chamber instituted two other changes in response to Ms. Bennett's complaint. First, Ms. Mogul stated that the Chamber instituted "changes in staffing" so that "they would avoid situations where the Governor might be seen as being in a compromising situation with any woman."<sup>513</sup> Ms. Mogul and Ms. DeRosa, who discussed these protocols with Ms. Mogul, described these changes in staffing as "really more for the Governor's protection."<sup>514</sup> Second, in December 2020, Ms. Mogul advised another Executive Chamber staff member to conduct exit interviews of staff members who were leaving to determine whether any staff members, and in particular women, had any concerns.<sup>515</sup>

Ms. DeRosa testified that after she learned that Ms. Bennett had spoken to Ms. Mogul and Ms. DesRosiers to complain about the Governor's conduct, Ms. DeRosa became upset and confronted the Governor while traveling with him in a car.<sup>516</sup> She told the Governor, "I can't believe that this happened. I can't believe you put yourself in a situation where you would be having any version of this conversation."<sup>517</sup> When asked about this confrontation with Ms. DeRosa, the Governor characterized Ms. DeRosa as having said that he should not have interacted with Ms. Bennett at all because she is a sexual assault survivor and he responded that he refused to write off a young woman just because she had been assaulted.<sup>518</sup>

Ms. Bennett stated that, on June 19, 2020, after she had transferred to the health policy team, she learned that a party for staff members had been planned at the Executive Mansion.<sup>519</sup> Although she was not on the initial email inviting staff members, Ms. Bennett says she received

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<sup>510</sup> Ex. 3 (Ms. DesRosiers' handwritten notes from the June 30, 2020 conversation with Ms. Bennett).

<sup>511</sup> Mogul Tr. 106:22–107:4. During her testimony, Ms. Mogul confirmed that she still believes that she correctly handled Ms. Bennett's complaint based on what Ms. Bennett told her at the time. *Id.* at 368:24–369:5.

<sup>512</sup> Bennett Tr. 225:13–226:2.

<sup>513</sup> Mogul Tr. 254:6–17.

<sup>514</sup> DeRosa Tr. 423:3–21; Mogul Tr. 254:13–17.

<sup>515</sup> Mogul Tr. 252:18–25.

<sup>516</sup> DeRosa Tr. 383:8–388:23.

<sup>517</sup> *Id.* at 383:20–25. Ms. DeRosa stated that after confronting the Governor, she got out of the car, which was stopped at a traffic light, and left. *Id.* at 388:13–23.

<sup>518</sup> Andrew Cuomo Tr. 326:21–327:24.

<sup>519</sup> Bennett Tr. 211:2–4.

a call from Ms. Benton approximately two hours before the party began inviting her to attend.<sup>520</sup> Ms. Bennett decided to go “to make everything look like it was fine.”<sup>521</sup> When the Governor arrived, he hugged all of the staff members, including Ms. Bennett; she described the interaction as “bizarre and uncomfortable.”<sup>522</sup> Ms. Bennett sent an email to Ms. Benton and Ms. DeRosa complimenting them and saying that it was an “honor to know [them].”<sup>523</sup> Ms. Bennett explained that she felt “disgusting” about sending the email, but that she did so out of desperation to “make it seem like everything was totally fine.”<sup>524</sup>

## Departure from State Government

Ms. Bennett testified that shortly after she transferred to the health policy team, she went on medical leave and quit her job approximately a month later.<sup>525</sup> She stated that she decided to quit because, among other things, she had “lost her confidence,” she was “teary [and] anxious” and ultimately “hated the fact . . . everything had to be about the Governor. . . . I had no interest. Not only did I have no confidence[,] but I had no interest in expending any energy as it related to him.”<sup>526</sup>

After Ms. Bennett informed her supervisor in the Department of Health that she was quitting, she received a call from Ms. Mogul.<sup>527</sup> During this call, Ms. Mogul offered to find Ms. Bennett another job and asked Ms. Bennett if her quitting had anything to do with her interactions with the Governor; Ms. Bennett replied that it did.<sup>528</sup> Ms. Mogul also told Ms. Bennett she sounded “depressed” and told Ms. Bennett that the Executive Chamber could “support” her.<sup>529</sup> Ms. Bennett explained that she felt “ambushed” and “pretty emotional and [] freaked out” as a result of this call.<sup>530</sup> Ms. Bennett subsequently met with Ms. DesRosiers about her decision to quit, and Ms. DesRosiers also offered to find Ms. Bennett another job.<sup>531</sup> During this conversation, Ms. Bennett again brought up her interactions with the Governor and Ms. DesRosiers cut her off, saying, “I’m so sorry [about] what happened with the team.”<sup>532</sup>

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<sup>520</sup> *Id.* at 211:4–10.

<sup>521</sup> *Id.* at 211:10–12.

<sup>522</sup> *Id.* at 212:14–16.

<sup>523</sup> *Id.* at 214:15–23.

<sup>524</sup> *Id.* at 214:16–215:2.

<sup>525</sup> *Id.* at 234:11–14.

<sup>526</sup> *Id.* at 235:10–16, 236:8–16.

<sup>527</sup> *Id.* at 235:5–9, 237:18–21.

<sup>528</sup> *Id.* at 238:7–239:2.

<sup>529</sup> *Id.* at 239:2–6.

<sup>530</sup> *Id.* at 239:6–7.

<sup>531</sup> *Id.* at 241:16–19.

<sup>532</sup> *Id.* at 241:23–242:5.



Ms. Bennett said that it felt as though Ms. DesRosiers was “rewriting history as the conversation was happening.”<sup>533</sup>

In a December 8, 2020 message Ms. Bennett sent to Ms. Boylan following Ms. Boylan’s first public allegation, Ms. Bennett summed up her experience with the Governor as follows:

The verbal abuse, intimidation and living in constant fear were all horribly toxic—dehumanizing and traumatizing. And then he came onto me. I was scared to imagine what would happen if I rejected him, so I disappeared instead. My time in public service ended because he was bored and lonely. It still breaks my heart.<sup>534</sup>

## Assessment

We found the level of detail and consistency in Ms. Bennett’s account, her demeanor, and the circumstances of her allegations to be credible. Ms. Bennett’s allegations were supported by voluminous contemporaneous documents in the form of text messages that she sent to friends, family, and other staff members immediately after the key events she described, as well as other staff members who described hearing about incidents from Ms. Bennett contemporaneously. In her contemporaneous texts, she described many key events in exactly the way she has described them to us in our investigation (and in a way that was inconsistent with the Governor’s version of the facts). Moreover, Ms. DesRosiers’s and Ms. Mogul’s testimony, as well as their contemporaneous notes, corroborate Ms. Bennett’s description of her interactions with the Governor. These notes specifically demonstrate that Ms. Bennett spoke consistently about these interactions, and her perception of them, long before any sexual harassment allegations against the Governor became public (indeed, at a time when she did not want them to be public). Notably, former and current Executive Chamber staff who were interviewed generally did not question the credibility of Ms. Bennett, though some disputed her characterization of her interactions with Governor Cuomo as inappropriate.

Although the Governor admitted to making many of the comments Ms. Bennett alleged, we found his explanations and characterizations of those conversations, as well as his blanket claim that he was “always” careful with her because of her status as a survivor of sexual assault, unpersuasive. We note that the Governor, during his testimony, asserted that Ms. Bennett’s story changed “markedly” over time, specifically, after Ms. Boylan’s allegations became public.<sup>535</sup> It did not. The Governor testified that, at the time Ms. Bennett reported his conduct to Ms. Mogul and Ms. DesRosiers, he was told only that Ms. Bennett reported that “[he] did not sexual[ly] harass her, [he] did not make inappropriate advances, she considered [him] a friend, and that [he] was paternalistic and a mentor.”<sup>536</sup> However, Ms. Mogul and Ms. DesRosiers’s notes from the June 30, 2020 conversation contain detailed descriptions of Ms. Bennett’s interactions with the Governor that closely track Ms. Bennett’s testimony as well as the statements she has given to

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<sup>533</sup> *Id.* at 242:6–7.

<sup>534</sup> Ex. 55 (Twitter direct message from Ms. Bennett to Ms. Boylan dated December 8, 2020).

<sup>535</sup> Andrew Cuomo Tr. 173:22–25.

<sup>536</sup> *Id.* at 174:14–17.

the press.<sup>537</sup> We find the Governor’s statements about his own knowledge of Ms. Bennett’s complaints, as well as his general denials of any of the sexually suggestive comments (memorialized in numerous real-time texts and in Ms. Mogul’s and Ms. DesRosiers’ notes), are not credible.

#### **iv. Lindsey Boylan**

Lindsey Boylan is a former employee of the Empire State Development Corporation (“ESD”) and former Deputy Secretary for Economic Development and Special Advisor to the Governor who has made public allegations of misconduct against the Governor.

In early 2015, Ms. Boylan joined ESD, a New York State agency, as Vice President for Business Development.<sup>538</sup> Later that year, she was promoted to Chief of Staff to Howard Zensky, the Chair and Chief Executive Officer of ESD.<sup>539</sup> Ms. Boylan took on increasing responsibility within the Executive Chamber<sup>540</sup> and in or around the fall of 2017, began to join regular meetings with the Governor and his senior staff.<sup>541</sup> In February 2018, Ms. Boylan officially joined the Executive Chamber and became Deputy Secretary for Economic Development and Special Advisor to the Governor.<sup>542</sup>

#### **Interactions with the Governor**

Ms. Boylan first met the Governor in 2014 when he spoke at Columbia Business School, before she joined ESD and while she was working as a municipal finance banker.<sup>543</sup> The next day, Richard Bamberger (the Governor’s former Communications Director) told Ms. Boylan the Governor had asked something to the effect of, “Why can’t we get more people like that?” regarding Ms. Boylan.<sup>544</sup>

Ms. Boylan’s next interaction with the Governor was as the new Chief of Staff to Mr. Zensky, when she attended a January 6, 2016 event at Madison Square Garden.<sup>545</sup> Ms. Boylan noted that the Governor spent more time with her than she would have expected, and in greeting her clasped her hand in both of his hands, “wrapping his hands around both sides of

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<sup>537</sup> Ms. Garvey, who was involved in issuing the Executive Chamber’s press response to Ms. Bennett’s allegations, testified that after speaking with Ms. Mogul it was her understanding that what Ms. Bennett had relayed to the New York Times was a “similar set of facts” to what she had told Ms. Mogul and Ms. DesRosiers months earlier, and Ms. Garvey “[did]n’t think factually there was much in dispute.” Garvey Tr. 337:25–338:3, 342:13–16.

<sup>538</sup> Boylan Tr. 18:13–15.

<sup>539</sup> *Id.* at 19:3–12.

<sup>540</sup> *Id.* at 25:2–26:2.

<sup>541</sup> *Id.* at 42:16–43:12.

<sup>542</sup> *Id.* at 34:9–39:11.

<sup>543</sup> *Id.* at 61:20–62:8.

<sup>544</sup> Boylan Tr. 62:8–16.

<sup>545</sup> *Id.* at 63:2–10; Lindsey Boylan, *My story of working with Governor Cuomo*, Medium (Feb. 24, 2021), <https://lindseyboylan4ny.medium.com/my-story-of-working-with-governor-cuomo-e664d4814b4e>.

[her] hands” during the interaction, which she felt was “weird” and “creepy.”<sup>546</sup> It surprised Ms. Boylan because, in her mind, it showed “how little concern he had for acting inappropriately in front of camera[s].”<sup>547</sup>

Over time, Ms. Boylan noticed that the Governor seemed to be making comments about her regularly, including by commenting on her appearance and attractiveness, and would casually touch her on the lower back, waist, and legs.<sup>548</sup> Ms. Boylan also testified that the Governor regularly told her that she was a “star,” because she was good at what she did and also attractive.<sup>549</sup> The Governor’s conduct and the attention he was giving Ms. Boylan was noticed by others, including her supervisor, Mr. Zemsky, who testified that he told Ms. Boylan that he thought the Governor had a “crush” on her (a comment that Ms. Boylan also remembered).<sup>550</sup> Mr. Zemsky recalled that the Governor “comment[ed] on Ms. Boylan’s appearance relative to Hollywood actresses of the past,” saying that she was even more attractive than those actresses.<sup>551</sup> In light of the Governor’s comments, which Mr. Zemsky thought were “uncomfortable” and “inappropriate,” Mr. Zemsky asked whether Ms. Boylan wanted him to “get involved or try to make a change” in the Governor’s behavior.<sup>552</sup> Ms. Boylan responded at the time that she was “okay” and would “handle it.”<sup>553</sup>

Ms. Boylan also noticed during that period that the Governor would check whether she would be attending particular events. On November 1, 2016, Ms. DesRosiers, a senior staff member for the Governor at the time, emailed Mr. Zemsky, asking about Ms. Boylan’s attendance at an upcoming event, and noting that she “[j]ust got that question.”<sup>554</sup> Ms. Boylan noted in a contemporaneous text exchange with her mother that this attention felt “creepy” and—as Mr. Zemsky had told her—“[the Governor] has a crush on me.”<sup>555</sup> The Governor testified that it would be “commonplace” for him to inquire about whether a staff member would be coming to a particular event or meeting.<sup>556</sup> The Governor testified that he did not recall paying Ms. Boylan undue attention, although he stated that he could see himself “complimenting someone” on their appearance.<sup>557</sup>

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<sup>546</sup> Boylan Tr. 63:15–64:18.

<sup>547</sup> *Id.* at 63:15–64:18.

<sup>548</sup> *Id.* at 78:2–79:6. The Governor testified that he “may very well have touched her lower back,” though he did not go out of his way to do so, and if he did, “it was incidental.” Andrew Cuomo Tr. 203:7–10, 206:6–16.

<sup>549</sup> Boylan Tr. 78:11–13.

<sup>550</sup> *Id.* at 98:21–100:17; Zemsky Tr. 28:12–20. Ms. Boylan also testified that, after she resigned from the Executive Chamber and as she considered running for office, Bill Mulrow (former Secretary to the Governor) told her the Governor “loves you” and then corrected himself. Boylan Tr. 178:19–20.

<sup>551</sup> Zemsky Tr. 17:13–19:4.

<sup>552</sup> *Id.* at 28:12–20.

<sup>553</sup> *Id.* at 28:12–29:4.

<sup>554</sup> Ex. 56.

<sup>555</sup> Ex. 57.

<sup>556</sup> Andrew Cuomo Tr. 78:9–80:7.

<sup>557</sup> *Id.* at 62:7–63:15.

Ms. Boylan attended the annual holiday party in 2016 for the agency heads and senior staff members in the State Capitol in Albany.<sup>558</sup> At the party, which was held in a large space in the Capitol, she noticed that the Governor saw her from across the room.<sup>559</sup> Subsequently, a staff member of the Executive Chamber called Ms. Boylan from an unlisted number and told her that the Governor wanted her to come for a tour of the second floor of the Capitol, where the Governor's office is located.<sup>560</sup> Ms. Boylan testified that she "said okay because that's what you do,"<sup>561</sup> but that she felt "really scared" that she was in a "very clear predatory situation."<sup>562</sup> The staff member then escorted Ms. Boylan to the Governor's office.<sup>563</sup>

According to Ms. Boylan, the Governor came into his office and walked over to Ms. Boylan.<sup>564</sup> Ms. Boylan testified that the Governor showed her around his office, and pointed out a cigar box which he said was from Bill Clinton.<sup>565</sup> Ms. Boylan felt that the Governor was pointing out the cigar box as an allusion to President Clinton and Monica Lewinsky.<sup>566</sup> The Governor testified he does not specifically recall showing Ms. Boylan the cigar box, but that he regularly conducts a tour of his office and has done so "a thousand times" and that the "first stop in the normal trajectory is the [cigar] box with the card from president Clinton," though he denied the "implication of Monica Lewinsky" associated with the cigar box.<sup>567</sup>

Also in December 2016, the Governor told Ms. Boylan that she looked like Lisa Shields, a woman he had previously dated. In an email dated December 14, 2016, Ms. Benton wrote to Ms. Boylan, "He said look up Lisa Shields. You could be sisters. Except you're the better looking sister."<sup>568</sup> Ms. Boylan testified that after making this comparison, the Governor sometimes referred to her as "Lisa."<sup>569</sup> As Ms. Boylan described the experience:

This, to me—like the tour of his office was, like, a watershed for me . . . I was trying and my professional overtures were met with stuff like this and sometimes they were, you know, quizzing me about information and sometimes it would be this and I would have no idea which it would be and I thought it was really brazen that that

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<sup>558</sup> Boylan Tr. 101:8–20.

<sup>559</sup> *Id.* at 101:13–102:17.

<sup>560</sup> *Id.* at 102:17–103:18.

<sup>561</sup> *Id.* at 103:21–22. Ms. Boylan also said that "You learn very quickly you can't say no. You just try and, you know, gloss over something and disappear before it's time." *Id.* at 33:23–34:2.

<sup>562</sup> *Id.* at 103:23–104:7.

<sup>563</sup> *Id.* at 103:23–106:9. A former staff member spoke to Ms. Boylan after she made her allegations public, and originally indicated that the staff member recalled seeing her at the December 2016 holiday party. The staff member said that upon reflection, the staff member cannot say with certainty that Ms. Boylan was at the holiday party.

<sup>564</sup> *Id.* at 106:24–107:3.

<sup>565</sup> *Id.* at 107:6–12.

<sup>566</sup> *Id.* at 107:12–14.

<sup>567</sup> Andrew Cuomo Tr. 92:5–94:15.

<sup>568</sup> Ex. 58.

<sup>569</sup> Boylan Tr. 88:12–19.

was in an email and I think more than anything what was unsettl[ing] to me was that this was [] communicated to him by a woman on his staff . . . I've been sexually harassed throughout my career, but not in a way where the whole environment was set up to feed the predator and this and every interaction I had with the Governor and the culture felt like it was all to feed the predator.<sup>570</sup>

She added that:

[I]t was deeply humiliating on some level. I think a lot of people are, like, of course this happened to young women who have no power. Well, I was really senior and I had worked my whole life to get to a point where I would be taken seriously and I wasn't being taken seriously and I worked so hard to be some little doll for the Governor of New York and that was deeply humiliating. So I would just try to be as professional, focused, go with the flow, keep everyone happy as possible.<sup>571</sup>

Ms. Benton testified that she recalled the Governor saying Ms. Boylan looked like Ms. Shields.<sup>572</sup> She did not recall the additional statements about Ms. Boylan looking like Ms. Shields's sister or the better looking sister, and testified that she could have been the one who added that part.<sup>573</sup> The Governor's testimony was that he had told Ms. Boylan that she "had a clone" or something along those lines, without naming who Ms. Boylan resembled.<sup>574</sup> The Governor told Ms. Benton later to tell Ms. Boylan to search Ms. Shields on the internet.<sup>575</sup> The Governor denied having referred to Ms. Shields as his girlfriend.<sup>576</sup> During his testimony, in response to the question, "Was [Ms. Shields] your girlfriend?" the Governor initially claimed there could be confusion over the meaning of the word "girlfriend" and the word "date."<sup>577</sup> After some back and forth about the meaning of those common words, the Governor agreed that Ms. Shields was in fact a "woman who was a friend who [he] did see romantically for a period of time."<sup>578</sup>

The Governor testified that he would not have said Ms. Boylan was the better looking sister because he does not feel comfortable comparing the attractiveness of two women, but acknowledged that he could have said Ms. Boylan and Ms. Shields "could be sisters," as that was

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<sup>570</sup> *Id.* at 89:18–90:17.

<sup>571</sup> *Id.* at 91:13–23.

<sup>572</sup> Benton Tr. 123:8–127:15.

<sup>573</sup> *Id.* at 124:4–127:22.

<sup>574</sup> Andrew Cuomo Tr. 66:23–67:8.

<sup>575</sup> *Id.* at 67:9–14.

<sup>576</sup> *Id.* at 67:20–67:23.

<sup>577</sup> *Id.* at 67:24–71:11.

<sup>578</sup> *Id.*

consistent with his recollection of saying “you could be clones.”<sup>579</sup> He agreed during his testimony that women in the Executive Chamber might think he was “coming onto them” or “propositioning” them if he made comparisons about “who’s prettier, better looking.”<sup>580</sup>

On December 31, 2016, Ms. Boylan attended the opening of New York City’s Second Avenue subway with her husband.<sup>581</sup> Ms. Boylan recalled that those attending the event stood near the top of the stairs in the new subway station and the Governor came up the steps with his then-partner.<sup>582</sup> Ms. Boylan was off to the side with her husband, and when the Governor saw them, he stopped walking up the stairs and went out of his way to go over to them to shake their hands.<sup>583</sup> Ms. Boylan testified that he did not greet anyone else that way, and that he singled out Ms. Boylan and her husband out of everyone in attendance.<sup>584</sup> Later that evening, Ms. Boylan’s husband (to whom Ms. Boylan had spoken about the Governor’s interactions with her) commented on how odd and awkward the encounter was, describing it as “one of the strangest things [he had] ever experienced.”<sup>585</sup>

On Valentine’s Day of 2017, while Ms. Boylan was still working as Chief of Staff for the ESD CEO, a staff member of the Executive Chamber presented her with a rose, which, at the time, the staff member identified as coming from the Governor.<sup>586</sup> To Ms. Boylan’s knowledge, no other ESD colleague received a rose.<sup>587</sup> Ms. Boylan emailed the staff member, writing “Sorry you had to bring that all the way down for me. Thank you though! Happy Vday!” The staff member responded, “Thank the chief executive!”<sup>588</sup> Ms. Boylan described the experience as “creepy as hell.”<sup>589</sup>

The staff member who had delivered the rose to Ms. Boylan testified that he did so at the request of Ms. Benton.<sup>590</sup> He recalled Ms. Benton telling him to give roses to all the women on the 39<sup>th</sup> floor of the Executive Chamber’s New York City office (where the Governor’s office

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<sup>579</sup> *Id.* at 72:13–75:8.

<sup>580</sup> *Id.* at 74:17–77:4.

<sup>581</sup> Boylan Tr. 155:2–23.

<sup>582</sup> *Id.* at 155:24–156:3.

<sup>583</sup> *Id.* at 156:6–13.

<sup>584</sup> *Id.* at 156:14–156:25.

<sup>585</sup> *Id.* at 157:5–8.

<sup>586</sup> Ex. 59; *see also* Boylan Tr. 113:11–20.

<sup>587</sup> Boylan Tr. 114:10–14. At least one other staff member remembers receiving a flower with a note stating that it was from the Governor on Valentine’s Day; this staff member said that all women working in the Capitol received the flowers. Moretoni Tr. 80:2–81:4.

<sup>588</sup> Ex. 59.

<sup>589</sup> Boylan Tr. 114:2. Another time, Ms. Boylan recalled returning to her office to find a signed photo of the Governor placed on her desk. Ms. Boylan said that she was alarmed and asked for a lock for her office door, but was not able to obtain one. *Id.* 119:4–11, 120:3–5, 121:16–23. According to one former staff member who had responsibilities for collecting and delivering photographs of people with the Governor on behalf of the Executive Chamber, it was not unusual for staff members to receive photographs of themselves with the Governor at events. Moretoni Tr. 108:3–109:16.

<sup>590</sup> Vicinanza Tr. 153:16–154:5.

was located), some of the women on the 38<sup>th</sup> floor and Ms. Boylan (who was on another floor at the time).<sup>591</sup> Ms. Benton testified that, every year that it has been done, she created the list of individuals who should receive roses on Valentine's Day.<sup>592</sup> She said she probably shared these lists with the Governor.<sup>593</sup> Ms. Benton testified she was the one who added Ms. Boylan to the recipient list in 2017.<sup>594</sup> The Governor testified that a friend of his in public relations once recommended that he send roses only to women on the staff in the office on Valentine's Day, and that is why he did that.<sup>595</sup> The Governor recalled asking Ms. Benton to start doing so, but he was not sure if this was still in practice.<sup>596</sup> The Governor testified that he usually does not see the list of recipients of the roses.<sup>597</sup> His understanding was that the top 20 or 30 women on the staff got a rose, and that Ms. Boylan was the only staff member on her floor to get a rose because there were no other senior staff members on her floor.<sup>598</sup>

In or around October 2017, Ms. Boylan flew with the Governor and a number of others back from an event in Western New York on the Governor's plane.<sup>599</sup> She recalled sitting across from the Governor and next to Abbey Fashouer Collins, then the First Deputy Press Secretary to the Governor.<sup>600</sup> Ms. Boylan testified that, at one point, the Governor said something to the effect of "let's play strip poker."<sup>601</sup> Ms. Boylan said that she was stunned by the Governor's remark and responded with something sarcastic, like, "That is exactly what I was thinking."<sup>602</sup> Ms. Boylan did not think he was "literally asking . . . to play" strip poker, but rather was doing it to "get a reaction."<sup>603</sup> She thought it had "a sexual innuendo" and was "inappropriate."<sup>604</sup>

After Ms. Boylan wrote about this exchange in a Medium piece in February 2021, the Executive Chamber issued a statement attributed to individuals who were potentially on flights with Ms. Boylan and the Governor in October 2017 that: "We were on each of these October flights and this conversation did not happen."<sup>605</sup> But during our investigation, one of the individuals who joined the statement, Mr. Zemsky, testified that he in fact did recall the

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<sup>591</sup> *Id.* at 153:22–154:7, 157:3–25.

<sup>592</sup> Benton Tr. 141:22–142:13.

<sup>593</sup> *Id.* at 141:22–142:13.

<sup>594</sup> *Id.* at 144:22–145:9.

<sup>595</sup> Andrew Cuomo Tr. 208:23–209:4.

<sup>596</sup> *Id.* at 209:5–209:11.

<sup>597</sup> *Id.* at 209:17–210:3.

<sup>598</sup> *Id.* at 210:4–15.

<sup>599</sup> Boylan Tr. 123:19–124:22; *see also* Lindsey Boylan, *My story of working with Governor Cuomo*, Medium (Feb. 24, 2021), <https://lindseyboylan4ny.medium.com/my-story-of-working-with-governor-cuomo-e664d4814b4e>.

<sup>600</sup> Boylan Tr. 124:23–125:2.

<sup>601</sup> *Id.* at 126:9–10.

<sup>602</sup> *Id.* at 127:18–19.

<sup>603</sup> *Id.* at 127:3–7.

<sup>604</sup> *Id.* at 127:7–8.

<sup>605</sup> *Statement from Press Secretary Caitlin Girouard*, Office of the Governor (Apr. 24, 2021) <https://www.governor.ny.gov/news/statement-press-secretary-caitlin-girouard>.



Governor making a comment about “strip poker” on a plane.<sup>606</sup> He testified that the Governor said “something like, ‘Hey, want to play strip poker?’” and that the statement was “directed at Ms. Boylan.”<sup>607</sup>

Mr. Zemsky explained that at the time he agreed to join the Executive Chamber’s statement, he “was going through [his] memory of playing strip poker on the plane, talking about playing strip poker, anything like that,” and he “didn’t have the slightest inkling of that.”<sup>608</sup> He said that on February 24, 2021, he received a call from Ms. DeRosa’s office and was connected to a conference call with Mr. Azzopardi, John Maggiore, Dani Lever (a former Communications Director), and perhaps someone else.<sup>609</sup> Mr. Zemsky said that Ms. DeRosa said something like, “‘Did the Governor want to play strip poker on a plane? . . . Lindsey Boylan said the Governor wanted to play strip poker’ or ‘Lindsey Boylan said the Governor invited her to play strip poker’” and then asked if everyone would agree to sign on to a statement denying that such a conversation happened.<sup>610</sup> Mr. Zemsky responded that he needed time to consider the request.<sup>611</sup>

Mr. Zemsky then called Mr. Maggiore and asked if he had ever heard the Governor say anything like the “strip poker” comment.<sup>612</sup> Mr. Zemsky testified that Mr. Maggiore said that in his 20 years of working with the Governor, he had never heard the Governor say something like the “strip poker” comment.<sup>613</sup> Mr. Zemsky testified that he tried to imagine “how might a game of strip poker happen on this plane or how unusual that is” and so, at the time, had no recollection of the “strip poker” comment.<sup>614</sup> Mr. Zemsky said that within 15 minutes of his call with Mr. Maggiore, Ms. DeRosa called Mr. Zemsky back to ask if he was okay with the statement, and he agreed to it.<sup>615</sup> Mr. Zemsky explained that it was his understanding at the time that Ms. DeRosa was asking whether the Governor said the “strip poker” comment in such a way that he was asking to actually play strip poker, rather than just saying it in jest.<sup>616</sup>

Mr. Zemsky testified that after the Executive Chamber issued its statement denying the “strip poker” comment, he received a disparaging message from Ms. Boylan that he found “jarring” and “threatening.”<sup>617</sup> He then reread Ms. Boylan’s description of the events in her Medium piece and “the way she kind of responded to the comment” and that “kind of struck a

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<sup>606</sup> Zemsky Tr. 33:14–17. Ms. Boylan did not recall that Mr. Zemsky was on the plane when the Governor made a comment about strip poker. Boylan Tr. 125:9–14.

<sup>607</sup> Zemsky Tr. 33:18–23.

<sup>608</sup> Zemsky Tr. 39:22–40:6.

<sup>609</sup> *Id.* at 37:20–38:7, 41:19–25.

<sup>610</sup> *Id.* at 38:12–24.

<sup>611</sup> *Id.* at 38:24–39:2.

<sup>612</sup> *Id.* at 39:3–10.

<sup>613</sup> *Id.* at 39:11–15.

<sup>614</sup> *Id.* at 39:17–40:6.

<sup>615</sup> *Id.* at 44:19–45:13.

<sup>616</sup> *Id.* at 40:10–41:2.

<sup>617</sup> *Id.* at 53:13–21.

note of familiarity.”<sup>618</sup> Mr. Zemsky believed that he had not recalled the comment earlier because it was “a very different type of exchange from the one that I had been thinking about which was a, you know, serious, maybe even threatening or, you know, sincere game of strip poker.”<sup>619</sup> He said that the comment he recalled instead was “a facetious comment in jest,” and “searching [his] recollection of those two very different things . . . brought [him] to very different conclusions.”<sup>620</sup>

The other individuals who were part of the Executive Chamber’s statement denying the strip poker conversation reaffirmed in their interviews with us that they never heard the Governor make any comment about “strip poker.”<sup>621</sup> The Governor denied having said to Ms. Boylan, “let’s play strip poker” or words to that effect.<sup>622</sup> The Governor went on further to testify that he does not remember “ever . . . saying” the words “strip poker” in his life.<sup>623</sup>

Ms. Boylan recalled traveling twice to Puerto Rico with the Governor in relation to recovery efforts following Hurricane Maria.<sup>624</sup> Ms. Boylan testified that, on one such trip, she avoided sitting with the Governor and Ms. DeRosa at an event, but felt that the Governor purposefully sat where he could see her.<sup>625</sup> Ms. Boylan testified that, after giving his remarks, the Governor approached her to take a picture and touched her back “not in a friendly way,” but “in a sexual way.”<sup>626</sup> She stated: “I feel like I know when I’m being touched in a weird way. I just know. I mean, it was—I would never do that to anyone, not even my husband.”<sup>627</sup>

Near the end of her time in the Executive Chamber, Ms. Boylan was at the Executive Mansion in the main foyer area when the Governor’s dog began to scratch her.<sup>628</sup> Ms. Boylan testified that the Governor saw this and remarked, “Well, if I was the dog, I’d mount you too.”<sup>629</sup> Ms. Boylan said that in response:

I think I kind of would laugh awkwardly or something. I don’t even know. Things were so far gone past appropriate at that point and there was no reaction to his deeply inappropriate things and I didn’t

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<sup>618</sup> *Id.* at 54:22–55:8.

<sup>619</sup> *Id.* at 55:9–15.

<sup>620</sup> *Id.* at 55:15–22.

<sup>621</sup> Collins Tr. 110:8–11; Lever Tr. 347:15–348:12; Maggiore Tr. 91:2–21.

<sup>622</sup> Andrew Cuomo Tr. 197:22–198:1.

<sup>623</sup> *Id.* at 198:2–15.

<sup>624</sup> Boylan Tr. 116:25–117:4, 146:2–12.

<sup>625</sup> *Id.* at 117:2–12.

<sup>626</sup> *Id.* at 117:12–18.

<sup>627</sup> *Id.* at 118:21–119:3.

<sup>628</sup> *Id.* at 66:23–25.

<sup>629</sup> *Id.* at 67:3–4.

want to create problems for myself and I didn't know what to do, so I would just try and not react.<sup>630</sup>

The Governor denied having made such a remark to Ms. Boylan, and said it was a “gross and vulgar statement” and he would not say that to “anyone under any circumstance.”<sup>631</sup>

At around the same time, Ms. Boylan testified, the Governor kissed her at the close of a one-on-one meeting in his New York City office.<sup>632</sup> Specifically, as Ms. Boylan walked by the Governor to leave, he stepped toward her and kissed her on the lips.<sup>633</sup> Ms. Boylan said she was shocked by the kiss, said nothing, and just kept walking.<sup>634</sup> The Governor testified he was sure that he had not kissed Ms. Boylan on the lips.<sup>635</sup>

Ms. Boylan testified that during her time working in the Executive Chamber, there was increasing tension between herself and senior staff. Ms. Boylan said Ms. DeRosa would “scream” at her and “yell at [her] for illogical things.”<sup>636</sup> Ms. Boylan testified that there were a number of times when she tried to resign from the Executive Chamber.<sup>637</sup> One of those attempts was in July 2018, after Ms. DeRosa yelled and cursed at Ms. Boylan.<sup>638</sup> Ms. DeRosa did not dispute that she might have cursed on the phone with Ms. Boylan.<sup>639</sup>

Robert Mujica, the Director of the Division of the Budget, informed us that Ms. Boylan had in fact confided in him about her frustrations about her work at the Executive Chamber, including inability to access or speak directly with the Governor. He said that Ms. Boylan told him a few times that she was thinking about leaving the Chamber. Mr. Mujica thought this was because she felt that there were too many obstacles in the way of her being able to get things done the way she wanted.

In January 2018, Ms. Boylan spoke with Alphonso David (former Counsel to the Governor) about a matter that was related to issues within the ESD and unrelated to the Governor.<sup>640</sup> In the context of that discussion, Mr. David stated that Ms. Boylan said that she had not been subject to sex discrimination, harassment, or retaliation.

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<sup>630</sup> *Id.* at 69:16–22.

<sup>631</sup> Andrew Cuomo Tr. 236:8–17.

<sup>632</sup> Boylan Tr. 148:6–152:2.

<sup>633</sup> *Id.* at 149:22–24.

<sup>634</sup> *Id.* at 149:24–150:13.

<sup>635</sup> Andrew Cuomo Tr. 222:25–223:15.

<sup>636</sup> Boylan Tr. 50:2–3.

<sup>637</sup> *Id.* at 190:24–191:10.

<sup>638</sup> *Id.* at 192:7–21.

<sup>639</sup> DeRosa Tr. 230:16–231:25.

<sup>640</sup> Boylan Tr. 163:15–24.

## Ms. Boylan's Departure from the Executive Chamber

In September 2018, a conflict arose between Ms. Boylan and an assistant at ESD. The issue was raised to the Executive Chamber, and Mr. David arranged for a meeting that was to be a “counseling session” during which that issue and others were to be addressed.<sup>641</sup> Prior to this meeting, which occurred on September 26, 2018, Ms. DeRosa forwarded an email regarding Ms. Boylan to Mr. David, saying “pls create a file for lindsey / Pls put this in it.”<sup>642</sup> Mr. David responded, “We manage all allegations/claims using the same process and applying the same standard. Accordingly, given that this was independently forwarded to counsel’s office, we have already began compiling information regarding this and other allegations regarding this employee.”<sup>643</sup> Some of the internal memoranda and documents created by Mr. David and his team for and after this meeting ended up being the confidential documents that were released to reporters following Ms. Boylan’s first allegation of sexual harassment against the Governor. The memorandum summarizing this September 26, 2018 meeting noted that “Mr. David was clear that she was not being asked to resign, fired, or pushed out in any way.”<sup>644</sup> During the course of the meeting, Ms. Boylan “tendered her resignation voluntarily.”<sup>645</sup>

Mr. David testified that, after Ms. Boylan resigned, she called and said that she wanted to come back to the Executive Chamber.<sup>646</sup> He said that he told her it would be “complicated” and that there would need to be “corrective action” related to the complaints made about her.<sup>647</sup> The Governor testified that Ms. Boylan called him to “intervene.”<sup>648</sup> The Governor said that he never called her back, pursuant to advice he received.<sup>649</sup>

Ms. DeRosa later reached out to Mr. David to request Ms. Boylan’s “full file” following Ms. Boylan’s tweets accusing the Governor of sexual harassment.<sup>650</sup>

## Public Allegations

On December 5, 2020, Ms. Boylan tweeted, in part, “Most toxic team environment? Working for @NYGovCuomo” and “I tried to quit three times before it stuck . . . That environment is beyond toxic.”<sup>651</sup> On December 8, 2020, Ms. Boylan continued tweeting about her experience working at the Executive Chamber. She said, in part, “you better believe I’ll be listening to what I hear out there, @NYGovCuomo. And if other women decide to come

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<sup>641</sup> *Id.* at 183:16–90; David Tr. 212:24–217:11.

<sup>642</sup> Ex. 60.

<sup>643</sup> Ex. 60.

<sup>644</sup> Ex. 61.

<sup>645</sup> Ex. 61.

<sup>646</sup> David Tr. 217:12–218:6.

<sup>647</sup> *Id.* at 218:6–21.

<sup>648</sup> Andrew Cuomo Tr. 98:4–17.

<sup>649</sup> *Id.* at 99:5–12.

<sup>650</sup> Ex. 62.

<sup>651</sup> Ex. 63.

forward I will back them up and elaborate.”<sup>652</sup> And on December 13, 2020, Ms. Boylan tweeted, in part, “@NYGovCuomo sexually harassed me for years. Many saw it, and watched. I could never anticipate what to expect: would I be grilled on my work (which was very good) or harassed about my looks. Or would it be both in the same conversations? This was the way for years.”<sup>653</sup> On February 24, 2021, Ms. Boylan detailed her allegations of sexual harassment in an article published on Medium.<sup>654</sup> Since that time, Ms. Boylan has been active both publicly and privately in criticizing the Governor and those who support and defend him, including members of the public.

Members of the Governor’s senior staff and others within the Executive Chamber questioned Ms. Boylan’s motives and her credibility, noting that she was running for political office at the time she made her allegations.<sup>655</sup> The Governor and Executive Chamber have suggested that Ms. Boylan made her allegations of sexual harassment in order to support her campaign and to retaliate against the Chamber for issuing an Executive Order changing the number of signatures required to get on the ballot and the time period for petitioning.<sup>656</sup> They have pointed to text messages that Ms. Boylan sent to then–Communications Director Ms. Lever and Mr. Mujica in March 2020, which stated: “Absolutely not helpful please relay that while we are ok, I see what the point is here and I will find ways to respond / Life is long / And so is my memory / And so are my resources.”<sup>657</sup> They have also emphasized that Ms. Boylan did not complain about the Governor’s conduct at the time.<sup>658</sup>

Ms. Boylan testified that she did not tell anyone in the Executive Chamber about the incidents with the Governor at the time because “[t]his is a really senior position to have and it was humiliating and it made me feel like my accomplishments were undermined by having this kind of attention. I didn’t tell as many people as, you know, I might have otherwise.”<sup>659</sup> Referring to staff members in the Executive Chamber, Ms. Boylan added that she “couldn’t trust that group of people.”<sup>660</sup> Ms. Boylan said that she never heard of anyone who made a complaint against the Governor, that they “would be destroyed before they even stepped out the door.”<sup>661</sup>

Ms. Boylan testified that she did not say anything for a long time but finally decided to speak out:

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<sup>652</sup> Ex. 64.

<sup>653</sup> Ex. 65.

<sup>654</sup> See Lindsey Boylan, *My story of working with Governor Cuomo*, Medium (Feb. 24, 2021), <https://lindseyboylan4ny.medium.com/my-story-of-working-with-governor-cuomo-e664d4814b4e>.

<sup>655</sup> Azzopardi Tr. 148:14–22; Andrew Cuomo Tr. 134:3–135:15; Maggiore Tr. 89:16–91:5.

<sup>656</sup> Andrew Cuomo Tr. 183:4–185:7, 200:25–201:4; DeRosa Tr. 537:2–12.

<sup>657</sup> There was a slight variation between the texts that the two recipients received.

<sup>658</sup> See, e.g., Azzopardi Tr. 77:20–78:5; Andrew Cuomo Tr. 88:17–89:2.

<sup>659</sup> Boylan Tr. 96:11–15.

<sup>660</sup> *Id.* at 179:25–180:5.

<sup>661</sup> *Id.* at 182:12–17.

[T]here's nowhere to go if you create [the Governor] as an enemy and I wasn't able to or strong enough to do it then and it really took hearing another woman's experience that was very much the same as mine where one I had more sympathy for myself in this dynamic because I had so much sympathy for her and then two, I felt so responsible for what had happened to her, so at this point, I'm still chugging along, thinking how do I get along in this world that belongs to this Governor and it took a very long time for me to change that, so that was where this was coming from.<sup>662</sup>

Ms. Boylan reached out to some women who were former colleagues from the Executive Chamber after making public her allegations regarding a toxic work environment and sexual harassment, to seek their support in corroborating her story. A couple of those individuals received communications from Ms. Boylan that they perceived as threatening, after they failed to respond in the way Ms. Boylan wanted them to.

Ms. Bennett confided in Ms. Boylan about her interactions with the Governor in December 2020, after seeing Ms. Boylan's tweets.<sup>663</sup> Ms. Bennett felt at times that Ms. Boylan was pushing her to go public with her allegations even though Ms. Bennett was not necessarily comfortable doing so at the time.<sup>664</sup> Ms. Bennett ultimately got comfortable—as noted above—and did decide to go public with her allegations.

## Assessment

Most of the allegations that Ms. Boylan has made against the Governor are now essentially uncontested. For example, although the intent is in dispute, there is no serious question that (1) the Governor commented on Ms. Boylan's appearance, including comparing her to someone who was an ex-girlfriend; (2) the Governor on occasion touched Ms. Boylan on the waist, leg, and back; (3) the Governor gave Ms. Boylan a tour of his office that included the cigar box from President Clinton; (4) Ms. Boylan received a rose from the Governor for Valentine's Day; and (5) the Governor thought she did good work<sup>665</sup> and paid attention to her at events. While the Governor vehemently denied, and others did not recall, the "strip poker" comment, Mr. Zemsky testified under oath that he recalls the Governor making such a comment, independently corroborating Ms. Boylan. And with respect to the alleged kiss on the lips, although the Governor again denied it, he has admitted that, on occasion, he has kissed members of his staff on the lips.<sup>666</sup>

Thus, despite the intensity of the attacks on Ms. Boylan by the Governor and others within and outside of the Executive Chamber, and the refusal to even consider the possibility that she may have felt harassed, most of the factual allegations that Ms. Boylan has made are not

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<sup>662</sup> *Id.* at 179:8–20.

<sup>663</sup> Bennett Tr. 248:11–18.

<sup>664</sup> *Id.* at 248:19–250:10.

<sup>665</sup> Andrew Cuomo Tr. 61:9–14.

<sup>666</sup> *Id.* at 218:17–226:11; *see also* Walsh Tr. 103:21–105:5.

disputed and those that are have corroboration, including in the allegations by the other complainants of similar conduct. What the Governor disputes is his intent and the way in which he believes Ms. Boylan perceived the interactions. Thus, regardless of whether Ms. Boylan may have had political or other personal motivation for making her allegations public, we find that the factual allegations she has made are credible and supported by the rest of the evidence in our investigation.

**v. Alyssa McGrath**

Alyssa McGrath works in the Executive Chamber as an executive assistant, providing administrative assistance to certain assigned staff members of the Executive Chamber, and has been in that role since May 2018.<sup>667</sup> Ms. McGrath currently works as an executive assistant to Christian Jackstadt, the Deputy Director of State Operations.<sup>668</sup> Since approximately December 2018, Ms. McGrath also assisted the Governor, including by covering phone calls and other executive assistant functions on weekends at the Executive Mansion.<sup>669</sup>

During her time in the Executive Chamber, Ms. McGrath has had a number of interactions with the Governor during which the Governor asked questions about Ms. McGrath's personal life, including her marital status, and made sexually suggestive and gender-based remarks to her and in her presence.

In early 2019, Ms. McGrath was assisting the Governor at the Executive Mansion by herself when the Governor asked her whether she spoke Italian.<sup>670</sup> Ms. McGrath replied that she did not speak Italian, although she is of Italian heritage.<sup>671</sup> The Governor then said a short Italian phrase to Ms. McGrath and grinned at her.<sup>672</sup> Ms. McGrath did not recognize the phrase, but when she consulted her parents, who are fluent in Italian, her father told her that the Governor's comment had been about how Ms. McGrath was beautiful.<sup>673</sup> Ms. McGrath testified that she felt uncomfortable and surprised at learning this, especially given that this had also been one of the first times she had assisted the Governor at the Executive Mansion by herself.<sup>674</sup> Since then, the Governor has, on a number of occasions, said things to her in Italian that she could not

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<sup>667</sup> Alyssa McGrath Tr. 23:19–24:6.

<sup>668</sup> *Id.* at 27:1–3.

<sup>669</sup> *Id.* at 32:23–34:19, 37:1–38:4. Over time, Ms. McGrath came to understand that she was expected to help staff the Governor whenever he was working out of Albany. *Id.* at 34:7–19, 37:5–38:6, 40:7–23.

<sup>670</sup> *Id.* at 56:23–24.

<sup>671</sup> *Id.* at 57:9–12.

<sup>672</sup> *Id.* at 56:25–57:6.

<sup>673</sup> *Id.* at 57:18–25. Ms. McGrath testified that she does know certain common words in Italian, such as “bella,” due to the number of her family members who speak Italian, and confirmed that the Governor had not said the word “bella” as part of the phrase. *Id.* at Tr. 57:7–17. Ms. McGrath also told Executive Assistant #1 about Governor Cuomo's Italian comment. *Id.* at 58:22–60:5. Ms. McGrath recalled Executive Assistant #1's response at the time as laughing off the Governor's comment, possibly with something like, “I can't believe he said that.” *Id.* at 60:25–61:3.

<sup>674</sup> *Id.* at 58:16–24.



understand.<sup>675</sup> The Governor testified that he tried to speak to Ms. McGrath in Italian, but she did not seem to understand, and he did not recall speaking Italian to Ms. McGrath again afterwards.<sup>676</sup>

In early 2019, Ms. McGrath had another uncomfortable interaction with the Governor.<sup>677</sup> Because this was one of her first times working on a dictation assignment with the Governor, Ms. McGrath was nervous.<sup>678</sup> On that day, she was seated slightly bent over her notepad and pen, ready to take dictation from the Governor, when she noticed the Governor had not spoken for an unusual amount of time.<sup>679</sup> Ms. McGrath looked up at him, and saw that he was staring down into Ms. McGrath's shirt, which was a silk-like blouse that was loosely hanging off of her as she was slightly bent forward.<sup>680</sup> After Ms. McGrath looked up and saw that the Governor had been looking in the area of her chest, the Governor asked her what was on her necklace, which was hanging between Ms. McGrath's breasts and the shirt.<sup>681</sup> Ms. McGrath responded that her necklace had a pendant of the Virgin Mary and an Italian horn.<sup>682</sup> Ms. McGrath understood the Governor's question about her necklace as confirmation that he in fact had been looking down her shirt, and she felt embarrassed, uncomfortable, and stressed.<sup>683</sup> While the Governor moved on to the dictation assignment, Ms. McGrath felt conscious of her shirt for the remainder of the meeting and continuously tried to adjust it.<sup>684</sup>

Governor Cuomo testified that he did not recall ever looking down Ms. McGrath's shirt, and noted that he believed it was physically impossible to do so from across his desk.<sup>685</sup> He did recall that Ms. McGrath was "very nervous when she came in," and acknowledged that he may have complimented her on her necklace "to sort of make her feel more at ease."<sup>686</sup> The Governor did not recall the specific necklace in question, but noted that he may have asked Ms. McGrath whether she knew what the Italian horn meant.<sup>687</sup>

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<sup>675</sup> *Id.* at 58:1–22, 61:18–62:7. According to Ms. McGrath, these comments were often accompanied by a "smirk" from the Governor. *Id.* at 61:24.

<sup>676</sup> Andrew Cuomo Tr. 482:9–483:7.

<sup>677</sup> Alyssa McGrath Tr. 62:18–64:2.

<sup>678</sup> *Id.* at 63:4–5.

<sup>679</sup> *Id.* at 63:14–18.

<sup>680</sup> *Id.* at 63:18–24.

<sup>681</sup> *Id.* at 63:18–64:2.

<sup>682</sup> *Id.* at 64:3–21.

<sup>683</sup> *Id.* at 64:6–11.

<sup>684</sup> *Id.* at 64:12–14. At least one other witness testified about a similar incident, in which Governor Cuomo was clearly looking down another executive assistant's shirt and commented about her necklace. Executive Assistant #1 Tr. 78:8–79:3. Once the Governor left the room, the executive assistant reacted uncomfortably and asked the observing witness whether her shirt was too low. *Id.* at 80:11–18.

<sup>685</sup> Andrew Cuomo Tr. 479:7–19.

<sup>686</sup> *Id.* at 479:15–80:13.

<sup>687</sup> *Id.* at 480:14–22.

Following this incident, Ms. McGrath told her close friend Executive Assistant #1 about the Governor's behavior.<sup>688</sup> Ms. McGrath testified that she did not tell other Executive Assistants who assisted the Governor, however, because:

I obviously want—I wanted to believe that I'm up there and helping out because of my good work. And I felt like if I said that to them, not only would I be embarrassed. I would, like, almost discredit myself . . . I didn't want them to think that that was the reason why we were up there. And, you know, they've already made comments here and there. Like, "of course the Governor wants—he calls you guys on the weekends. He wants pretty . . . faces around." . . . [T]hey would make comments like that.<sup>689</sup>

Ms. McGrath also did not feel comfortable telling anyone other than Executive Assistant #1 (with the exception of her parents concerning the Governor's Italian statement) about her interactions with the Governor, as she had been instructed by other staff in the Executive Chamber not to talk about anything related to the Governor to anyone who did not directly assist the Governor.<sup>690</sup>

Over time, the Governor developed a more personal and friendly relationship with Ms. McGrath and Executive Assistant #1, and they often assisted the Governor together.<sup>691</sup> The Governor would engage in playful and flirtatious behavior with them, showing them special attention almost every time they spoke with him.<sup>692</sup> As an example, Ms. McGrath noted that, "if he . . . came into a room and I had to be in there, and he would . . . say hello to me first, and only say hello to me."<sup>693</sup> Ms. McGrath also testified that, at the annual holiday party, the Governor "would intentionally go up to [her and Executive Assistant #1] instead of us going up to him. And he would always want to take a picture with the two of us," even though "people are all like trying to get to him."<sup>694</sup> Ms. McGrath recalled being "a little surprised that he came up to us out of . . . everyone there."<sup>695</sup> Photographs of the Governor with Ms. McGrath and Executive Assistant #1 at holiday parties show the Governor holding both of them tight, with his hands on

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<sup>688</sup> Alyssa McGrath Tr. 65:1–67:8. Executive Assistant #1 corroborated hearing Ms. McGrath talk about this incident with the Governor. Executive Assistant #1 Tr. 168:16–69:2.

<sup>689</sup> Alyssa McGrath Tr. 66:15–25. Ms. McGrath felt objectified by such comments and found such comments to be uncomfortable, demeaning, and upsetting. *Id.* at 67:3–8.

<sup>690</sup> *Id.* at 67:17–68:10.

<sup>691</sup> Our review of Blackberry PIN message from the PSU Troopers who send messages for those covering the Governor on weekends at the Mansion confirmed that both Ms. McGrath and Executive Assistant #1 covered the Governor at the Executive Mansion on a regular basis during the pandemic.

<sup>692</sup> Alyssa McGrath Tr. 86:7–13 ("How often was the Governor engaging in playful or flirtatious behavior with you?" / "Probably almost every time I saw him."). Ms. McGrath also testified, "The way he acted with us was very different compared to [other Executive Assistants who assisted the Governor]." *Id.* at 66:14–15.

<sup>693</sup> *Id.* at 86:11–13.

<sup>694</sup> *Id.* at 90:3–16.

<sup>695</sup> *Id.* at 94:3–9.

their sides right under their breasts.<sup>696</sup> In one of the pictures, the Governor appears to be about to kiss Ms. McGrath on the forehead.<sup>697</sup>

During conversations with them, the Governor also asked Ms. McGrath and Executive Assistant #1 questions about their personal and marital lives. For example, Ms. McGrath was informed by Executive Assistant #1 that the Governor had asked Executive Assistant #1 why Ms. McGrath was no longer wearing a wedding ring, and “wanted to know why . . . [and] specific details as far as what exactly happened.”<sup>698</sup> Executive Assistant #1 explained to the Governor that Ms. McGrath had separated from her husband, and then informed Ms. McGrath about the conversation afterwards.<sup>699</sup> On another occasion, and as described above, the Governor asked Ms. McGrath whether she planned to “mingle” with men on a planned trip to Florida with Executive Assistant #1 and called the two women “mingle mamas” for the remainder of the day. Ms. McGrath also recalled the Governor making a suggestive comment to her and Executive Assistant #1 when he saw the two women doing a stretch that was intended to relieve muscle pain in the groin area.<sup>700</sup>

In or around November 2020, when Governor Cuomo called the office and Ms. McGrath picked up the phone, the Governor commented on how Ms. McGrath had still retained her married name and told her that he preferred her maiden name.<sup>701</sup> On this call, the Governor asked Ms. McGrath a series of questions about her personal life, including whether Ms. McGrath was seeing anyone, whether her ex-husband would pay child support, where her ex-husband worked and what her child custody arrangements were.<sup>702</sup> Ms. McGrath testified that the conversation felt like an “interrogation,” particularly because she had not told many people in the Executive Chamber any details about her divorce.<sup>703</sup> One colleague who overheard Ms. McGrath’s conversation with the Governor noticed the intensity of the conversation, and asked Ms. McGrath afterwards what the call had been about.<sup>704</sup>

On March 19, 2021, the New York Times published an article reporting on “a series of unsettling interactions” that Ms. McGrath had with Governor Cuomo.<sup>705</sup> That same day, Ms. Garvey filed a report with GOER on behalf of Ms. McGrath.

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<sup>696</sup> Photographs of Ms. McGrath and Executive Assistant #1 with the Governor are attached as Ex. 17, Ex. 18, Ex. 19, Ex. 20, Ex. 21, Ex. 22, and Ex. 23.

<sup>697</sup> Alyssa McGrath Tr. 95:15–24; Ex. 20.

<sup>698</sup> Alyssa McGrath Tr. 52:9–11.

<sup>699</sup> *Id.* at 51:11–52:13.

<sup>700</sup> *Id.* at 107:19–109:6.

<sup>701</sup> *Id.* at 101:16–102:8.

<sup>702</sup> *Id.* at 102:12–22.

<sup>703</sup> *Id.* at 103:16–23.

<sup>704</sup> *Id.* at 102:23–103:8.

<sup>705</sup> Jesse McKinley, *Cuomo Faces New Claims of Sexual Harassment From Current Aide*, N.Y. Times (Mar. 19, 2021, updated Apr. 7, 2021), <https://www.nytimes.com/2021/03/19/nyregion/alyssa-mcgrath-cuomo-harassment.html>.

## Assessment

Based on her demeanor during her testimony, as well as the level of detail and consistency in the substance of her allegations and the corroboration from other individuals and documents, we found Ms. McGrath to be credible. In fact, other than the allegation that he was looking down Ms. McGrath's shirt and the comment about stretching, the Governor recalled and did not deny the other interactions. Rather, he painted his interactions with Ms. McGrath (and Executive Assistant #1) as his attempts to put the two women "at ease."<sup>706</sup>

### vi. Ana Liss

Ana Liss was an Empire State Fellow who worked in the Executive Chamber from about September 2013 to September 2015.<sup>707</sup> Ms. Liss explained that she had applied to the Empire State Fellowship out of an interest in government service, specifically economic development, and at the outset of the program, the fellows were told that "the ultimate goal was . . . to develop sufficient experience . . . [to] become deputy secretaries."<sup>708</sup> She explained that "the Governor had developed a reputation" for championing economic development in upstate New York, where she was from, and she was excited for the opportunity "to play a role in this larger effort to make things better."<sup>709</sup> She was initially assigned to work for a senior staff member handling economic development.<sup>710</sup> After a couple months, beginning in or around November 2013, Ms. Liss was informed that Howard Glaser, the then Director of State Operations, wanted her "to go over and work in his office."<sup>711</sup> Ms. Liss moved to Mr. Glaser's office, which was close to the Governor's office.<sup>712</sup> She initially thought her assignment to work with Mr. Glaser was a promotion that would lead to increasing responsibility.<sup>713</sup>

Ms. Liss testified that she quickly came to feel that the Governor and his senior staff valued her for her appearance rather than her capabilities.<sup>714</sup> She explained that while she worked on projects she was "really proud of," she was not "given enough work" and her projects were ad hoc.<sup>715</sup> She testified that she felt as if "the only reason why [she was] sitting [t]here . . . [was] because [she is] good looking and . . . otherwise, [she was] not serving any other purpose."<sup>716</sup> A former colleague of Ms. Liss recalled that he formed the impression that Ms. Liss had been moved to sit closer to the Governor because she was a young, beautiful, blonde woman

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<sup>706</sup> Andrew Cuomo Tr. 382:5–13 ("I'm more in the reciprocal business . . . I don't want to make you feel uneasy, you know."); *id.* at 479:12–480:22 (noting that Ms. McGrath was very nervous and he wanted to put her "at ease").

<sup>707</sup> Liss Tr. 14:2–12.

<sup>708</sup> *Id.* at 15–16; 17:23–25.

<sup>709</sup> *Id.* at 19:12–20:16.

<sup>710</sup> *Id.* at 22:4–11.

<sup>711</sup> *Id.* at 25:8–11, 25:23–26:6.

<sup>712</sup> *Id.* at 26:10–12, 31:9–13, 32:5–33:9.

<sup>713</sup> *Id.* at 42:25–44:24, 45:8–13.

<sup>714</sup> *Id.* at 46:8–20, 53:10–56:13.

<sup>715</sup> *Id.* at 53:7–56:13.

<sup>716</sup> *Id.* at 54:12–18, 59:19–24.

and that he understood that she was there to be eye candy. Another former colleague said it was widely considered that Ms. Liss's office had been moved because of her appearance.

### Interactions with the Governor

Ms. Liss testified that the Executive Chamber was an environment with “a lot [of] cursing and screaming.”<sup>717</sup> During her tenure, the Governor subjected her to unwelcome and non-consensual kissing, touching, and comments.<sup>718</sup>

Ms. Liss testified that she understood employees who angered the Governor faced outbursts from the Governor and his surrogates, involuntary reassignment, and even termination.<sup>719</sup> She observed that the Governor was customarily aggressive and short-tempered with men and flirtatious with women.<sup>720</sup> Ms. Liss referred to two male staff members in the Executive Chamber that she recalled were “subject to [the Governor's] abuse and ire[,]” including being “yelled at all the time[.]”<sup>721</sup> She said “[e]verybody seemed to be afraid of him, and [she] was afraid of him too,” although she did not experience his outbursts.<sup>722</sup>

Ms. Liss testified that upon meeting her, the Governor held her hand and gazed into her eyes in a manner that Ms. Liss felt was simultaneously “grandfatherly” and “somewhat flirtatious.”<sup>723</sup> She recalled that a longtime aide told her that the Governor liked her, which she interpreted to mean that her “appearance was attractive to the Governor, and that was a good thing for [her] ability to survive and stay there and that he was going to be friendly towards [her] and [she] didn't have to be worried or scared that [she] might be a target of anything negative.”<sup>724</sup> The aide recalled that she may have told Ms. Liss that the Governor seemed to like her. On multiple occasions afterwards, the Governor kissed and touched Ms. Liss both in the office and at work parties, including a celebration in or around May 2014, after the passage of the budget.<sup>725</sup> On that occasion, the Governor approached her, kissed her on the cheek, and slipped his hand around her lower waist.<sup>726</sup> The Governor beckoned his photographer to take

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<sup>717</sup> *Id.* at 29:18–22.

<sup>718</sup> *Id.* at 92:4–21, 95:20–97:6; *id.* at 98:15–99:5 (describing how the Governor looked at her during “the only time [she] ever directly had a professional interaction” with him “[l]ike he was just sizing [her] up, like up and down”); *id.* at 102:4–8.

<sup>719</sup> *See e.g., id.* at 38:16–39:3, 78:8–17.

<sup>720</sup> *Id.* at 119:3–121:2, 165:22–166:21.

<sup>721</sup> *Id.* at 83:4–9.

<sup>722</sup> *Id.* at 119:3–16.

<sup>723</sup> *Id.* at 77:5, 78:21–79:5.

<sup>724</sup> *Id.* at 77:13–78:4.

<sup>725</sup> *Id.* at 96:5–15, 102:4–8.

<sup>726</sup> *Id.* at 96:7–12, 104:10, 109:9–12, 196:4–8.

their picture.<sup>727</sup> Ms. Liss produced that photograph from March 2015, which showed the Governor with his hand around her waist.<sup>728</sup>

Ms. Liss testified that in the following days, colleagues remarked on the interaction to Ms. Liss, including her former supervisor, who said “people [were] talking about it.”<sup>729</sup> Ms. Liss said that after the interaction, other younger staff communicated to Ms. Liss that the Governor’s conduct toward her meant that he did not hate her.<sup>730</sup> Ms. Liss said she felt “sort of icky because it sucked that [she] was nominally there on this Fellowship that was supposed to be recognizing [her] intellect and [her] credentials and [she] was supposed to be influencing policy according to this Fellowship program, but then like in practice, [she] was eye candy.”<sup>731</sup> She explained that up until around March 2021, the picture had served as “evidence that [she] worked for the Governor’s Office” and “was around him and adjacent to him,” and “[she] was proud of that.”<sup>732</sup> The picture had “[taken] on a different meaning” after the “broader dialogue started percolating from other women about their time working [in the Executive Chamber] and how toxic it was.”<sup>733</sup> She suggested that the Governor’s pose in the picture, with his hand around her waist, diminished her by making their relationship “look[] less professional and more intimate.”<sup>734</sup>

Ms. Liss said that the Governor frequently stopped by her office and interacted with her in a playful or flirtatious manner.<sup>735</sup> On at least one occasion, the Governor “kissed [Ms. Liss’s] hand and asked [her] if [she] had a boyfriend and kissed [her] cheek.”<sup>736</sup> Ms. Liss testified the Governor never asked permission to touch her, and his conduct was unwelcome.<sup>737</sup> She felt that she would not say no to the Governor, in any event, because saying no could result in being ostracized or fired.<sup>738</sup> Ms. Liss also testified that the Governor twice told her she looked lovely, once in the office and another time at a Father’s Day party.<sup>739</sup> She described the Governor’s comment on the latter occasion not as overtly sexual or flirtatious, but instead as demeaning—he was “talking to [her] like she was a little girl almost.”<sup>740</sup> Both comments about her appearance were also unwelcome.<sup>741</sup> Ms. Liss testified that the Governor almost always addressed her as

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<sup>727</sup> *Id.* at 96:7–12, 104:10, 196:4–8, *see also* Ex. 66.

<sup>728</sup> Ex. 66 (photograph).

<sup>729</sup> Liss Tr. 109:20–110:2. Ms. Liss’s former supervisor did not recall this encounter.

<sup>730</sup> *Id.* at 82:22–83:3.

<sup>731</sup> *Id.* at 110:10–111:2.

<sup>732</sup> *Id.* at 105:21–106:7.

<sup>733</sup> *Id.* at 106:12–18.

<sup>734</sup> *Id.* at 109:2–16.

<sup>735</sup> *Id.* at 79:9–22.

<sup>736</sup> *Id.* at 76:22–77:1, 79:14–22.

<sup>737</sup> *Id.* at 165:4–8.

<sup>738</sup> *Id.* at 167:15–22, 168:22–24.

<sup>739</sup> *Id.* at 111:14–112:6.

<sup>740</sup> *Id.* at 112:9–17.

<sup>741</sup> *Id.* at 225:23–226:3. Governor Cuomo’s comments about Ms. Liss’s appearance should be understood in the context of the broader Executive Chamber atmosphere. Ms. Liss reiterated that she felt pressure to appear attractive

“sweetheart” or “darling,” instead of by her name.<sup>742</sup> She described this as demeaning.<sup>743</sup> Ms. Liss also noted that the Governor never spoke with her about work or her professional experience.<sup>744</sup>

## Reporting the Governor’s Conduct

Ms. Liss explained that the environment in the Executive Chamber deterred her from reporting the Governor’s unwelcome conduct. First, she was not aware of where or how she could complain.<sup>745</sup> Ms. Liss testified that in “any other workplace environment,” she would have rejected the advances from a boss, but that for “whatever reason in [the Governor’s] office the rules were different.”<sup>746</sup> That is, the norm was that “you should just feel flattered” at the Governor’s attention, which could at least insulate you against “get[ting] fired” or being treated like “a zero and a loser.”<sup>747</sup> Ms. Liss testified that, as a result, if she had complained, she would have been “laughed out of town.”<sup>748</sup> She understood that complaining would have been “a fool’s errand” that would probably have come at the expense of her job.<sup>749</sup>

In or around December 2020, before Ms. Liss publicly shared her experience in the Executive Chamber, but after Ms. Boylan’s initial tweets, Mr. Azzopardi called her to ask if she had been in contact with Ms. Boylan and to let him know if Ms. Boylan reached out.<sup>750</sup> Ms. Liss testified that when she spoke out later, she was “fully expecting” that the Governor’s team would “deny, deny, deny, character assassinate,” because “that’s the style of their communications operation” and because of the disclosure of the complaints against Ms. Boylan.<sup>751</sup>

In explaining the reason she nevertheless came forward to discuss her experience, Ms. Liss said:

[W]hen I spoke up about all of this, I did so by and large because the other young women that had come forward with more egregious allegations weren’t being believed and I believed them and I wanted

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to the Governor. *Id.* at 116:4–117:8. She said that a longtime aide told her that she should look attractive and she was told that the Governor prefers blonds. *Id.* at 47:10–25. Ms. Liss believed that this pressure was reinforced by senior women in the Executive Chamber who conformed to these standards, which Ms. Liss understood as indicating that appearing attractive to the Governor was critical to her career prospects. *See, e.g., id.* at 48:2–49:22, 115:21–118:22.

<sup>742</sup> *Id.* at 92:6–12, 99:21, 225:10–16.

<sup>743</sup> *Id.* at 92:12–13.

<sup>744</sup> *Id.* at 94:3–96:2.

<sup>745</sup> *Id.* at 81:6–25. Ms. Liss testified she also did not report the unwelcome advances of two other men because she “didn’t know where to go to ask for help.” *Id.* at 143:2–144:5.

<sup>746</sup> *Id.* at 80:4–16.

<sup>747</sup> *Id.* at 81:6–25.

<sup>748</sup> *Id.* at 80:8–81:25.

<sup>749</sup> *Id.* at 88:3–12.

<sup>750</sup> *Id.* at 204:4–205:13.

<sup>751</sup> *Id.* at 214:25–215:23.



to share an account that was less egregious and spoke to the broader culture that allowed for the things that happened to them to happen to them. The tolerance for those micro flirtations, I guess, that would allow for him to act a certain way behind closed doors with women in more serious manners.<sup>752</sup>

The Governor testified that he did not remember Ms. Liss.<sup>753</sup>

## Assessment

We found Ms. Liss to be credible in substance and in demeanor. Ms. Liss's testimony was corroborated in relevant part by photographs and other witnesses.

### vii. Kaitlin

Kaitlin (whose last name is not public) is a former employee of the Executive Chamber. On December 12, 2016, Kaitlin attended a fundraiser for the Governor, which was hosted by Kaitlin's employer at the time, a lobbying firm.<sup>754</sup> At the conclusion of the event, the Governor met with the lobbying firm employees to thank them for their work. Kaitlin introduced herself to the Governor and extended her hand to offer a handshake, at which point the Governor pulled her by her hand and held her in a dance pose that was captured in photographs.<sup>755</sup> Kaitlin told the Governor they had met once before, when she was working for a former U.S. Congressman. The Governor responded, after he pulled her in close to his body to pose for the picture, that Kaitlin would be returning to government service because "he was going to have [her] work at the state level."<sup>756</sup>

Kaitlin was disturbed by the interaction and confused by the Governor's response to her introduction. She recalled that several of her colleagues who attended the event teased her afterwards because of the special attention she received that evening from him, saying that the Governor "had singled [her] out and paid attention to [her]."<sup>757</sup> They also noted "how uncomfortable" the encounter seemed.<sup>758</sup> Kaitlin also called her mother, two of her sisters and her roommate after the event, sharing that the Governor had "grabbed [her] and [that they] took those weird photos and that he said [she] was going to work . . . in government again, at the state level."<sup>759</sup>

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<sup>752</sup> *Id.* at 86:18–87:13.

<sup>753</sup> Andrew Cuomo Tr. 481:3–16.

<sup>754</sup> Kaitlin testified that she may have met the Governor on one occasion prior to her interaction with the Governor on December 12, 2016, but this encounter was her first time speaking to the Governor. Kaitlin Tr. 22:2–9.

<sup>755</sup> Ex. 5.

<sup>756</sup> Kaitlin Tr. 21:8–25.

<sup>757</sup> *Id.* at 27:19–25.

<sup>758</sup> *Id.* at 25:25–26:4.

<sup>759</sup> *Id.* at 30:12–25.

The Governor recalled meeting Kaitlin at the fundraiser she described and posing for a picture in a dance pose with her, which he described as a “funny, entertaining pose,” one that he “frequently” assumes for photographs.<sup>760</sup> The Governor also acknowledged saying he would “steal” Kaitlin because the Chamber “need[ed] the best talent in state government.”<sup>761</sup> He recalled that “her bosses” had introduced Kaitlin as “a superstar.”<sup>762</sup>

On December 21, 2016, nine days later, Kaitlin received a voice message inviting her to interview for a position in the Executive Chamber, at the Governor’s request.<sup>763</sup> Kaitlin said she did not share her contact information with any member of the Executive Chamber at the event where she had met the Governor, nor had she applied for or otherwise expressed any interest in joining the Executive Chamber to anyone. Unbeknownst to Kaitlin, at the Governor’s request, two of the Governor’s senior staff members had located her contact information.<sup>764</sup> Kaitlin said she sought advice from a number of people about whether she should attend the interview, including current and former colleagues.<sup>765</sup> Kaitlin said she felt the opportunity had been made available to her “because of what [she] looked like,” and she was therefore anxious that she might be subjected to conduct she deemed unprofessional and undesirable.<sup>766</sup> Kaitlin specifically told her former supervisor and mentor, “I am not going to sleep with the Governor.”<sup>767</sup> She said her colleagues and mentors said that she of course should not, but if the Governor made her a job offer, particularly if she wanted a career around government, she could not refuse the offer.<sup>768</sup> She also had some concerns about compensation, as she had been working two jobs to keep up with her student loan payments.<sup>769</sup> Her colleagues told her that she should request a salary that matched or exceeded her combined compensation, taking into account both her salary at the lobbying firm and the supplemental wages she received from her work at a local restaurant on the weekends.<sup>770</sup>

Kaitlin ultimately decided to go to her interview at the Executive Chamber’s New York City office and met with Ms. Benton and Ms. Walsh, who was the Assistant Director of Scheduling at the time. During the interview, she recalled expressing her desire to receive an

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<sup>760</sup> Andrew Cuomo Tr. 458:5–14.

<sup>761</sup> *Id.* at 459:6–10.

<sup>762</sup> *Id.* at 459:6–8.

<sup>763</sup> Kaitlin Tr. 30:5–9, 30:15–31:5.

<sup>764</sup> *See* Ex. 67 (On 12/13/2016, Jill DesRosiers sent a message to Stephanie Benton via Google Hangouts saying “can we ask if this is who he meant” and included a link to Kaitlin’s company. Mogul Tr. 297:19–299:2 (“Stephanie told me that . . . the Governor had met Kaitlin at some kind of an event. Shortly after [a staff member] . . . announced that she was leaving and that the Governor thought that Kaitlin might be good for that position to—they called it sitting on the desk.”)).

<sup>765</sup> Kaitlin Tr. 30:10–14, 36:19–22.

<sup>766</sup> *Id.* at 37:4–15.

<sup>767</sup> *Id.* at 38:25–39:9.

<sup>768</sup> Kaitlin explained that, “[e]verybody told me that I had to take the job. If the Governor is asking for something, you don’t say no to the Governor.” *Id.* at 39:12–14.

<sup>769</sup> *Id.* at 19:19–23, 32:19–24.

<sup>770</sup> *Id.* at 32:7–11.

annual salary of \$120,000, to which Ms. Benton and Ms. Walsh laughed, saying “that’s probably not going to happen[.]”<sup>771</sup> Towards the end of the interview, Ms. DesRosiers joined. Kaitlin said she believed the Governor was present in the Executive Chamber, but that he did not attend. Kaitlin testified that she was offered a position a few days later, at her requested salary of \$120,000.<sup>772</sup>

## **Interactions with the Governor**

Kaitlin recalled receiving very little guidance or direction from anyone once she joined the Executive Chamber. She was simply instructed at some point by the Governor to act like a “sponge” and soak up knowledge, an instruction that evolved into the Governor giving her the nickname “sponge.”<sup>773</sup> Kaitlin testified that she found the nickname to be “embarrassing . . . , condescending [and] demeaning.”<sup>774</sup> The Governor acknowledged that he “may have” used the term “sponge” to refer to Kaitlin and agreed with her account of the origin of the nickname.<sup>775</sup> The Governor added that he recalled “[t]he staff” within the Chamber, particularly “junior staff,” used the term “sponge” to refer to her.<sup>776</sup> Senior staff members within the Chamber acknowledged referring to Kaitlin as “sponge” after hearing the Governor’s use of the phrase as well.<sup>777</sup>

Kaitlin testified that the Governor often made comments about her appearance, as well as the appearance of others. On days she rushed into the office, the Governor would comment on her lack of makeup or share his impression that she hadn’t gotten “ready” for work that day and “didn’t look right.”<sup>778</sup> The Governor testified that he didn’t “remember saying anything like that.”<sup>779</sup> The Governor also commented on Kaitlin’s clothing, including on one occasion when she wore a “black and red button down and a black skirt” and the Governor “said [she] looked like a lumberjack.”<sup>780</sup> The Governor said “[he] did not remember” commenting on her appearance, but that “[he] could have said that about a lumberjack shirt.”<sup>781</sup>

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<sup>771</sup> *Id.* at 42:15–23.

<sup>772</sup> *Id.* at 44:25–45:22. Ms. Benton and Ms. Walsh did not recall who approved her salary although they both acknowledged that Kaitlin’s compensation package was unusually high. Benton Tr. 75:4–14 (“[s]he g[ot] a little more coming in the door than someone might.”); Walsh Tr. 209:19–210:14 (“I believe [Kaitlin’s salary] was 120. I remember that [] because of the weekend job . . . [as] compare[d] to other people who had been in that same position . . . [Kaitlin’s salary was] . . . [h]igher I would imagine”). The Governor denied being involved in the process of approving Kaitlin’s salary. Andrew Cuomo Tr. 460:22–23 (“I had nothing to do with her salary as far as I know”).

<sup>773</sup> Kaitlin Tr. 77:14–17.

<sup>774</sup> *Id.* at 78:2–10.

<sup>775</sup> Andrew Cuomo Tr. 472:2–24.

<sup>776</sup> *Id.* at 472:2–473:8.

<sup>777</sup> DeRosa Tr. 689:2–13; DesRosiers Tr. 151:3–25; Walsh Tr. 154:18–155:3.

<sup>778</sup> Kaitlin Tr. 86:18–23.

<sup>779</sup> Andrew Cuomo Tr. 474:24–475:9.

<sup>780</sup> Kaitlin Tr. 83:14–24

<sup>781</sup> Andrew Cuomo Tr. 473:16–475:9.

On one occasion, when she first started working with the Governor, Kaitlin was exchanging Blackberry codes with the Governor and offered him her personal cell phone number. Kaitlin testified that she “thought it was normal to give your boss your number” and noted that practically speaking, she “had to be [at the office] whenever the Governor was there, but before him . . . [and] assumed that he would want to get ahold of [her] . . . [since] that’s how he would reach other people as well. It wasn’t uncommon for the Governor to have personal numbers for anybody.”<sup>782</sup> Kaitlin said the Governor responded by asking, in a suggestive way, why he would need her cell phone number.<sup>783</sup> She understood the Governor to be insinuating that she “was coming onto [him] based on the look he gave [her] and the tone in his voice when he asked why he would need [her] personal number.”<sup>784</sup> Kaitlin testified that she was embarrassed with this insinuation because it “was not [her] intention.”<sup>785</sup>

On another occasion, Kaitlin testified that the Governor called her into his office and asked her to search for car parts on eBay for him. She thought it was a strange request since she felt the Governor was capable and best situated to search for the car parts himself.<sup>786</sup> She testified that she walked into the Governor’s office and stood at the Governor’s desk to conduct the searches on his computer as he requested.<sup>787</sup> While she stood at the Governor’s desk, he sat in his chair “directly behind” her “backside[.]”<sup>788</sup> There was a writing desk behind the Governor such that the two of them were between desks in close proximity.<sup>789</sup> Kaitlin recalled feeling anxious because she was standing with her backside to the Governor in a skirt and heels, with him sitting close behind.<sup>790</sup> She felt that the request for assistance was a pretext to be close to her and watch her from behind.<sup>791</sup> The Governor testified that he was sure he “asked [Kaitlin] to come help [him] with the computer on occasion” and recalled an incident “where [Kaitlin] was bent over the computer and [he] was sitting behind her[.]” noting that Kaitlin was bent over “a little bit because . . . the computer is . . . desk level” and the Governor “had to look at the screen [] to tell her what to click.”<sup>792</sup>

Kaitlin also testified that the Governor once showed her his office in the Capitol. She said the Governor took her into what was referred to as a “war room.”<sup>793</sup> She testified that she was shaking because they were alone together and that she tried to ask questions about random items in the room to ease her nerves. Kaitlin said “there was no reason for [her] to be given this

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<sup>782</sup> Kaitlin Tr. 80:13–81:13.

<sup>783</sup> *Id.* at 81:9–13.

<sup>784</sup> *Id.* at 81:14–25.

<sup>785</sup> *Id.* at 81:16.

<sup>786</sup> *Id.* at 99:3–6.

<sup>787</sup> *Id.* at 97:22–98:6.

<sup>788</sup> *Id.* at 100:10–14, 100:23–25.

<sup>789</sup> *Id.* at 101:15–19.

<sup>790</sup> *Id.* at 102:20–103:2.

<sup>791</sup> *Id.* at 97:22–103:23.

<sup>792</sup> Andrew Cuomo Tr. 468:5–10, 477:8–478:18.

<sup>793</sup> Kaitlin Tr. 106:4–14.

tour, for [her] to be in that room . . . [i]t was an odd situation and then that room was very cold and [the Governor] was close to [her], standing next to [her] and it's a big space.”<sup>794</sup> Kaitlin said the Governor eventually “just left” the room.<sup>795</sup>

Kaitlin also testified that the Governor would ask her sometimes to do things that would make her uncomfortable, in the sense that he was overly aggressive, including asking her to send threatening emails to commissioners of agencies who had done things he did not like, and ask them if they liked their job and wanted to keep it.<sup>796</sup>

On occasion, the Governor would ask her about how the “mean girls” were treating her. Kaitlin testified that the Governor used the term “mean girls,” to refer to certain members of the senior staff that included Ms. DeRosa, Ms. Benton, Ms. Walsh, Ms. DesRosiers, and Andrew Ball. Kaitlin told the Governor that he was right, that they were mean, but said she could handle it because she had grown up with two sister who were mean.<sup>797</sup>

Over time, Kaitlin felt that she fell out of favor with the Governor, noting that she “wasn’t going on as many trips with him [or] staffing him” as often.<sup>798</sup> And she also recalled that “the mean girls . . . started to be short with” her as well.<sup>799</sup> She was then moved to sit farther away from the Governor to work with another staff member in a different part of the office. Her sense was that she was “being moved between roles because . . . [the Governor’s] inner circle” did not like her.<sup>800</sup> Some senior staff members in the Executive Chamber testified that Kaitlin did not perform well in her role within the Executive Chamber, including one staff member who said she “felt [Kaitlin’s job performance] was lacking at times” and that Kaitlin did not “necessarily love the role.”<sup>801</sup> The Governor testified that Kaitlin “did not work out on the telephone” and that he “asked her a number of times to please learn how to transfer a call . . . [b]ut she just didn’t work out.”<sup>802</sup>

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<sup>794</sup> *Id.* at 104:5–107:17.

<sup>795</sup> *Id.* at 107:9–13.

<sup>796</sup> *Id.* at 113:24–114:17.

<sup>797</sup> *Id.* at 71:11–23, 121:22–24. The Governor denied using the term “mean girls” or talking to Kaitlin about the “mean girls.” Andrew Cuomo Tr. 464:3–12. Ms. DeRosa testified that she “hear[d] the governor use the term ‘mean girls’” and that “any time he felt [Ms. DeRosa, Mr. Ball, Ms. Benton, Ms. Lever, Ms. DesRosiers, and Ms. Walsh] weren’t being inclusive, or [that they] should be more inclusive, he would say: ‘Stop being the mean girls.’” DeRosa Tr. 482:20–484:17. Ms. DeRosa said she told the Governor to stop using the term, explaining that “[she] hate[s] that term” and the Governor “never used it again . . . in her presence.” DeRosa Tr. 485:4–15. Ms. DesRosiers also testified that the Governor “definitely used” the term and that she told him “[she is] not a mean girl” that she “hate[s] when [he] say[s] that,” and that she wanted him to “cut it out”—however, the Governor continued to use the term. DesRosiers Tr. 131:12–133:18.

<sup>798</sup> Kaitlin Tr. 121:22–24.

<sup>799</sup> *Id.* at 71:24–72:9.

<sup>800</sup> *Id.* at 120:18–121:13.

<sup>801</sup> Walsh Tr. 214:10–16.

<sup>802</sup> Andrew Cuomo Tr. 475:10–476:3.

## Leaving the Executive Chamber

After about a year of working in the Executive Chamber, Ms. DesRosiers approached Kaitlin about transferring to another state agency, noting that “what they were doing was not fair to [her].”<sup>803</sup> Kaitlin understood this to mean that Ms. DesRosiers thought it was unfair that Kaitlin had been asked to leave her job at a lobbying firm to come to the Executive Chamber to perform administrative tasks and have very little substantive work.<sup>804</sup>

Kaitlin ultimately ended up taking a role at a different State agency that Ms. DesRosiers had offered.<sup>805</sup> She noted that she later learned from a senior member of that agency that she had been “pushed onto” that agency by the Executive Chamber.<sup>806</sup>

Kaitlin testified that she was initially asked at the new agency to split her time between an internal team and an assignment supporting an individual who worked with the Executive Chamber in a liaison capacity.<sup>807</sup> She was very hesitant to assume a role that required exposure to the Executive Chamber, and when her interviewers raised this possibility to her, she cried in the interview and explained that she did not want to interact with the Governor.<sup>808</sup> Kaitlin testified that her interviewers promised that they would try to limit her interactions with the Governor.<sup>809</sup> One of Kaitlin’s interviewers shared that Kaitlin told him she had a very difficult experience working in the Executive Chamber and that she was open about the fact that she did not want to interact with the Governor.

Kaitlin testified that at the new agency, her interactions with the Governor were in fact limited and that she returned to the Executive Chamber’s New York City office on only two or three occasions.<sup>810</sup> On one such occasion, Kaitlin walked into the building and emerged on the 38<sup>th</sup> floor and became physically distressed. She said her supervisor responded to the sight of her shaking by asking her what was wrong and whether she was okay. Kaitlin shared with her supervisor that she had had extremely negative experiences in the Executive Chamber and cited the incident with the eBay search, as well as some of the Governor’s comments about her appearance.<sup>811</sup>

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<sup>803</sup> Kaitlin Tr. 125:20–126:4. Ms. DesRosiers, who helped Kaitlin transfer into the state agency where she currently works, testified that she learned at some point that “Kaitlin . . . wanted to leave the Chamber” and had “a conversation with [Kaitlin] about what she was interested in doing in government. DesRosiers Tr. 155:9–15. DesRosiers said she did not recall whether Kaitlin explained why she wanted to leave the Chamber, but that she generally “remember[ed] [Kaitlin] being unhappy.” *Id.* at 156:5–10.

<sup>804</sup> Kaitlin said the senior staff member thought it was unfair that the Executive Chamber staff members had “brought [her] on and then pushed [her] off . . . and [that she] didn’t have a real job.” Kaitlin Tr. 127:25–128:15.

<sup>805</sup> *Id.* at 132:12–20.

<sup>806</sup> *Id.* at 134:20–135:7.

<sup>807</sup> *Id.* at 139:5–13.

<sup>808</sup> *Id.* at 132:12–20.

<sup>809</sup> *Id.* at 139:20–23.

<sup>810</sup> *Id.* at 139:23–140:6.

<sup>811</sup> *Id.* at 140:7–14.

## Reporting Governor Cuomo's Conduct

Kaitlin testified that she has never characterized her experience working in the Chamber as sexual harassment because she did not want to think of herself as a victim.<sup>812</sup> But she was moved by Ms. Boylan's public allegations of sexual harassment against the Governor in December 2020, and retweeted and shared messages of support on her private Twitter account.<sup>813</sup> Shortly after that, she received indications that staff members within the Executive Chamber were beginning to pay increasing attention to her. She received notifications on LinkedIn that Ms. Lacewell and Ms. Walsh had viewed her profile.<sup>814</sup> She also received a phone call from a former staff member with whom she had worked.<sup>815</sup> She did not perceive it to be a genuine call to check in on her well-being, but rather a fishing expedition on behalf of the Executive Chamber.<sup>816</sup>

Kaitlin's instinct was correct. The former staff member testified that she called Kaitlin—and surreptitiously recorded the call—at the insistence of Ms. DeRosa, who “was looking for information about if [Kaitlin] was working with Lindsey [Boylan] or if she had allegations against the Governor.”<sup>817</sup> The former staff member testified that she felt pressured by the incessant calls and texts from Ms. DeRosa reiterating the request that she call Kaitlin.<sup>818</sup> The former staff member explained that she was deeply regretful after she made the call, and said that Ms. DeRosa instructed her to tell Kaitlin during the call that reporters had called asking about Kaitlin's tweets in support of Ms. Boylan.<sup>819</sup> That was something Ms. DeRosa acknowledged she asked her to say, but in fact “there was nothing specific to Kaitlin” as far as reporter outreach at the time.<sup>820</sup> Mr. Cohen, Mr. David, and Ms. Lacewell were also involved in the discussions about calling and recording the call between the former staff member and Kaitlin.<sup>821</sup>

Following that call from the former staff member and the LinkedIn notifications, Kaitlin decided to notify her immediate supervisor that she believed she might be retaliated against by the Executive Chamber for speaking out in support of Ms. Boylan in a public forum.<sup>822</sup> Kaitlin testified that she feared she would be fired from her state agency role and that her future career prospects in public service would be limited as a result, but she wanted to be transparent with her supervisor. Kaitlin said her supervisor told her that she would not be fired, but Kaitlin insisted

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<sup>812</sup> *Id.* at 158:11–22.

<sup>813</sup> *Id.* at 147:3–7.

<sup>814</sup> *See, e.g.*, Ex. 68.

<sup>815</sup> The transcript of the call between the former staff member and Kaitlin is attached as Ex. 69.

<sup>816</sup> Kaitlin Tr. 153:17–20.

<sup>817</sup> Collins Tr. 219:3–8. Ms. DeRosa testified that she called the former staff member and asked her to call Kaitlin because Ms. DeRosa “thought there was a politically calculated movement afoot that was being driven by [Alessandra] Biaggi and [Lindsey] Boylan, and that Kaitlin was part of it.” DeRosa Tr. 612:2–7.

<sup>818</sup> Collins Tr. 220:20–23, 224:18–226:6, 230:11–16.

<sup>819</sup> Collins Tr. 238:25–240:4, 220:4–19.

<sup>820</sup> DeRosa Tr. 613:18–24.

<sup>821</sup> Cohen Tr. 298:24–301:12; Collins Tr. 241:8–23; Lacewell Tr. 195:20–199:23.

<sup>822</sup> Kaitlin Tr. 154:16–155:23.

they inform his supervisor as well, so that she would not be caught off guard if the Executive Chamber tried to contact her.<sup>823</sup> Kaitlin felt that her immediate supervisor was being naïve about the prospect for retaliation, but she was grateful for his support.<sup>824</sup>

Kaitlin subsequently approached the senior supervisor and explained that she wanted to take responsibility for her tweet and cautioned that her tweet may cause the Executive Chamber to reach out. Kaitlin said the senior supervisor shared with her that she knew (from her predecessor) that Kaitlin had come from the Executive Chamber at the request of the Chamber because her role within the Chamber was not working out.<sup>825</sup> Kaitlin's senior supervisor recalled that Kaitlin shared more details about her experience working in the Executive Chamber, including the way she was hired and her experience of being summoned by the Governor to search for car parts on his computer while he sat behind her.

Based on her conversation with Kaitlin, the senior supervisor said that she believed that Kaitlin may have experienced sexual harassment so she reached out to Ms. Garvey and an attorney at the state agency.<sup>826</sup> The senior supervisor informed us that Ms. Mogul and Ms. Lacewell called her in response to the email she sent Ms. Garvey and she reported Kaitlin's statements to them, although she did not reach out to GOER.<sup>827</sup> Ms. Mogul testified that she understood from the senior supervisor that Kaitlin said the Executive Chamber was "a difficult work environment and . . . that Kaitlin said that she thought some of her difficulty with the Governor related to her physical appearance."<sup>828</sup> Ms. Mogul further testified that she understood that Kaitlin "was concerned that she was going to lose her job, that she expressed that explicitly and said that she had come to [her supervisor] hoping that [her supervisor] could help her keep her job" in light of the "tweets she had tweeted in support of Ms. Boylan" and in light of the possibility that she was considering "making a legal claim against the Governor[.]"<sup>829</sup> Ms. Mogul testified that she felt she needed more information about Kaitlin's allegations and reached out to Kaitlin's direct supervisor.<sup>830</sup> She also followed up with the senior supervisor and an attorney at that state agency to state that they could tell Kaitlin that, "so long as she was truthful, that . . . it was the . . . State policy that there could be no retaliation."<sup>831</sup> Ms. Mogul learned that after the two relayed Ms. Mogul's message to Kaitlin, Kaitlin had "wept with relief and thanked them for the call."<sup>832</sup>

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<sup>823</sup> *Id.*

<sup>824</sup> *Id.* at 155:20.

<sup>825</sup> *Id.* at 134:24–135:7.

<sup>826</sup> The state agency has asserted privilege over the substance of this communication.

<sup>827</sup> This state agency has taken the position that it was not the obligation of a state agency to report sexual harassment through the normal reporting channels (*e.g.*, contacting GOER) if the alleged conduct occurred outside the time frame of the employee's employment at the agency and at a different agency.

<sup>828</sup> Mogul Tr. 311:19–312:15.

<sup>829</sup> *Id.* at 314:1–20.

<sup>830</sup> *Id.* at 327:18–21, 330:6–7.

<sup>831</sup> *Id.* at 324:22–325:16.

<sup>832</sup> *Id.* at 325:20–326:2.



After his call with Ms. Mogul, Kaitlin's immediate supervisor reached out to Kaitlin to relay Ms. Mogul's impression that Kaitlin had retained counsel in order to assert a sexual harassment claim against the Governor and to inform Kaitlin that he told Ms. Mogul that she was "a great employee."<sup>833</sup> Kaitlin was deeply troubled by what she believed to be misinformation passed on to Ms. Mogul.<sup>834</sup> After consulting with her direct supervisor and the state agency attorney who had communicated with Ms. Mogul, Kaitlin reached out directly to Ms. Mogul to clear up the confusion and conveyed both that she had not retained counsel and that she had not made any allegations of sexual harassment.<sup>835</sup> Ms. Mogul did not follow up at all or ask about any of the factual allegations made by Kaitlin, including the story relayed to her about the search for car parts.<sup>836</sup>

## **Assessment**

We found the level of detail and consistency provided in Kaitlin's account, her demeanor, and the circumstances of Kaitlin's allegations to be credible. A number of key details were corroborated by other witnesses and documentary evidence, including the audio recording of her call with the senior staff member. Her account of events was also corroborated by her colleagues at the State agency where she now works who observed, among other things, the visible distress she felt whenever she returned to the Executive Chamber's New York City offices.

### **viii. State Entity Employee #1**

State Entity Employee #1 is an employee of a State-affiliated entity created by State legislation, who made allegations of inappropriate conduct by the Governor.

## **Interaction with the Governor**

State Entity Employee #1 alleged that, on a Saturday in September 2019, the Governor touched her butt in an unwelcome manner during a work event. That day, State Entity Employee #1 attended an event for her work that was also attended by the Governor.<sup>837</sup> As a part of the event, the Governor gave a brief speech and was accompanied by a small crowd of relevant individuals from the agencies participating in the event.<sup>838</sup>

Following his speech, the Governor grabbed State Entity Employee #1's arm and asked her for a photograph.<sup>839</sup> State Entity Employee #1 posed for a photograph with the Governor, along with her supervisor.<sup>840</sup> State Entity Employee #1 testified that the Governor stood between

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<sup>833</sup> *Id.* at 349:14–15. Both of Kaitlin's supervisors at her state agency said that Kaitlin is diligent and hard working.

<sup>834</sup> Kaitlin Tr. 162:9–21.

<sup>835</sup> Mogul Tr. 352:4–353:23.

<sup>836</sup> Kaitlin Tr. 166:3–167:6; Mogul Tr. 353:24–355:9.

<sup>837</sup> State Entity Employee #1 Tr. 21:6–11.

<sup>838</sup> *Id.* at 24:19–25:12.

<sup>839</sup> *Id.* at 26:25–27:1.

<sup>840</sup> *Id.* at 25:15–22, 26:20–25.

State Entity Employee #1 and her supervisor, with the Governor's arms around State Entity Employee #1.<sup>841</sup>

During the time in which their photographs were being taken, the Governor "took his hand and double tapped the area where [State Entity Employee #1's] butt and [her] thigh meet," and then moved his fingers upward to "kind of grab that area between [her] butt and [her] thigh."<sup>842</sup> According to State Entity Employee #1, the Governor did not say anything when he grabbed her, and they stepped away from each other soon after.<sup>843</sup>

State Entity Employee #1 testified that she understood the Governor's actions to be intentional.<sup>844</sup> Though she wished it were not the case, "[she] knew from the moment that that occurred that that wasn't normal, that's not something that has ever happened to [her] in a professional setting."<sup>845</sup>

State Entity Employee #1 testified that she immediately shared what had happened with her supervisor, who had also been in the photographs with the Governor.<sup>846</sup> State Entity Employee #1's supervisor did not respond, so she repeated herself.<sup>847</sup> Her supervisor still did not respond, but another attendee who was close by seemingly heard what State Entity Employee #1 had said, because he laughed uncomfortably.<sup>848</sup> State Entity Employee #1 did not say anything more about the incident during the event and has not interacted with the Governor since.<sup>849</sup>

State Entity Employee #1 testified that she "was really shocked" by the Governor grabbing her butt.<sup>850</sup> As she explained:

I felt deflated and I felt disrespected and I felt much like smaller and almost younger than I actually am because kind of the funny part of it all is I was making this project happen. So we were there because, you know, the work that I had been doing and have continued to do . . . so it was just very, yeah, a moment of like, disempowerment.<sup>851</sup>

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<sup>841</sup> *Id.* at 25:15–22, 29:17–18.

<sup>842</sup> *Id.* at 27:8–21.

<sup>843</sup> *Id.* at 27:24–28:4.

<sup>844</sup> *Id.* at 43:5–10.

<sup>845</sup> *Id.* at 43:13–17.

<sup>846</sup> *Id.* at 27:24–28:11.

<sup>847</sup> *Id.* at 28:11–17.

<sup>848</sup> *Id.* at 28:14–29:4.

<sup>849</sup> *Id.* at 30:1–8.

<sup>850</sup> *Id.* at 44:3–4.

<sup>851</sup> *Id.* at 44:18–45:1.

State Entity Employee #1 identified certain photographs that were taken that day, including one photograph with the Governor taken, she believed, prior to the time the Governor grabbed her butt.<sup>852</sup>

### **Reporting the Governor's Conduct**

After the September 2019 event, State Entity Employee #1 sent messages to her siblings and mother about what had happened.<sup>853</sup> She provided us with screenshots of the messages. She also told some friends later that evening what had happened.<sup>854</sup> The following day, at her friends' suggestion, she wrote down what the Governor had done and emailed it to herself.<sup>855</sup> State Entity Employee #1 provided a copy of that document, which was consistent with her testimony.<sup>856</sup>

The week following the incident, State Entity Employee #1 followed up again with her supervisor and asked if she had heard State Entity Employee #1's report that the Governor touched her butt.<sup>857</sup> State Entity Employee #1's supervisor acknowledged that she had heard State Entity Employee #1, but she proceeded to ask questions focusing on the Governor's intent.<sup>858</sup> State Entity Employee #1 understood that her supervisor likely would not take any action.<sup>859</sup>

State Entity Employee #1 next went to her employer's human resources staff member and posed "hypothetical questions" about how to handle a situation where an external leader "inappropriately touched someone."<sup>860</sup> The human resources staff member described the reporting and investigation process, and she also encouraged State Entity Employee #1 to report if anything had occurred.<sup>861</sup> State Entity Employee #1 testified that she did not report the incident at the time in part because of the personal and professional repercussions.<sup>862</sup> She explained that "it felt very scary to report something against someone who has so much power so—and [she] very much felt like the burden and impact was going to be . . . fully on [her]. Like [she] was going to perhaps have [her] career impacted" and that being publicly identified in connection with the incident was "incredibly intimidating."<sup>863</sup>

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<sup>852</sup> *Id.* at 30:16–21, 31:20–25.

<sup>853</sup> *Id.* at 34:1–6.

<sup>854</sup> *Id.* at 33:1–18.

<sup>855</sup> *Id.* at 37:9–23.

<sup>856</sup> *See* Ex. 4 (email from State Entity Employee #1 to herself).

<sup>857</sup> State Entity Employee #1 Tr. 41:23–42:6.

<sup>858</sup> *Id.* at 42:13–43:4.

<sup>859</sup> *Id.* at 45:13–19.

<sup>860</sup> *Id.* at 46:6–15.

<sup>861</sup> *Id.* at 46:4–47:4.

<sup>862</sup> *Id.* at 47:10–48:6.

<sup>863</sup> *Id.* at 47:7–19. Around the same time that she spoke with the human resources staff member, State Entity Employee #1 told one of her colleagues about the incident. *Id.* at 48:7–49:11.

State Entity Employee #1 told some additional friends about the Governor touching her inappropriately.<sup>864</sup> In one text exchange in April 2020, State Entity Employee #1 said: “as people celebrate Cuomo so much right now. [*sic*] It’s v conflicting as some [*sic*] who has been inappropriately touched by him to ‘stand with him’ . . . we should have so much more and it sucks ‘accepting’ less from men.”<sup>865</sup>

Earlier this year, State Entity Employee #1 spoke with another colleague about what happened with the Governor.<sup>866</sup> State Entity Employee #1 now has a different supervisor.<sup>867</sup> State Entity Employee #1’s supervisor at the time of the incident told the State Entity’s general counsel around March 2021 that the Governor grabbed [State Entity Employee #1’s] “ass” at an event. The general counsel told State Entity Employee #1’s new supervisor, who told State Entity Employee #1 around March 16, 2021 that she had heard about the Governor inappropriately touching State Entity Employee #1.<sup>868</sup> State Entity Employee #1 discussed what had happened at the event with her supervisor.<sup>869</sup>

State Entity Employee #1 explained that she decided to report the Governor’s conduct to us because:

[T]here were other people that were sharing their story and I very much—I could help support that there’s a pattern to what was occurring and to legitimize that this is happening. I wanted to support those other people. So I didn’t want it to impact my job. I hope that it doesn’t impact me much more but I very much was cognizant that I experienced something that could support individuals who maybe experience something of greater frequency or something, you know, more extreme and if I could do that I felt that it was my responsibility to do that.<sup>870</sup>

We interviewed State Entity Employee #1’s current supervisor, as well as the organization’s general counsel, and two colleagues in whom she confided. They all described what she had told them about her interactions with the Governor in a manner consistent with State Entity Employee #1’s testimony. We interviewed one of the friends to whom State Entity Employee #1 reported the incident the evening it had occurred. The friend also corroborated State Entity Employee #1’s testimony.

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<sup>864</sup> *Id.* at 49:16–52:9.

<sup>865</sup> *Id.* at 52:10–53:9.

<sup>866</sup> *Id.* at 53:25–55:7.

<sup>867</sup> *Id.* at 21:3.

<sup>868</sup> *Id.* at 56:3–10.

<sup>869</sup> *Id.* at 58:25–60:15.

<sup>870</sup> State Entity Employee #1 Tr. 63:7–24.

The Governor testified that he could not recall the event and denied that he touched anyone on the butt at the event.<sup>871</sup>

## Assessment

We find State Entity Employee #1's allegation that the Governor grabbed her butt without her consent to be credible. She testified about the incident with a compelling level of detail in a consistent manner. Her written description of the incident, in an email to herself composed the day after the incident, matched her testimony, as did messages she sent to friends and family recounting the key details. Additionally, we interviewed multiple co-workers and a friend, all of whom corroborated that State Entity Employee #1 had told them the key details of the incident in a manner consistent with her testimony.

### ix. State Entity Employee #2

State Entity Employee #2 is a former Director at the New York State Department of Health and a doctor.<sup>872</sup>

On March 17, 2020, State Entity Employee #2 performed a live demonstration of a COVID-19 nasal swab on the Governor during a televised press conference. Prior to the press conference, State Entity Employee #2 conducted a run-through of the nasal swab with the Governor. She first indicated to the Governor that he should be seated for the nasal swab.<sup>873</sup> The Governor responded that he was going to stand because it looked better.<sup>874</sup> State Entity Employee #2 tried to persuade the Governor that he needed to be seated, given that State Entity Employee #2 needed to be able to reach the Governor for the nasal swab.<sup>875</sup> The Governor then pointed at State Entity Employee #2's heeled boots, and said something along the lines of, "You will be fine with those on."<sup>876</sup>

As part of the run-through, State Entity Employee #2 performed a nasal swab on the Governor to ensure she could reach him during the press conference. Prior to the nasal swab, the Governor asked State Entity Employee #2 to make sure she didn't "go so deep that [she] hit [his] brain."<sup>877</sup> State Entity Employee #2 promised that she would be "gentle but accurate."<sup>878</sup> The Governor responded, "[G]entle but accurate[, I've] heard that before."<sup>879</sup> State Entity Employee #2 testified that she changed the subject at that point because she understood the Governor's

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<sup>871</sup> Andrew Cuomo Tr. 490:17–491:19.

<sup>872</sup> State Entity Employee #2 Tr. 14:16–21, 16:9–13.

<sup>873</sup> *Id.* at 157:10–158:15.

<sup>874</sup> *Id.*

<sup>875</sup> *Id.*

<sup>876</sup> *Id.* State Entity Employee #2 shared this incident with a colleague on a phone call following the press conference.

<sup>877</sup> *Id.* at 158:19–159:17.

<sup>878</sup> *Id.*

<sup>879</sup> *Id.* at 159:18–23.

comment to be a joke of an implied sexual nature.<sup>880</sup> She “just wanted to move on, . . . , and do [her] work.”<sup>881</sup> State Entity Employee #2 testified that she interpreted the Governor’s comment to have a sexual undertone that was inappropriate, and that the Governor would not have made that same comment to a physician who was a man.<sup>882</sup>

State Entity Employee #2 testified that throughout this run-through, the Governor was behaving in a flirtatious manner, including by standing very close to State Entity Employee #2 and speaking in a deeper tone.<sup>883</sup> The Governor also appeared to be gazing at her throughout, to the point where the Governor appeared to tune out and had to ask State Entity Employee #2 to repeat herself.<sup>884</sup>

During the live televised press conference, State Entity Employee #2 appeared on camera attired in full personal protective equipment, including a face shield and gown. When he stood up and walked toward State Entity Employee #2 for the nasal swab, the Governor said to State Entity Employee #2, “Nice to see you, Doctor—you make that gown look good.” His remark was in front of the press and livestreamed publicly, as well as captured as a video recording.<sup>885</sup>

Following the press conference, State Entity Employee #2 waited in the foyer with a security guard so that the press could not question her about the Governor’s comment.<sup>886</sup> State Entity Employee #2 testified that she was worried the press would try to bring her into the public sphere, which she had no desire to enter.<sup>887</sup>

Colleagues who spoke to State Entity Employee #2 immediately following the press conference recalled how State Entity Employee #2 was shocked that the Governor had made such a comment on national television. They also recalled State Entity Employee #2’s concern that the Governor’s comment would take away from the important public health service State Entity Employee #2 was trying to perform. State Entity Employee #2’s colleagues remembered State Entity Employee #2 saying that the Governor’s comments were inappropriate and had made her feel uncomfortable.

Toward the conclusion of her testimony, State Entity Employee #2 shared the following about why she decided to speak with us about her experience with the Governor:

I felt that in my situation it was very, very brief. I did not have typical interactions with the Governor and I felt I had a lot of professional opportunities otherwise. I felt that in my professional

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<sup>880</sup> *Id.* at 160:20–161:2.

<sup>881</sup> *Id.* at 161:19–22.

<sup>882</sup> *Id.* at 161:10–18.

<sup>883</sup> *Id.* at 161:3–9, 174:16–176:23.

<sup>884</sup> *Id.* at 176:24–177:14.

<sup>885</sup> See, e.g., NBC News, *Gov. Cuomo Demonstrates ‘How Easy’ It Is To Take The Coronavirus Test*, YouTube (May 17, 2020), <https://www.youtube.com/watch?v=9usnMvlp3ZY>.

<sup>886</sup> *Id.* at 185:5–186:3.

<sup>887</sup> *Id.* at 172:10–16.

standing I should share these facts, whatever they are, in order to support if there are any other women[,] and I can't say there are or not, who are saying they have been put in an uncomfortable position[,] or if there is any sexual harassment, that you have the facts that you might need.<sup>888</sup>

Similarly, one of State Entity Employee #2's colleagues recalled State Entity Employee #2 saying she felt obligated to report the Governor's comments, because if the Governor had felt so comfortable making comments of this nature to an established physician in State Entity Employee #2's position, he could easily be making similar or worse comments to younger women.

The Governor testified that he did not recall saying anything specific to State Entity Employee #2 prior to the press conference, including any statement using the phrase "gentle and accurate."<sup>889</sup> The Governor did not dispute his public comment during the press conference.<sup>890</sup>

## **Assessment**

We found State Entity Employee #2 to be credible both in demeanor and substance. What the Governor said to her during the press conference was captured on film and therefore is fully corroborated. Moreover, a number of State Entity Employee #2's colleagues who spoke to her immediately following the event corroborated State Entity Employee #2's experience and her reaction to the Governor's conduct.

### **B. Other Complainants**

A number of women outside State government have also made allegations, whether publicly or for the first time through this investigation, of sexual harassment (and other forms of misconduct) by Governor Cuomo.

#### **i. Virginia Limmiatis**

In May 2017, Virginia Limmiatis attended a conservation event in upstate New York, at which the Governor gave a brief speech.<sup>891</sup> Ms. Limmiatis wore a shirt that had the name of her employer, the Energy Company (which was involved in the event), printed across the chest.

After the formal program, Ms. Limmiatis joined a rope line to meet the Governor.<sup>892</sup> When the Governor reached her, Ms. Limmiatis held out her hand for a handshake.<sup>893</sup> The Governor walked up close to Ms. Limmiatis and pressed his first two fingers of his right hand on

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<sup>888</sup> *Id.* at 192:22–193:8.

<sup>889</sup> Andrew Cuomo Tr. 494:15–495:10.

<sup>890</sup> *Id.* at 493:22–494:3.

<sup>891</sup> Limmiatis Tr. 18:24–20:7, 22:9–12.

<sup>892</sup> *Id.* at 28:22–29:19.

<sup>893</sup> *Id.* at 30:21–31:3.

each letter of the Energy Company’s name printed across the chest of Ms. Limmiatis’ shirt.<sup>894</sup> The Governor pressed his fingers on each letter before sliding his fingers to the next letter, while saying “[Energy Company] I know you.”<sup>895</sup> The Governor leaned in so his cheek was touching Ms. Limmiatis’ cheek, and said something along the lines of, “I’m going to say I see a spider on your shoulder.”<sup>896</sup> Ms. Limmiatis looked down to see that there was no spider or bug on her, but the Governor brushed his hand in the area between her shoulder and breast below her collarbone.<sup>897</sup> Ms. Limmiatis testified that she was too shocked and appalled during the interaction to say anything, and understood the Governor knew he had “done something wrong and that he had to create a cover story.”<sup>898</sup> The Governor continued down the rope line and Ms. Limmiatis looked around to see if anyone else had noticed, but it appeared no one had.<sup>899</sup>

Shortly after the rope line had dispersed, Ms. Limmiatis approached three other attendees of the event, and told them about the Governor’s conduct.<sup>900</sup> One of those three attendees, Attendee #1, provided a declaration to us in which he attested that Ms. Limmiatis told him that the Governor had “dragged his finger across the logo” on her shirt, which Attendee #1 saw firsthand was at breast-level.<sup>901</sup> Attendee #1 further attested that Ms. Limmiatis shared that the Governor exclaimed he knew the Energy Company and said “something about brushing a bug off of [Ms. Limmiatis’] shirt.”<sup>902</sup> Attendee #1 attested that what Ms. Limmiatis shared “made an impression on [him] because of how upset Ms. Limmiatis looked and acted.”<sup>903</sup>

Shortly after the event, Ms. Limmiatis returned to her office and told her boss what had occurred.<sup>904</sup> Ms. Limmiatis’ boss did not raise the option of reporting what had happened to the Energy Company or the Executive Chamber, and Ms. Limmiatis did not independently pursue these options because there was “trepidation and fear . . . how do you explain to someone what the Governor did in public, such an egregious act, heinous act. I was very fearful . . . how does someone believe that this happened to me.”<sup>905</sup>

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<sup>894</sup> *Id.* at 31:4–32:10.

<sup>895</sup> *Id.*

<sup>896</sup> *Id.* at 32:11–33 :20.

<sup>897</sup> *Id.* at 33:4–11, 33:21–34:5.

<sup>898</sup> *Id.* at 32:24–24, 57:21–58:3.

<sup>899</sup> *Id.* at 34:9–21. Subsequent to Ms. Limmiatis’ testimony, we obtained photographs of the event from the Executive Chamber and conducted follow-up interviews with Ms. Limmiatis. Ms. Limmiatis identified the photographs as almost certainly being from the May 24, 2017 event, and explained that it was difficult for her to even review the photographs because they brought a flood of negative emotions about the incident, including shame.

<sup>900</sup> *Id.* at 35:22–37:15.

<sup>901</sup> Ex. 71 at ¶ 9.

<sup>902</sup> *Id.*

<sup>903</sup> *Id.* We interviewed Attendee #1, who recounted the events in a manner consistent not only with his declaration, but also with Ms. Limmiatis’ testimony. We also interviewed the two additional attendees Ms. Limmiatis testified she had spoken to at the event. Both attendees corroborated Ms. Limmiatis’ testimony. However, unlike Attendee #1, these two attendees did not recall Ms. Limmiatis being outwardly upset at the event.

<sup>904</sup> Limmiatis Tr. 40:21–41:6.

<sup>905</sup> *Id.*



Within a day or two of the incident, Ms. Limmiatis confided in her sister, who has provided a declaration attesting to details consistent with Ms. Limmiatis' testimony.<sup>906</sup>

Ms. Limmiatis testified that when the Governor touched her, she was "absolutely humiliated. It's very difficult even talking about it. I was absolutely profoundly humiliated and appalled. I was in shock. Very negative feelings is the best way to describe it."<sup>907</sup> The Governor denied any recollection of the event or any of the conduct alleged by Ms. Limmiatis.<sup>908</sup>

At the conclusion of her testimony, Ms. Limmiatis read the following prepared statement into the record:

Nothing would prepare me for May [ ], 2017, a day that, for me, was the culmination of a lot of hard work with the team at [Energy Company].

The day started with excitement and joy, but quickly turned into something ugly because of the actions of the Governor.

I was there as a professional to do my work. The Governor turned a sincere gesture of simply extending my hand as an expression of gratitude for the State's partnership into a moment of profound shame and humiliation . . . . He did not respect me as a professional and a contributor to the project . . . .

I want to tell the governor that this is not about cancel culture. This is about consequences.

My coming forward is a direct result of the Governor's March 3[, 2021] press conference in which he said, "I never touched anyone inappropriately."

He is lying again. He touched me inappropriately. I am compelled to come forward to tell the truth.

I do not know how to report what he did to me—I didn't know how to report what he did to me at the time and was burdened by shame, but not coming forward now would make me complicit in his lie, and I won't do it.

I am a cancer survivor. I know an oppressive and destructive force when I see it. Thank you.<sup>909</sup>

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<sup>906</sup> Ex. 72 at ¶ 9; Limmiatis Tr. 41:22–42:14.

<sup>907</sup> Limmiatis Tr. 35:11–15.

<sup>908</sup> Andrew Cuomo Tr. 491:20–493:2.

<sup>909</sup> Limmiatis Tr. 56:22–58:21.

## Assessment

We found Ms. Limmiatis to be credible both in demeanor and the substance of her allegations. Her allegations were substantially corroborated by individuals whom Ms. Limmiatis spoke to contemporaneously about her experience.

### ii. Anna Ruch

On Saturday, September 14, 2019, Anna Ruch attended the wedding of Gareth Rhodes, a senior aide to the Governor. Ms. Ruch was a close friend of the bride. The wedding took place at a restaurant in New York City, and the Governor officiated. Ms. Ruch had not met the Governor prior to the wedding. Shortly after the ceremony ended, one of her friends pointed out that the Governor was approaching them and suggested that they try to take a picture with him.

Ms. Ruch said that when the Governor reached them she thanked him for saying nice things about her friends. She stated that the Governor shook her hand and then quickly moved his hand to her back, touching her bare skin on a place where there was cutout in the dress. Ms. Ruch stated that she felt very uncomfortable so she immediately grabbed the Governor's wrist and removed his hand from her back. The Governor denied having ever put his hand on her bare back, or that Ms. Ruch pushed his arm away. The Governor said that he would have remembered if someone had pushed his arm away.<sup>910</sup>

Ms. Ruch said that the Governor remarked, "wow, you're aggressive." She recalled thinking "why is he saying that" and stammering words to the effect of "I dunno" in an expression of discomfort. Ms. Ruch said that the Governor immediately cupped her face in his hands and said, "can I kiss you?" The Governor did not recall saying "May I kiss you" to Ms. Ruch but said this is a phrase he has started to use more recently.<sup>911</sup> Ms. Ruch stated that she felt distraught and uncomfortable so she did not respond but tried to move away and turned her face as the Governor kissed her left cheek.

Ms. Ruch had handed her phone to one of her friends, who photographed the encounter. Ms. Ruch produced the photos and identified them in her interview. They show the Governor with his hands on her face and Ms. Ruch twisting away. Ms. Ruch's facial expression appears to show discomfort. Ms. Ruch said that three of her friends watched the encounter, and that the Governor did not speak to or touch them.

Ms. Ruch stated that she felt shocked, angry, and embarrassed that the Governor touched and kissed her in a public place within moments of meeting her and without her consent. She said that she was appalled and angry that the Governor so comfortably, swiftly, and publicly treated her the way he did. Ms. Ruch said that she looked for the Governor later on at the wedding to tell him how upset she was, but did not find him. Ms. Ruch and her friend also recounted that a stranger who overheard them talking about the incident in the women's bathroom remarked that the Governor had done something similar to her.

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<sup>910</sup> Andrew Cuomo Tr. 484:3–10.

<sup>911</sup> *Id.* at 484:14–18.

That night, Ms. Ruch told several people what happened. Ms. Ruch did not believe the bride and groom witnessed the incident and said that she avoided saying anything to the bride during the wedding. Ms. Ruch said, however, that after exchanging pleasantries with Mr. Rhodes at the wedding she told him, in sum and substance, “your boss is a creep,” and that he appeared shocked and apologetic. Mr. Rhodes did not recall the exchange, but did recall learning of the incident from friends in the weeks after the wedding, long before Ms. Ruch shared her allegations publicly in March 2021.

Two days after the interaction with the Governor, Ms. Ruch texted her friend a picture of Ms. Ruch and the Governor, “This fucking guy / I’m so pissed / I lost the photographers [sic] card but don’t want the photo of us on the wedding photos. Yuck,” accompanied by a vomit emoji.<sup>912</sup>

On February 28, 2021, Ms. Ruch posted pictures of the interaction with the Governor on her Instagram story, writing “Slid his hand on my lower back which I promptly removed and then he proceeded to grab my face with both hand and asked if he could kiss me, laid one on my cheek, and then told me *I* was aggressive.”<sup>913</sup> On March 1, 2021, a New York Times article detailing Ms. Ruch’s allegations was published.<sup>914</sup>

## **Assessment**

Ms. Ruch was credible both in her demeanor and in the substance of her allegations. Pictures taken as the Governor held Ms. Ruch’s face and kissed her corroborate her general description of what the Governor did.<sup>915</sup>

## **II. The Governor’s and the Executive Chamber’s Response to Allegations**

Since the public allegations of sexual harassment began to emerge, the Governor and Executive Chamber have responded in various ways that have been relevant to our investigation. For example, as set forth in greater detail below, six months after Ms. Bennett reported the Governor’s conduct to senior-level Executive Chamber staff, when Ms. Boylan alleged in December 2020 that the Governor had sexually harassed her, the Executive Chamber responded by, among other things, (1) releasing to the press confidential files relating to complaints made against Ms. Boylan, (2) drafting a letter disparaging Ms. Boylan and circulating it to a number of current and former members of the Executive Chamber for their consideration (although not ultimately releasing it publicly), (3) reaching out to various current and former members of the

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<sup>912</sup> Ex. 73.

<sup>913</sup> Ex. 74.

<sup>914</sup> Matt Flegenheimer & Jesse McKinley, *Cuomo Accused of Unwanted Advance at a Wedding: ‘Can I Kiss You?’*, N.Y. Times (Mar. 1, 2021).

<sup>915</sup> Other individuals have described being grabbed in the face and being kissed on the cheeks by the Governor that made them feel uncomfortable. Sherry Vill, a complainant whom we interviewed, described an incident on May 28, 2017 when the Governor visited her home following flooding that took place in the area, during which the Governor grabbed her face and kissed her on the cheek. Perhaps sensing her discomfort, Ms. Vill informed us that he said something along the lines of “That’s what Italians do—kiss both cheeks.” She also told us that the Governor told her she was “beautiful.”

Executive Chamber regarding a more positive message of support (that also was not released), and (4) reaching out, through certain trusted former members of the Executive Chamber, to identify any former staff members who might be supportive of Ms. Boylan and might themselves be in a position to make allegations against the Governor.

Following the publication of Ms. Bennett's allegations in February 2021, members of the Executive Chamber (particularly those who had been involved in taking Ms. Bennett's report of the issues she had with the Governor in June 2020) advised the Governor to express contrition and a recognition that he may have had inappropriate conversations with Ms. Bennett and that he may have made her and others feel uncomfortable. The Governor initially appeared to take that advice in his public appearances and statements, although, over time, he appears to have changed the tone to one of denial and defiance. In addition, our investigation showed that part of the Executive Chamber's plan from shortly after the launch of our investigation, and prior to any substantive interviews or testimony, was to take aim at and attack the investigation and those tasked with conducting it.

#### **A. The Release of Confidential Files Relating to Ms. Boylan**

On December 9, 2020, Ms. DeRosa shared with Mr. David and Ms. Lacewell tweets that Ms. Boylan posted that day describing the Governor as "one of the biggest abusers of all time."<sup>916</sup> Ms. DeRosa reached out to Mr. David in a text to say that she needed to see Ms. Boylan's "full file."<sup>917</sup> Mr. David, former Counsel to the Governor but at the time President of the Human Rights Campaign, responded that Ms. Mogul should be able to provide the file for the time when Ms. Boylan worked in the Chamber, and Ms. Lacewell confirmed that Ms. Mogul had the file.<sup>918</sup> On December 11, Mr. David sent to Mr. Azzopardi files relating to his investigation into and counseling of Ms. Boylan shortly before her departure from the Executive Chamber ("Confidential Files") that he had retained and taken with him when he left the Executive Chamber.<sup>919</sup> Mr. David testified that he kept with him a copy of Ms. Boylan's files because it "may have been the only instance where [he] was actually involved in a counseling of an employee when [he] was in the Executive Chamber."<sup>920</sup>

On December 13, 2020, just hours after Ms. Boylan tweeted that the Governor had sexually harassed her, Mr. Azzopardi sent the Confidential Files to David Caruso of the Associated Press, Dana Rubinstein of the New York Times, and Bernadette Hogan of the New York Post, along with a statement from Press Secretary Caitlin Girouard that "[t]here is simply no truth to these claims."<sup>921</sup> The Confidential Files consisted of (1) a September 20, 2018 memorandum to Mr. David regarding "Confidential Personnel Matter"; (2) a September 26, 2018 memorandum to Mr. David labeled "Draft, privileged and confidential - Attorney Client Privileged Communication / Intra-Agency Communication / Memo to File"; and (3) a September

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<sup>916</sup> Ex. 62.

<sup>917</sup> Ex. 62.

<sup>918</sup> *Id.*

<sup>919</sup> Ex. 75.

<sup>920</sup> David Tr. 61:15–66:11, 82:19–83:8.

<sup>921</sup> Ex. 61.

30, 2018 email from Mr. David labeled “Privileged and confidential / Attorney client communication / Attorney work product.”<sup>922</sup>

The Confidential Files discussed complaints against Ms. Boylan. Witnesses involved in disclosing the Confidential Files testified that the complainants’ names were redacted with Wite-Out before they were sent to reporters.<sup>923</sup>

Mr. Azzopardi also sent the Confidential Files to Ed McKinley of the Times Union<sup>924</sup> and David Caruso of the Associated Press, among others, on the same day.<sup>925</sup> Earlier on December 13, Mr. Azzopardi had sent the Confidential Files to former Executive Chamber staff, Josh Vlasto, Mr. Bamberger, Ms. Lever, and Steve Cohen. At the direction of Ms. DeRosa or Mr. Azzopardi, Mr. Bamberger and Ms. Lever coordinated with some of the reporters who received the documents to let them know that the Executive Chamber would be sending them.<sup>926</sup>

The next day, on December 14, Mr. Azzopardi sent the documents to Zack Budryk of The Hill, Marcia Kramer of CBS, and Zack Fink of NY1 News.<sup>927</sup> On December 15, at the direction of Ms. DeRosa or Mr. Azzopardi, Mr. Vlasto sent the documents to Mike Gartland of the New York Daily News.<sup>928</sup>

Ms. DeRosa testified that Mr. Vlasto (former Chief of Staff to the Governor) had first proposed releasing the Confidential Files to respond to the tweets Ms. Boylan sent before December 13.<sup>929</sup> Ms. DeRosa weighed whether to disclose the Confidential Files at that time and sought different opinions.<sup>930</sup> Ms. Mogul’s view was that Ms. Boylan “was trying to bait a reaction out of the Executive Chamber and [Ms. Mogul] thought the Chamber should not react.”<sup>931</sup> According to Ms. DeRosa, Mr. Azzopardi had also been against releasing the Confidential Files because years earlier, a senior member of the Executive Chamber had read someone’s personnel file on the radio “and it was a disastrous public relations move.”<sup>932</sup> Ms. DeRosa made the decision to disclose the Confidential Files on December 13, the day

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<sup>922</sup> *Id.*

<sup>923</sup> Azzopardi Tr. 85:21–86:5; Vlasto Tr. 177:22–179:3.

<sup>924</sup> Based on an audio tape of a recorded call between Ms. DeRosa and Peter Ajemian with Casey Seiler and Brendan Lyons at the Times Union on March 13, 2021, Mr. Lyons said that at the Times Union did not want the Confidential Files sent to them, but the Executive Chamber did so anyway. Ex. 76 (transcript of call). The audio of the call is also publicly available at <https://vimeo.com/582254025/6904a32412>. In her testimony, Ms. DeRosa stated that the “Times Union took [Ms. Boylan’s] personnel file.” Ms. DeRosa testified that she did not think that the Times Union did not want to receive the personnel file. DeRosa Tr. 585:7–17.

<sup>925</sup> Ex. 61.

<sup>926</sup> Bamberger Tr. 97:2–20, 106:13–25; Lever Tr. 303:20–305:3; Ex. 77; Ex. 78; Ex. 79.

<sup>927</sup> Ex. 80, Cover Page (without attachment); Ex. 81, Cover Page (without attachment); Ex. 82, Cover Page (without attachment).

<sup>928</sup> Vlasto Tr. 157:3–162:24; Ex. 83, Cover Page (without attachment).

<sup>929</sup> DeRosa Tr. 532:19–533:10.

<sup>930</sup> *Id.* at 535:8–536:15.

<sup>931</sup> Mogul Tr. 186:12–187:10.

<sup>932</sup> DeRosa Tr. 534:4–25.

Ms. Boylan tweeted that the Governor had sexually harassed her, because Ms. Boylan's tweets had gotten "more and more escalating" and the group's view was that they had "made a mistake by not doing something earlier."<sup>933</sup>

Mr. Azzopardi testified that the Executive Chamber had disclosed the Confidential Files "in order to correct demonstrably false information" about the circumstances of Ms. Boylan's departure from the Chamber.<sup>934</sup> According to him, Ms. Boylan had made public statements on Twitter and in the New York Post that "she left because of a toxic workplace, and she tried to quit three times until it actually stuck."<sup>935</sup> He told Bernadette Hogan of the New York Post, David Caruso of the Associated Press, and Jimmy Vielkind from the Wall Street Journal that Ms. Boylan "got fired after being confronted," and they asked him to prove it.<sup>936</sup> He provided the Confidential Files to prove his claim.<sup>937</sup> The Confidential Files, however, state that Ms. Boylan resigned voluntarily.<sup>938</sup> In fact, one of the memoranda that Mr. Azzopardi released noted, under the heading "Ms. Boylan's Resignation," that "[d]uring the meeting Mr. David was clear that she was not being asked to resign, fired, or pushed out in any way. In no uncertain terms he said that she was simply being counseled in response to the complaints that have been made about her from multiple sources."<sup>939</sup> Ms. Lacewell, Ms. Lever, and Mr. Zemsky confirmed during their testimony that Ms. Boylan had tried to resign from the Chamber more than once.<sup>940</sup>

The Executive Chamber also justified the release of the Confidential Files as correcting the allegedly "false" statement in Ms. Boylan's December 13 tweet that her work was "very good."<sup>941</sup> But the Governor himself testified that, based on his observations of the quality of Ms. Boylan's work, he "thought she was very good," and that Mr. Zemsky also thought she was "very good."<sup>942</sup>

Mr. Vlasto testified that he had supported disclosing the Confidential Files as long as it was legally permissible because the Confidential Files provided "relevant context for the reporters," "given that Lindsey [Boylan] was making accusations of harassment."<sup>943</sup> Similarly, Ms. Mogul told us that Ms. Boylan had "cast herself as being a victim of a toxic work environment," and the Confidential Files "spoke to" Ms. Boylan's role "in the environment and

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<sup>933</sup> *Id.* at 537:2–538:12.

<sup>934</sup> Azzopardi Tr. 84:15–85:2.

<sup>935</sup> *Id.* at 79:10–91:12.

<sup>936</sup> *Id.* at 84:15–85:2.

<sup>937</sup> *Id.*

<sup>938</sup> Ex. 61 ("Further, she has notified practically all state employees and many external stakeholders of her voluntary resignation, which was accepted.").

<sup>939</sup> Ex. 61; *see also* David Tr. 216:6–217:11.

<sup>940</sup> Lacewell Tr. 92:7–93:21; Lever Tr. 84:14–19; Zemsky Tr. 70:5–21.

<sup>941</sup> Garvey Tr. 107:17–108:11.

<sup>942</sup> Andrew Cuomo Tr. 61:2–14.

<sup>943</sup> Vlasto Tr. 134:11–22.

her contribution to an unhealthy work environment for some of the people that she worked with.”<sup>944</sup>

Ms. DeRosa had sought advice from Ms. Mogul and Ms. Lacewell about whether it was permissible to release the Confidential Files, and she had asked them to consult with GOER.<sup>945</sup> Michael Volforte, Director of GOER, testified that Ms. Mogul and Ms. Lacewell asked him generally about whether or not the Chamber could release a “personal history folder,” which is a file that is kept generally for each state employee and includes information about hiring, promotions, and if the employee is the subject of disciplinary action or counseling.<sup>946</sup> They did not show him the files that they were considering releasing, never discussed the actual documents that they were considering releasing, and never identified Ms. Boylan or any particular individual as the subject of their inquiry.<sup>947</sup> Ms. Mogul, during her testimony, denied that the Confidential Files are “personnel records”<sup>948</sup> or even that they are “confidential,” on the basis that if they had been the subject of a FOIL request, “they may well have had to be released.”<sup>949</sup> Ms. Mogul also testified that she had concluded that the Confidential Files were not privileged either.<sup>950</sup> According to Ms. DeRosa and Ms. Mogul, they did not discuss whether releasing the Confidential Files could be considered retaliation.<sup>951</sup> The Confidential Files were shared with various people who were outside of the Executive Chamber and not State employees, including Mr. Cohen, Mr. Vlasto, and Mr. Bamberger, without any discussion of whether that was appropriate or permissible.<sup>952</sup>

According to Ms. DeRosa, she only notified the Governor about releasing the Confidential Files to the press after the Executive Chamber did so, because she wanted to protect him from any criticism.<sup>953</sup> The Governor testified that he did not recall having been in any conversation about disclosing the Confidential Files, and that he only learned about it after the fact from the press.<sup>954</sup> Mr. Azzopardi testified that as to “allegations against the [Governor’s] personal conduct,” he did not think “anything went out the door without [the Governor’s] knowledge.”<sup>955</sup> Mr. Vlasto, the Governor’s former Chief of Staff who did not work for the Executive Chamber at the time, assumed that the Governor had approved the disclosure of the

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<sup>944</sup> Mogul Tr. 180:17–181:2.

<sup>945</sup> DeRosa Tr. 543:2–13. The Executive Chamber asserted privilege over the substance of the discussions with GOER. Mogul Tr. 177:23–178:6; Volforte Tr. 132:15–133:23.

<sup>946</sup> Volforte Tr. 132:15–135:20.

<sup>947</sup> *Id.* at 134:2–21, 148:12–17.

<sup>948</sup> Mogul Tr. 179:19–21.

<sup>949</sup> *Id.* at 179:2–15. She confirmed that the Chamber had not released the Confidential Files in response to FOIL requests. *Id.* at 180:2–8.

<sup>950</sup> *Id.* at 181:15–182:14.

<sup>951</sup> DeRosa Tr. 543:20–23; Mogul Tr. 178:7–15.

<sup>952</sup> DeRosa Tr. 581:13–584:9.

<sup>953</sup> *Id.* at 551:20–554:23, 556:5–12.

<sup>954</sup> Andrew Cuomo Tr. 115:18–116:3, 117:5–118:25.

<sup>955</sup> Azzopardi Tr. 33:24–34:3.

Confidential Files.<sup>956</sup> Mr. Vlasto's view was that if Ms. DeRosa had made the decision to disclose the information, it was "safe to say" that the decision "was consistent with what the Governor wanted or had been discussed with him and he approved it."<sup>957</sup> Mr. Bamberger, the Governor's former Communications Director who did not work for the Executive Chamber at the time, also testified that the Governor is "a very hands-on Governor," and this is particularly true for press issues (except television).<sup>958</sup>

The author of one of the documents in the Confidential Files wrote in a diary entry on March 8, 2021:

When Azzo[pardi] released my 2018 HR type memo about the Lindsay's exit counseling session I was surprised and not surprised at the same time. I knew that senior staff had the documents and my files from that time, but I was not told it was going to the press until after it was out. Also I thought it was attorney client privilege and I assumed I would have been told if the Governor decided to waive that privilege. I also was kind of surprised because I didn't think it was a great rebuttal to what she was saying—the counseling session didn't have anything to do with sexual harassment (there was none alleged at the time) . . . I was however not prepared for how widely my memo went out—I was dismayed when my memo was picked up in papers literally around the world and domestically—this was not how I wanted to find my name in People Magazine.<sup>959</sup>

## **B. Letters in Response to Ms. Boylan's Allegations and in Support of Governor**

Following Ms. Boylan's tweet alleging sexual harassment against the Governor, beginning around December 15, 2020, the Governor and a group of advisors worked on a draft letter or op-ed.<sup>960</sup> The letter was to be sent by former Executive Chamber staff members who had worked with Ms. Boylan and the Governor. The various drafts of this letter included complaints against Ms. Boylan that were part of the Confidential Files. The drafts also discussed alleged interactions between Ms. Boylan and male colleagues other than the Governor. The letter denied the legitimacy of Ms. Boylan's allegations, impugned her credibility, and attacked her claims as politically motivated (including with theories about connections with supporters of President Trump and a politician with an alleged interest in running for Governor).

Ms. Benton and Ms. DeRosa testified that the Governor wrote the first draft of the letter by hand and that Ms. Benton typed it up.<sup>961</sup> Others, including Ms. DeRosa, Ms. Mogul, and

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<sup>956</sup> Vlasto Tr. 139:2–13.

<sup>957</sup> *Id.* at 139:17–25.

<sup>958</sup> Bamberger Tr. 205:8–206:7.

<sup>959</sup> Ex. 14.

<sup>960</sup> Benton Tr. 194:8–25; DeRosa Tr. 632:17–20, 669:7–23.

<sup>961</sup> Benton Tr. 194:8–25; DeRosa Tr. 632:17–20.



Mr. Cohen, commented on early drafts of the letter.<sup>962</sup> The Governor testified that he did not “remember handwriting any document” but he “participated in drafts.” According to the Governor, he did not know if he started the letter or if “someone else started it and then [he] chimed in.”<sup>963</sup>

Ms. DeRosa’s understanding was that the letter would be in response to Ms. Boylan’s sexual harassment allegations.<sup>964</sup> She told the Governor that she thought the letter would backfire, in part because the draft included information that was based on hearsay and secondhand sources and “it would be really hard to get anyone to sign it.”<sup>965</sup> The Governor directed Ms. DeRosa to seek input from “some of the folks on the team.”<sup>966</sup> He asked her to send the draft to Roberta Kaplan (an attorney at the firm Kaplan Hecker & Fink LLP, and now counsel to Ms. DeRosa with respect to our investigation), Mr. Cohen, and Ms. Lacewell, as well as Ms. Mogul.<sup>967</sup> Ms. DeRosa also sent the draft to Mr. David, Mr. Vlasto, Ms. Lever, and Ms. Walsh.<sup>968</sup> According to Ms. DeRosa, Ms. Kaplan read the letter to the head of the advocacy group Times Up, and both of them allegedly suggested that, without the statements about Ms. Boylan’s interactions with male colleagues, the letter was fine.<sup>969</sup> Ms. DeRosa testified that Mr. Cohen initially thought the letter was not a good idea, but he later took the position that with some edits it would be acceptable.<sup>970</sup> Mr. Cohen “spent some time reworking” the letter.<sup>971</sup> Ms. Mogul thought releasing the letter was a “horrible idea.”<sup>972</sup> At Ms. DeRosa’s request, she tried to fact check the letter,<sup>973</sup> but she was unable to find factual support for parts of the letter.<sup>974</sup> The others whom Ms. DeRosa consulted agreed that the letter was an overreaction.<sup>975</sup> Ms. DeRosa reported back to the Governor that Ms. Kaplan and the head of Times Up thought the letter was okay with some changes, as did Mr. Cohen, but everyone else thought it was a bad idea.<sup>976</sup>

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<sup>962</sup> DeRosa Tr. 677:13–18. Ms. DeRosa testified that she had included the complaints from the Confidential Files in the draft letter.

<sup>963</sup> Andrew Cuomo Tr. 153:8–12.

<sup>964</sup> DeRosa Tr. 669:1–6.

<sup>965</sup> *Id.* at 635:18–36:20.

<sup>966</sup> *Id.* at 648:4–6.

<sup>967</sup> *Id.* at 648:7–10.

<sup>968</sup> *Id.* at 648:11–23.

<sup>969</sup> *Id.* at 656:19–658:10.

<sup>970</sup> *Id.* at 651:12–652:1.

<sup>971</sup> Cohen Tr. 90:22.

<sup>972</sup> Mogul Tr. 203:19–23.

<sup>973</sup> DeRosa Tr. 652:10–653:5.

<sup>974</sup> Mogul Tr. 198:22–35, 200:4–201:7.

<sup>975</sup> DeRosa Tr. 653:15–655:17, 659:15–20.

<sup>976</sup> *Id.* at 661:6–12.

Ms. DeRosa testified that in response to her report about the different views on the letter, the Governor suggested that they see if they could get some people to sign it.<sup>977</sup> Initially, the letter had been drafted to be from Ms. Lever, Cathy Calhoun, and Mr. David, whom Ms. DeRosa had thought would be inclined to sign a letter.<sup>978</sup> All of these individuals were contacted about potentially signing onto this letter. Ms. Lever declined to sign the letter.<sup>979</sup> Mr. David testified that he told Ms. DeRosa that he was not signing the letter but was willing to reach out to others to see if they would sign it.<sup>980</sup> Later versions of the letter simply identified “former senior staff members” of the Executive Chamber more generally as the signatories.

Ms. DeRosa, Mr. David, Ms. Lacewell, and Mr. Bamberger sent or read drafts of the letter to a number of other former Executive Chamber staff members to ask them to sign it or to seek their help in getting others to sign it.<sup>981</sup> Although the letter was ultimately never published, over a dozen people inside and outside the Chamber saw drafts of the letter, including eventually a reporter from the New York Post.<sup>982</sup> According to Ms. DeRosa, when it looked like the letter might not be published, part of the letter was also communicated to a reporter at the New York Daily News.<sup>983</sup> Several people whom the Governor’s advisors asked to sign the letter were uncomfortable with what it said about Ms. Boylan. Ms. Lever suggested that the letter amounted to “victim shaming.”<sup>984</sup> Ms. Walsh remarked that “this entire thing is castigating her” and “why[?] this is just attacking.”<sup>985</sup> She suggested to Ms. DeRosa on December 16 that instead of attacking Ms. Boylan, a better alternative would be to prepare a statement discussing positive experiences of working with the Governor.<sup>986</sup> She sent Ms. DeRosa a model for such a statement.<sup>987</sup>

Ms. DeRosa convened a call with the Governor, Mr. Vlasto, and other advisors. Mr. Vlasto expressed the group’s consensus that the original letter that the Governor had drafted

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<sup>977</sup> *Id.* at 661:25–662:7.

<sup>978</sup> *Id.* at 635:2–7.

<sup>979</sup> Lever Tr. 325:14–17.

<sup>980</sup> David Tr. 251:5–252:2. In a text message on December 16, Ms. DeRosa told other former staff members whom she had asked to sign the letter that Mr. David said he would sign the letter “if we need him.” Ex. 84. Ms. DeRosa testified that Mr. David initially said he would not sign the letter but later said he would if needed. DeRosa Tr. 656:5–12.

<sup>981</sup> David Tr. 263:14–265:3.

<sup>982</sup> Vlasto Tr. 281:15–25; DeRosa Tr. 657:14–659:14, 696:15–697:3; Ex. 85. Ms. DeRosa confirmed that individuals who were not part of “a close group of advisors” received drafts of the letter. DeRosa Tr. 673:1–675:24, 690:23–691:9.

<sup>983</sup> DeRosa Tr. 642:2–643:16 (Ms. DeRosa testified she asked Mr. Vlasto to convey the substance of a part of the letter to Denis Slattery).

<sup>984</sup> Lever Tr. 325:7–10.

<sup>985</sup> Ex. 86.

<sup>986</sup> Ex. 87; Walsh Tr. 258:10–24.

<sup>987</sup> Ex. 87.

was a bad idea.<sup>988</sup> The Governor accepted the group's view.<sup>989</sup> Ms. DeRosa testified that it was also implied during the call that the letter could be considered retaliatory.<sup>990</sup> The Governor testified that because there was no consensus on the draft letter, he and his advisors "wound up doing nothing."<sup>991</sup> He drew a comparison with Abraham Lincoln's apparent practice of handwriting a long response to an article that infuriated him and then crumpling up the response and throwing it out.<sup>992</sup> The Governor testified that, like Lincoln, the writing process was cathartic for him.<sup>993</sup>

On December 17, Ms. DeRosa sent Mr. Cohen, Ms. Lacewell, Mr. David, and Mr. Vlasto the more positive model statement that Ms. Walsh had shared.<sup>994</sup> Later that day, Ms. Benton sent a draft of a statement that was supposed to come from women.<sup>995</sup> The statement described positive experiences of working with the Governor and described him as "strong tough respectful inclusive and effective."<sup>996</sup> Mr. Azzopardi testified that he and Ms. Lacewell drafted the statement.<sup>997</sup>

According to contemporaneous emails, the Governor wanted to get 50 signatories for the statement.<sup>998</sup> Ms. DeRosa and Ms. Benton were involved in coming up with a list of women who had worked for the Governor at some point, to ask them to sign the statement.<sup>999</sup> In an email exchange on December 17, 2020, Ms. Benton wrote to Ms. Lacewell, copying Ms. DeRosa, with a long list of names of current and former staff members, stating: "[s]o this is progress. How do we get him 50 plus names. Would be great to keep his mind on this path."<sup>1000</sup> Ms. Lacewell, Mr. David, and Ms. Benton worked on asking the women to sign the statement.<sup>1001</sup> One woman, who worked in the Chamber at the time, told us that she declined to sign the statement because she did not believe the Chamber was an inclusive and supportive environment, and instead thought it was abusive and toxic.

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<sup>988</sup> DeRosa Tr. 663:25–665:8.

<sup>989</sup> *Id.* at 669:16–23.

<sup>990</sup> *Id.* at 665:14–666:18. Other witnesses testified that they did not consider whether the letter could be retaliatory. *See, e.g.*, David Tr. 252:8–22 (He doesn't think he considered whether the letter was retaliatory because Ms. Boylan was no longer a Chamber or State employee.).

<sup>991</sup> Andrew Cuomo Tr. 152:5–10.

<sup>992</sup> *Id.* at 152:11–17.

<sup>993</sup> *Id.* at 152:18–22.

<sup>994</sup> Ex. 88.

<sup>995</sup> Ex. 89.

<sup>996</sup> Ex. 89.

<sup>997</sup> Azzopardi Tr. 168:6–15.

<sup>998</sup> Ex. 89.

<sup>999</sup> DeRosa Tr. 700:10–701:9.

<sup>1000</sup> Ex. 89.

<sup>1001</sup> Ex. 89; Ex. 90; Ex. 91.

### **C. Outreach to Determine Which Former Staff Members Might Be Supportive of Ms. Boylan**

The Governor's circle of advisors also engaged in efforts to determine which former Executive Chamber staff members might be supportive of Ms. Boylan and also might have their own allegations of harassment.<sup>1002</sup> In mid-December 2020, Ms. DeRosa and Ms. Benton asked certain former Executive Chamber staff members to contact others to find out if they had been speaking with the press about the allegations against the Governor and report back. Ms. DeRosa and Ms. Benton also asked certain former Executive Chamber staff members to find out if Ms. Boylan had reached out to others.<sup>1003</sup> The former staff members conveyed what they learned to Ms. DeRosa or Ms. Benton.

For example, as discussed above, after Kaitlin posted a tweet in support of Ms. Boylan on December 13, 2020,<sup>1004</sup> Ms. DeRosa insisted that a former Chamber staff member call Kaitlin to find out if Kaitlin was working with Ms. Boylan, had her own allegations against the Governor, or was talking to reporters.<sup>1005</sup>

### **D. Expressions of Contrition, Followed by Denials and Defiance**

As additional allegations of sexual harassment against the Governor surfaced in the spring of 2021, the Governor's team of advisors from within and outside the Chamber had ongoing and regular discussions about how to respond to the allegations publicly.<sup>1006</sup> The group included the Governor, senior Executive Chamber staff Ms. DeRosa, Mr. Azzopardi, Peter Ajemian (the Governor's Director of Communications at the time), Ms. Mogul, and Ms. Garvey.<sup>1007</sup> It also included Ms. Lacewell, Jeffrey Pollock, Lis Smith, Mr. Cohen, Mr. Vlasto, Mr. Bamberger, and Ms. Lever, as well as the Governor's brother Chris Cuomo.<sup>1008</sup> Mr. Pollock has a public affairs firm, and the Governor is one of his clients.<sup>1009</sup> Ms. Smith was self-employed as a political consultant.<sup>1010</sup> Mr. Cohen is a lawyer and was a self-employed consultant while serving on ESD's Board of Directors at the time.<sup>1011</sup> Mr. Vlasto and Mr. Bamberger worked at a public relations firm.<sup>1012</sup> Ms. Lever worked at a technology company.<sup>1013</sup> The Chamber did not retain, in any official or formal way, any of these outside

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<sup>1002</sup> Ms. Benton claimed that the purpose was to make former employees aware that Ms. Boylan had been reaching out to former staffers in an effort to gather support for her allegations. Ms. Benton Tr. 241:10–14.

<sup>1003</sup> Benton Tr. 240:16–241:15, 251:6–25; Walsh Tr. 273:4–274:2.

<sup>1004</sup> Ex. 92 (“Keep talking, Lindsey. Men like him should not be in positions of power.”).

<sup>1005</sup> DeRosa Tr. 613:3, 614:11–13; Collins Tr. 216:6–23, 218:6–219:16, 220:4–221:6, 237:2–8.

<sup>1006</sup> See, e.g., Ex. 70; Ex. 93; Ex. 94; Ex. 95; Ex. 96.

<sup>1007</sup> See, e.g., Ex. 70; Ex. 93; Ex. 94; Ex. 95; Ex. 96; Azzopardi Tr. 32:3–15, 36:2–17.

<sup>1008</sup> See, e.g., Ex. 70; Ex. 93; Ex. 94; Ex. 95; Ex. 96; Azzopardi Tr. 32:3–15, 36:2–17, 37:16–25.

<sup>1009</sup> Pollock Tr. 22:12–23:21.

<sup>1010</sup> Smith Tr. 23:13–18.

<sup>1011</sup> Cohen Tr. 200:2–5.

<sup>1012</sup> Bamberger Tr. 51:4–17; Vlasto Tr. 52:3–5.

<sup>1013</sup> Lever Tr. 17:22–24.

advisors or compensate them for their advice.<sup>1014</sup> Mr. Azzopardi testified that the outside advisors were “people who have been with us for a long time who we could trust.”<sup>1015</sup> He also explained, “when you feel like you’re in battle you turn to those you trust.”<sup>1016</sup>

According to internal documents and communications obtained during the investigation, it appears that the Governor’s advisors, including Mr. Pollock and Chris Cuomo, counseled him to express contrition after the press published Ms. Bennett’s allegations.<sup>1017</sup> On February 27, 2021, the date when the first article about Ms. Bennett’s allegations appeared, the Governor issued a press release saying that he never “intend[ed] to act in any way that was inappropriate.”<sup>1018</sup> The next day, he issued another press release saying that he “never intended to offend anyone or cause any harm.”<sup>1019</sup> He explained in the press release:

I now understand that my interactions may have been insensitive or too personal and that some of my comments, given my position, made others feel in ways I never intended. I acknowledge some of the things I have said have been misinterpreted as an unwanted flirtation. To the extent anyone felt that way, I am truly sorry about that.<sup>1020</sup>

Ahead of a press conference on March 3, 2021, a group of advisors, including Ms. DeRosa, Ms. Smith, Mr. Pollock, Mr. Azzopardi, Mr. Ajemian, Ms. Benton, Ms. Mogul, and Ms. Lacewell, met in the Executive Mansion on March 2 and March 3 to prepare the Governor.<sup>1021</sup> Ms. Mogul testified that the general consensus was that the Governor had “screwed up” and needed to show contrition.<sup>1022</sup> As Ms. Mogul explained, “the Governor needed to project contrition”<sup>1023</sup> and “this was really about him needing to go out there and really express that he knew he had screwed up.”<sup>1024</sup> At the press conference, the Governor said during his remarks:

I now understand that I acted in a way that made people feel uncomfortable. It was unintentional, and I truly and deeply apologize for it. I feel awful about it, and frankly, I am embarrassed

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<sup>1014</sup> Andrew Cuomo Tr. 124:1–125:11; Azzopardi Tr. 38:1–39:8.

<sup>1015</sup> Azzopardi Tr. 39:14–16.

<sup>1016</sup> *Id.* at 102:22–103:5.

<sup>1017</sup> Ex. 97; Ex. 98; Ex. 99; Ex. 100; Ex. 101.

<sup>1018</sup> *Statement from Governor Andrew M. Cuomo*, Office of the Governor (Feb. 27, 2021), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-208>.

<sup>1019</sup> *Statement from Governor Andrew M. Cuomo*, Office of the Governor, (Feb. 28, 2021), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-209>.

<sup>1020</sup> *Id.*

<sup>1021</sup> Smith Tr. 201:19–202:5; Mogul Tr. 52:12–18.

<sup>1022</sup> Mogul Tr. 59:12–18, 62:6–8.

<sup>1023</sup> *Id.* at 59:12–18.

<sup>1024</sup> *Id.* at 62:6–8.

by it. That's not easy to say, but that's the truth. But this is what I want you to know, and I want you to know this from me directly. I never touched anyone inappropriately. I never touched anyone inappropriately. I never knew at the time that I was making anyone feel uncomfortable. I never knew at the time I was making anyone feel uncomfortable. And I certainly never ever meant to offend anyone, or hurt anyone, or cause anyone any pain.<sup>1025</sup>

During the press conference, a group of advisors sent reactions and comments in a group chat that included Ms. DeRosa (who was on the dais with the Governor), Ms. Smith, Mr. Pollock, Mr. Azzopardi, Mr. Ajemian, Ms. Lacewell, and Ms. Mogul.<sup>1026</sup> Ms. Smith testified that she and Mr. Pollock “were texting with Melissa [DeRosa] in realtime” about how they thought the press conference was going and to pass on “any pointers [Ms. DeRosa] could give to [the Governor] while they were up there together.”<sup>1027</sup> At one point, Mr. Pollock texted, “And now he is not sounding contrite so let's get back to that.”<sup>1028</sup> Ms. Smith added, “Tone is not contrite.”<sup>1029</sup>

The Governor said, during the question and answer session at the press conference:

It doesn't matter my intent. What matters is if anybody was offended by it. And I could intend no offense, but if they were offended by it, then it was wrong. And if they were offended by it, I apologize. And if they were hurt by it, I apologize. And if they felt pain from it, I apologize. I apologize. I did not intend it. I didn't mean it that way, but if that's how they felt, that's all that matters, and I apologize.<sup>1030</sup>

Following the press conference, the Governor's group of advisors discussed the “spin” from the press conference.<sup>1031</sup> Ms. DeRosa texted that she thought the spin was “getting back to work” and “full throated emotional apology.”<sup>1032</sup>

On March 9, the date that the press reported Executive Assistant #1's allegations, one of the Governor's former consultants texted Ms. DeRosa, “I think he needs to say he is going to

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<sup>1025</sup> *New York Gov. Andrew Cuomo COVID-19 Press Conference Transcript March 3: Addresses Sexual Harassment Allegations*, Rev (Mar. 3, 2021), <https://www.rev.com/blog/transcripts/new-york-gov-andrew-cuomocovid-19-press-conference-transcript-march-3-addresses-sexual-harassment-allegations>.

<sup>1026</sup> Smith Tr. 257:11–258:19; Ex. 99.

<sup>1027</sup> Smith Tr. 258:4–6.

<sup>1028</sup> Ex. 99.

<sup>1029</sup> Ex. 100.

<sup>1030</sup> *New York Gov. Andrew Cuomo COVID-19 Press Conference Transcript March 3: Addresses Sexual Harassment Allegations*, Rev (Mar. 3, 2021), <https://www.rev.com/blog/transcripts/new-york-gov-andrew-cuomocovid-19-press-conference-transcript-march-3-addresses-sexual-harassment-allegations>.

<sup>1031</sup> Ex. 102.

<sup>1032</sup> *Id.*

counseling for his tendency to be aggressive and to reacclimate how he interacts with people. AG report may find no offense but will find inappropriate behavior so why not get out ahead of this now. So the pattern of all these allegations is addressed with this effort for counseling and training.”<sup>1033</sup> The former consultant testified that she told the Governor in a phone call that she thought “he should apologize and go to counseling.”<sup>1034</sup> The Governor “said he didn’t disagree, but that his advisors, the team, thought that he should announce something like that later. Not the apology, but counseling.”<sup>1035</sup> During his testimony, Chris Cuomo explained that there was discussion about remedial measures the Chamber should take in light of the sexual harassment allegations, but some people had taken the position that “they should just wait.”<sup>1036</sup> When asked about any remedial measures during his testimony, the Governor testified that the Chamber is “talking to people about” them.<sup>1037</sup>

Soon after March 9, the general tone and strategy appeared to shift and grow more defiant. On March 12, the Governor declared at a press conference, “I never harassed anyone. I never abused anyone. I never assaulted anyone.”<sup>1038</sup> In a March 16 text message from Mr. Vlasto to his colleagues, he noted that “Steve [Cohen] told me this morning they are asking him to spread oppo on Joon Kim. Don’t think we want to be getting down with that crowd.”<sup>1039</sup> In fact, Mr. Vlasto testified that the Governor had asked him to “take over the politics and press operation in leading the response to the assembly and all of [the] investigations,”<sup>1040</sup> but that he had declined in part because of personal reasons and also because he did not believe in the “style” the Governor and his advisors were adopting, which he believed to be more negative than it should be.<sup>1041</sup> Mr. Cohen testified that he did not recall anyone asking him to do “opposition research,” but he did note that there may have been discussions from the start of our investigation about the Attorney General’s motivations and the backgrounds of the attorneys selected for the investigation and what they would say if the investigative findings were not favorable.<sup>1042</sup>

#### **E. Melissa DeRosa Directs Larry Schwartz to Call County Executives**

As more complainants went public with allegations of sexual harassment, public calls for the Governor’s resignation grew and a number of public officials joined that call. Others stated publicly that any judgment should await the results of the investigation. It was around this time in early March that Ms. DeRosa called Larry Schwartz, former Secretary to the Governor who

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<sup>1033</sup> Ex. 103.

<sup>1034</sup> Former Consultant Tr. 85:2–7.

<sup>1035</sup> *Id.* at 85:9–12.

<sup>1036</sup> Christopher Cuomo Tr. 188:3–190:15.

<sup>1037</sup> Andrew Cuomo Tr. 499:24–500:6.

<sup>1038</sup> *New York Gov. Andrew Cuomo COVID-19 Press Conference Transcript March 12*, Rev (Mar. 12, 2021), <https://www.rev.com/blog/transcripts/new-york-gov-andrew-cuomo-covid-19-press-conference-transcript-march-12>.

<sup>1039</sup> Ex. 104.

<sup>1040</sup> Vlasto Tr. 243:7–23.

<sup>1041</sup> *Id.* at 247:15–248:7.

<sup>1042</sup> Cohen Tr. 382:11–383:13, 386:10–21; *see also* Christopher Cuomo Tr. 163:15–22; 168:16–21.

was serving as the State’s COVID-19 “Vaccine Czar” at the time, and asked him to join a conference call.<sup>1043</sup> On the call, Ms. DeRosa asked Mr. Schwartz to reach out to Democratic County Executives to ascertain their positions on whether the Governor should resign in light of the sexual harassment allegations.<sup>1044</sup> Mr. Schwartz testified that he agreed to make the calls because Ms. DeRosa, the Secretary to the Governor, had asked.<sup>1045</sup> At the time, Mr. Schwartz’s sole official responsibility related to COVID-19 vaccine administration and distribution and he was in regular contact with county officials on this subject. In that regard, as the State’s Vaccine Czar, Mr. Schwartz was perceived by County Executives to have significant authority over the speed and volume of vaccinations that the Counties were receiving at a time when demand exceeded supply. Mr. Schwartz testified that the vaccine distribution he oversaw was “formula driven.”<sup>1046</sup> We found that the County Executives we interviewed reasonably felt that Mr. Schwartz had significant authority and influence over supplemental vaccine requests and other issues like the location of vaccine sites, at a time when County officials urgently wanted to get vaccines to their constituents.

Mr. Schwartz’s calls to the County Executives started shortly after Ms. Bennett’s allegations were made public. Mr. Schwartz recalled starting off his calls to County Executives along the lines of, “I’m not calling you about vaccines, I’m calling because you’ve taken a public position calling for an independent investigation by the Attorney General’s office and you’re going to wait for the outcome of that investigation. Is that still your position?”<sup>1047</sup> Mr. Schwartz testified that he did not ask any County Executive to change or maintain any position.<sup>1048</sup> Mr. Schwartz testified that to the best of his recollection, he never brought up the topic of vaccines on these calls.<sup>1049</sup> Mr. Schwartz called Ms. DeRosa to report back to her what the County Executives had said.<sup>1050</sup>

One Democratic County Executive (“County Executive #1”) received a phone call from Mr. Schwartz on March 2, 2021. According to County Executive #1, and consistent with Mr. Schwartz’s testimony, Mr. Schwartz began the call by noting, “I’m not calling about the vaccine.” Mr. Schwartz then presented the Executive Chamber’s position that this investigation should be permitted to play out before reaching conclusions. County Executive #1 understood the call to contain an implicit threat linking access to vaccines for County Executive #1’s county, which County Executive #1 had been working with Mr. Schwartz and others in the Executive Chamber to obtain, with County Executive #1’s position on the allegations regarding the Governor. County Executive #1 described himself as “stunned” and unsettled by Mr. Schwartz’s call.

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<sup>1043</sup> Schwartz Tr. 188:9–189:21.

<sup>1044</sup> *Id.*

<sup>1045</sup> *Id.* at 187:22–188:25.

<sup>1046</sup> *Id.* at 104:3–105:13.

<sup>1047</sup> *Id.* at 198:3–17, 200:9–17.

<sup>1048</sup> *Id.* at 204:17–205:11.

<sup>1049</sup> *Id.* at 214:6–9.

<sup>1050</sup> *Id.* at 196:9–17.



Two weeks after Mr. Schwartz had made his first round of calls, Ms. DeRosa asked him to make another round of calls to the County Executives to check in on their positions. Mr. Schwartz again made these calls and reported back to Ms. DeRosa.<sup>1051</sup>

On March 7, 2021, a few minutes after County Executive #1 had discussed potential vaccination sites in County Executive #1's county with another staff member of the Executive Chamber, Mr. Schwartz called County Executive #1 again and said, "We hope you can continue to hold your position in terms of the investigation," which County Executive #1 understood to be a request not to call for the Governor's resignation but instead wait for the end of the investigation. County Executive #1 informed us that he found the calls from Mr. Schwartz, someone he did not know well and whose only interaction with him was in the context of vaccines, to be stunning, and that he read implicit threats into the calls. None of the other County Executives we interviewed found the calls from Mr. Schwartz to be threatening. Only two County Executives stated that the topic of vaccines came up (other than Mr. Schwartz's statement at the beginning of the call that it was not about vaccines), and of those, one said that he raised the topic, not Mr. Schwartz.

Mr. Schwartz testified that to his recollection, none of the County Executives expressed discomfort during his calls.<sup>1052</sup> He also emphasized the formulaic nature of vaccine distribution decisions using outside consultants. Mr. Schwartz nevertheless testified that he now understands the "optics problem" of his making the calls to the County Executives while being responsible for vaccine administration and distribution, and it would have been "better and smarter" for someone else to make the calls.<sup>1053</sup> Ms. DeRosa testified that it did not cross her mind that the County Executives might feel some pressure in receiving a call from Mr. Schwartz, whose only role in the government at that time was the administration and distribution of vaccines.<sup>1054</sup>

### **III. The Culture and Practices of the Executive Chamber Under Governor Cuomo**

The alleged sex-based harassment by the Governor did not occur in a vacuum, and the allegations of women who have worked in the Executive Chamber cannot be understood or assessed without the context of the overall workplace culture. Over the course of our investigation, most witnesses not in the Governor's inner circle provided a consistent narrative as to the office culture of the Executive Chamber, describing it as "toxic" and full of bullying-type behavior, where unflinching loyalty to the Governor and his senior staff was highly valued. It became clear during our interviews with the complainants and other witnesses that the overall work culture and environment was relevant to important aspects of our findings, including how the Governor appeared to believe he never behaved inappropriately, as well as the complainants' willingness, delay, and sometimes refusal to report inappropriate conduct within the Executive Chamber.

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<sup>1051</sup> *Id.* at 206:4–209:24.

<sup>1052</sup> *Id.* at 210:3–211:4.

<sup>1053</sup> *Id.* at 211:10–18.

<sup>1054</sup> DeRosa Tr. 831:12–833:9.

*First*, witnesses, particularly women working as junior staff members and executive assistants as well as members of the State Police’s PSU, consistently described a work environment that normalized the Governor’s flirtatious behavior, and some noted that the special attention was a better alternative to the otherwise tense, stressful and “toxic” experience in the Executive Chamber. The Governor’s more intimate behavior with women working in the most senior roles of the Executive Chamber, according to many witnesses, served to underscore the value of the Governor’s attention to those women working in more junior positions. We heard that, as a result, women faced a strong incentive to remain quiet and avoid objecting to Governor Cuomo’s behavior, even if they felt uncomfortable and at times even “completely violated”<sup>1055</sup> by his conduct. *Second*, we found that the staff of the Executive Chamber, as well as members of the PSU, understood that loyalty to the Governor was highly valued, sometimes as much if not more so than the duties and obligations of one’s work, while any complaints or disagreements with the Governor could, and often did, lead to negative consequences. Such an environment created powerful incentives for employees to maintain their silence and a positive outward demeanor rather than risk being perceived as critical of the Governor or his loyal senior staff. *Finally*, the Executive Chamber’s failure to ensure a clear and consistent understanding and enforcement among its staff of the policies and procedures regarding sexual harassment in the workplace exacerbated the difficulties that women already faced in reporting and addressing sexual harassment.

As the 2016 Select Task Force on Sexual Harassment of the Equal Employment Opportunity Commission<sup>1056</sup> (“EEOC”) concluded, workplaces with “significant power disparities can be a risk factor” for sexual harassment, because “low-status workers may be particularly susceptible to harassment, as high-status workers may feel emboldened to exploit them.”<sup>1057</sup> The Task Force further concluded, “[l]ow-status workers may be less likely to understand internal complaint channels, and may also be particularly concerned about the ramifications of reporting harassment (e.g., retaliation or job loss).”<sup>1058</sup> Meanwhile, “senior management may be reluctant to challenge the behavior of their high value employees, and the high value employees, themselves, may believe that the general rules of the workplace do not apply to them.”<sup>1059</sup>

We find the Task Force’s conclusions to be particularly relevant to the Executive Chamber. Executive Chamber employees often did not know how to make a complaint and

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<sup>1055</sup> Trooper #1 Tr. 92:5–12, 139:18–25.

<sup>1056</sup> The Select Task Force was a group of outside experts—academics, lawyers, advocacy groups, and organized labor—impaneled to examine harassment in the workplace, including its causes and effects, and what could be done better to prevent it. See Feldblum, Chai R. & Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, Equal Employment Opportunity Commission (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace>.

<sup>1057</sup> *Id.*

<sup>1058</sup> *Id.*

<sup>1059</sup> *Id.*; see also Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 Yale L.J. Forum 22, 29 (2018) (“It is not only the gendered nature of the hierarchy that fuels harassment: it is also the nature of the hierarchy itself. Harassment is fueled by employment systems that give higher-ups unchecked, subjective authority to make or break other people’s careers on their own subjective say-so, without the use of objective criteria or external oversight to constrain their judgments.”).

faced significant disincentives that discouraged them from speaking up about any potential harassment perpetuated by the Governor.<sup>1060</sup> Their supervisors were senior staff who were loyal to the Governor, and in many cases received special attention and treatment from the Governor. As a result, complainants often delayed—and even waited until they exited the Executive Chamber—to raise their allegations against the Governor (as a number of complainants did). Or, in the case of Executive Assistant #1, she intended to take her experiences of harassment by the Governor “to the grave,” until her reaction to allegations of sexual harassment regarding the Governor revealed her distress to her colleagues.<sup>1061</sup>

#### **A. Normalization of the Governor’s Sexual or Other Sex-/Gender-Based Conduct as a Preferred Alternative to Poor Treatment**

We found a range of observations and experiences related to the Governor’s conduct and the culture and practices of the Executive Chamber from former and current staff and advisors of the Governor, as well as employees of other State agencies (including the PSU) who worked closely with the Governor or members of his staff. As a general matter, however, it became clear that the Governor’s behavior toward women, particularly those in the Executive Chamber, exhibited certain tendencies that normalized flirtatious, suggestive or other gender- or sex-based conduct that make it difficult for women to object to or report such conduct.<sup>1062</sup>

##### **i. Governor Cuomo’s Flirtatious, Suggestive, and Other Gender- or Sex-Based Conduct**

During the course of our investigation, we encountered substantial evidence of recurring conduct by the Governor that was suggestive or sexual in nature or otherwise gender- or sex-based and potentially offensive.

In addition to his comments regarding Ms. Boylan and other complainants’ beauty detailed above, we found numerous other instances in which the Governor commented on the attractiveness of women, including women in the Executive Chamber. For example, on one occasion, before a woman on staff walked into his office, the Governor commented to two male staff members, “[y]ou’ll see why we hired her.” One of the men in the room at the time interpreted the Governor to mean that the staff member’s looks played a role in her being hired for the Chamber. Another woman on the staff felt (much like how Ms. Boylan had described during her testimony) that the Governor always made a point to talk to her at events or stared at

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<sup>1060</sup> Indeed, many witnesses throughout our investigation expressed concern (and in some instances, outright fear) that cooperating with our investigation would lead to retribution from the Executive Chamber or the Governor and negative consequences as a result.

<sup>1061</sup> Executive Assistant #1 Tr. 182:23–24.

<sup>1062</sup> We obtained substantial evidence of the overall culture within the Executive Chamber through the interviews we conducted with many current and former employees. Unlike the complainants whose allegations are described in greater detail in this Report and from whom we obtained sworn testimony because we were relying on their allegations to form the basis of our conclusion that the Governor sexually harassed a number of them, we did not take sworn testimony from all of the witnesses who made allegations about the general toxicity or inappropriateness of the culture. Thus, there are fewer cites to transcripts of testimony for these witnesses who provided this type of background information to us during our investigation, although, as noted below, there was a general consistency in the description of the culture.

her “in a creepy way” from across the room. During one event, the Governor walked up to the staff member to ask about her last name; the staff member told the Governor that she was Italian, to which the Governor responded, “I don’t know what you are, but you’re beautiful.” The staff member felt weird and uncomfortable with the Governor’s attention, but was told by other staff in the Executive Chamber that it was good the Governor liked her. One former employee told us that women had told him that the Governor had made them feel like “prey,” as the Governor’s gaze would linger on them, seemingly taking in their whole bodies, and then he would hold eye contact with the women for longer than expected.

Witnesses also observed that the Governor often touched people, more frequently women, and often without permission. While many witnesses observed the Governor regularly touch his constituents or other members of the public at events, including with hugs, kisses on the cheek, and by placing his arms around people’s shoulders or waists during photographs, as he did with a number of the complainants, we found that the Governor’s conduct sometimes went beyond these regular displays of public affection. For example, at a fundraising event on December 9, 2015, the Governor approached a woman, asked to take a picture with her, and then rubbed a tattoo she had on her arm, causing the woman to feel uncomfortable.<sup>1063</sup> A former member of the PSU reported that, at a staff holiday party in or around December 2018, before posing for a photograph with the then-current PSU member and his wife, the Governor reached out and physically peeled off the wife’s name tag that was just underneath her breast. After the photograph was taken, the Governor began to walk away, and then turned back to hand the name tag to the former PSU member, saying something to the effect of, “[y]ou might want this—I could get in trouble.” The PSU member said he and his wife both felt that the Governor’s conduct was odd and inappropriate.

This type of behavior extended to members of the Executive Chamber outside of large events. Similar to the allegations of some of the complainants detailed above, one staff member noted that the Governor often stopped by her desk to grab and hold her hand as if he were going to shake it, but then continued holding her hand. The staff member became unsettled and flustered during these interactions and often blushed. She felt that her reaction was “part of the point” of the Governor’s behavior. The staff member also noted that, on occasion, the Governor put his arm around her, which made her feel “small” and uncomfortable, even as she tried to maintain a professional demeanor to signal that she was not interested in any flirtatious or other non-professional interactions with the Governor.

Other witnesses in addition to the complainants reported to us specific instances in which the Governor made a comment or joke that seemed sexual or suggestive in meetings with Executive Chamber staff. One former staff member recalled hearing the Governor repeatedly make a joke about how the young bull runs down the hill to have sex with one bull and the old bull walks down the hill to have sex with all of them—meaning that it is better to slow down and get a lot of things done. The Governor denied recollection of this. On another occasion, in the spring of 2016, the Governor spotted a bottle on an Executive Assistant’s desk labeled “Skinny Bunny,” with an accompanying image of rabbit ears. After learning the Executive Assistant was drinking Skinny Bunny tea in an attempt to help lose weight in advance of her wedding, the Governor asked the Executive Assistant if she was trying to look like a “Playboy bunny.” Two

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<sup>1063</sup> See Ex. 105 (photographs of the Governor holding the woman’s arm at the same event in question).

witnesses also recounted that during a meeting, the Governor looked at his Emmy statue, which he had won in November 2020 and put in his Albany office, and said something to the effect of, “look at her figure. Isn’t she buxom?”<sup>1064</sup> In December 2020 or in January 2021, the Governor was meeting with members of his staff to discuss a meeting with the White House related to COVID-19, when the Governor expressed disappointment that he did not have any “catchy one-liners” in his speech, and said something to the effect of, “You need to give me some catchy one-liners. Come up with a line like, ‘you’re having sex without the orgasm.’”<sup>1065</sup>

There have been media reports of pressure for women in the Executive Chamber to wear makeup, dresses, and heels because that is what the Governor likes.<sup>1066</sup> While many staff described a general expectation to dress professionally, particularly during public events or when Governor Cuomo was in the office, we found that expectations for women related to wearing dresses or high heels were not at the direction of the Governor or his senior staff.<sup>1067</sup>

A number of former and current Executive Chamber staff, particularly the senior staff, as well as State Troopers on the PSU, denied having witnessed or experienced any conduct by the Governor that could be characterized as sexual or otherwise inappropriate. Some of these witnesses, including the Governor himself, also explained certain of his behavior, such as kissing people on the cheek or grabbing someone’s face before kissing the person on the cheek, as “old fashioned” or “traditional” behavior representative of his age and background, including his Italian heritage. Specifically, while the Governor denied ever saying some of the specific things identified above, he also did not dispute that he sometimes commented on staff members’ appearance and attire, used terms of endearment (such as “honey,” “darling” or “sweetheart”) and gave people hugs and kisses on the cheek and forehead, although he testified that more “recently,” because of “shifting norms,” he has changed his behavior—though “there are times” when he “slips.”<sup>1068</sup> However, the Governor disputed the way in which his conduct has been interpreted by others.

The evidence in our investigation has also shown that the Governor exhibited a close and sometimes physical intimacy with his senior staff. Staff members in the Executive Chamber observed that the Governor regularly spoke with one senior staff member in “baby voices,” or called her “baby, sweetie, and honey,” while other witnesses recalled seeing the Governor kiss the same senior staff member on the cheek or engage in other somewhat intimate behavior in a private setting. One former senior staff member who is a woman acknowledged that the Governor had occasionally kissed her on the lips.<sup>1069</sup> The Governor testified that “there may be

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<sup>1064</sup> The Governor denied joking about his Emmy statue. Andrew Cuomo Tr. 506:19–507:6.

<sup>1065</sup> The Governor denied any recollection of making this statement. *Id.* at 506:3–14.

<sup>1066</sup> *See, e.g.,* Brian M. Rosenthal & Luis Ferré-Sadurní, *For Some Women, Working for Cuomo Is the ‘Worst Place to Be,’* N.Y. Times (Mar. 12, 2021), <https://www.nytimes.com/2021/03/12/nyregion/cuomo-women-toxic-workplace.html>.

<sup>1067</sup> Collins Tr. 129:20–24; Kaitlin Tr. 49:5–12.

<sup>1068</sup> *See, e.g.,* Andrew Cuomo Tr. 63:2–66:9 (commenting on people’s appearance); *id.* 81:3–84:22 (hugging and kissing staff); *id.* 87:3–22 (would not be surprised if he has kissed staff members on the forehead); *id.* 242:18–243:16 (may have used endearing terms); *id.* 443:25–444:24 (kissed and hugged Troopers); *id.* 83:9–24 (“shifting norms”); *id.* 243:22–16 (“there are times that I slip”).

<sup>1069</sup> Walsh Tr. 104:2–105:9. She testified that she did not feel uncomfortable during these kisses. *Id.* at 105:21–25.

an occasion where a staff member kissed [him] on the lips,” but noted that he “kiss[es] on the cheek as a rule.”<sup>1070</sup> Another senior staff member admitted to sitting on the Governor’s lap during an event for certain members of the Executive Chamber and heads of State agencies,<sup>1071</sup> while the Governor noted he “wouldn’t be surprised, at a social event or something,” if “somebody may have sat on [his] lap,” including the senior staff member in question,<sup>1072</sup> or if he had held hands with certain women on his staff.<sup>1073</sup> A senior staff member also recalled the Governor lying down on a couch with his head on a staff member’s lap.<sup>1074</sup> None of these senior staff reported feeling uncomfortable with this behavior.

A number of witnesses we spoke to informed us that all of this behavior led to a sense among staff members in the Executive Chamber that personal attention from the Governor, even if flirtatious or unrelated to their work and despite what they may feel, was not only normal, but to be valued. One former staff member said that the Governor would make comments on women’s attractiveness and sexual innuendos to his inner circle, and felt as though she needed to be a part of those conversations to do her job.

## **ii. The Alternative: “Extremely Toxic, Extremely Abusive” Behavior**

While the many former and current employees of the Executive Chamber we interviewed described a range of experiences working in the Executive Chamber, many—particularly junior staff members—consistently described a toxic culture and “abusive environment” within the Executive Chamber. One former staff member felt that crying at one’s desk was common and normal within the office, while another felt that supervisors went out of their way to “make people feel stupid.” Another former staff member noted that there was always an “element of fear,” and people were always “looking behind their backs.” Witnesses also described an environment in which supervisors would “blow mistakes out of proportion,” such that staff members faced constant fear and anxiety. Two former staff members compared the dynamics of the Executive Office to an abusive relationship, with one noting that staff members could face intense criticism and then make an “amazing” achievement, which seemingly then enabled staff members to face the next cycle of mistreatment. Yet another staff member described the Executive Chamber as a mix between the *West Wing* and *The Devil Wears Prada*, noting that the Governor’s senior staff consists of “big personalities” who are “comfortable using power” and who maintain a “culture of fear and intimidation” in the Executive Chamber. One former senior staff member noted in a text exchange after some of the sexual harassment allegations became public that “[h]opefully when this is all done people will realize the culture—even outside the

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<sup>1070</sup> Andrew Cuomo Tr. at 218:17–222:3.

<sup>1071</sup> Benton Tr. 208:6–209:14.

<sup>1072</sup> Andrew Cuomo Tr. 167:15–169:5.

<sup>1073</sup> Andrew Cuomo Tr. 507:23–508:4.

<sup>1074</sup> Benton Tr. 216:20–218:19. The Governor testified that he lies down because of a bad back and that a staff member could have been sitting near his head when he was lying down on a couch in the office. Andrew Cuomo Tr. 226:12–229:1.

sexual harassment stuff—is not something you can get away with ... you can't berate and terrify people 24/7.”<sup>1075</sup>

Rather than reject such behavior, according to many witnesses, the Governor appears to have personified it.<sup>1076</sup> Members of the Executive Chamber, as well as members of the PSU, recalled observing the Governor yelling at staff or PSU members for perceived mistakes, including “screaming” at his senior staff during meetings. One woman on staff recalled that the Governor would become angry at her if he deemed her work less than perfect, and felt that the Governor tried to humiliate her. Another former staff member recalled the Governor calling him “stupid” and an “idiot,” and at least on one occasion saying, “Why don't I do my job *and* your job, because you obviously cannot do your job?”<sup>1077</sup> As Ms. Bennett noted:

If you got yelled at in front of everyone, it wasn't any special day . . . It was controlled largely by [the Governor's] temper, and he was surrounded by people who enabled his behavior, like surrounded by Yes Men . . . of this is what he wants, this is what he gets, and that mood and that anger definitely ruled the office and then trickled down, which is why it was like more stressful where I sat [near the Governor's office].<sup>1078</sup>

Ms. McGrath, during her time assisting in the Front Office, also testified she had witnessed the Governor “scream” at others, including at members of his senior staff, and that she had been told by other Executive Assistants to “just tune it out . . . and just try to, like, don't pay attention to it because it happens fairly often.”<sup>1079</sup>

Staff members often felt particular anxiety focused on the Governor's mood and treatment, rather than their work. A former senior staff member recalled a conversation with Mr. Cohen, who explained that when the Governor was upset, he expected his staff members to reflect his displeasure, and so when senior staff members yelled at others within the Executive Chamber, it was because the Governor expected them to do so. Another senior staff member of a state agency said that she never raised concerns about the Governor's behavior, which she described as inappropriate and derogatory, because she was afraid of both personal retaliation and negative implications for her team's work and her agency's agenda. In particular, she cited an instance where she spearheaded a major policy initiative and, after an encounter where the Governor yelled at her, she was removed from any speaking role at the announcement ceremony.

Some of the former and current staff members of the Executive Chamber, however, denied that the Executive Chamber had a toxic environment.<sup>1080</sup> Certain witnesses

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<sup>1075</sup> Ex. 12.

<sup>1076</sup> Some witnesses believed that senior staff often channeled their aggressive and hostile behavior from Governor Cuomo himself. We did not find sufficient evidence to support or refute this belief conclusively.

<sup>1077</sup> Bamberger Tr. 273:7–275:12.

<sup>1078</sup> Bennett Tr. 82:8–23.

<sup>1079</sup> Alyssa McGrath Tr. 45:19–46:12.

<sup>1080</sup> Azzopardi Tr. 130:2–23; DeRosa Tr. 214:10–22; Lacewell Tr. 289:11–17.

acknowledged that the Governor was demanding and could make it clear when he was unhappy, but did not go so far as to describe his behavior as toxic, abusive, or unreasonable. Others, often former or current senior staff, acknowledged that they had experienced, at least on occasion, raised voices, “belittling” emails and other forms of aggressive conduct, but justified such behavior by emphasizing the importance of the work they were performing in the Executive Chamber, describing their work as “life or death” or noting their belief that State government “should be that way,” given the importance of the work.<sup>1081</sup>

However, given the volume and consistency of the evidence developed during our investigation, we find that many, especially more junior employees, felt the environment was toxic and abusive. As a former senior staff member who had previously worked for a Presidential administration noted, it was possible to work with professionalism and respect in a high-stakes and stressful environment, as she had in the White House previously, but the way the Executive Chamber was run was “no way to run a State.”

Within this context, as noted above, some women who worked in the Executive Chamber, particularly junior staff members and executive assistants, described their understanding that the alternative to special and flirtatious attention from the Governor was being subjected to “extremely toxic, extremely abusive” treatment from the Governor and others in the Executive Chamber.<sup>1082</sup> Many of the complainants described being uncomfortable with the Governor’s flirtatious advances while also perceiving such behavior as a sign that they were favored—and spared from being yelled at, ignored, or otherwise mistreated by the Governor instead. Ms. Boylan, for example, noted that observing the Governor’s hostile behavior toward others planted that fear of the alternative: “I would say that was his ‘if he liked you’ toxicity. For most people, when you [are] around, you saw the ‘if-he-hated you’ toxicity” in how he treated others.<sup>1083</sup> Ms. Bennett also testified, “I felt really uncomfortable” during some conversations with the Governor, “but . . . I also was acutely aware that I did not want him to get mad.”<sup>1084</sup> As Ms. McGrath explained:

[W]hat makes it so hard to describe every single inappropriate incident is the culture of the place. On the one hand, he makes all this inappropriate and creepy behavior normal and like you should not complain. On the other hand, you see people get punished and screamed at if you do anything where you disagree with him or his top aides.<sup>1085</sup>

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<sup>1081</sup> See, e.g., Ex. 13 (“The odd part about these workplace stories / It’s not even close to what it was really like to work there day to day / It was so much worse / The abuse and mind games / But for me it never really bothered me. It was part of the deal”).

<sup>1082</sup> Bennett Tr. 82:7–21.

<sup>1083</sup> Boylan Tr. 80:7–13.

<sup>1084</sup> Bennett Tr. 173:24–174:16; see also Executive Assistant #1 Tr. 79:21–25 (“I think that he definitely knew what he was doing and it was almost as if he would do these things and know that he could get away with it because of the fear that he knew we had.”).

<sup>1085</sup> Alyssa McGrath Tr. 199:17–200:2.



Many other staff members also expressed the sense that they were left to choose between one type of negative attention—one that might hurt their careers and ability to focus on meaningful work—or another type of negative attention—one that might make them personally uncomfortable. This made it difficult for staff members to resist or object to the Governor’s favorable attention, even when unwanted. One woman on the Executive Chamber staff noted that, because the Governor was a difficult person and boss, she did not want him to be upset with her and felt that any sign that the Governor was happy with her made her work easier, and expressed her ambivalence as: “he seemed to like me, so that’s something, I guess.”

## **B. Focus on Secrecy, Loyalty, and Fear of Retaliation**

Witnesses reported that the Executive Chamber under Governor Cuomo cultivated an environment that was highly protective of the Governor, above all else. For example, many witnesses reported on what appeared to be an intense focus on secrecy. Ms. McGrath, for example, testified that she was instructed not to discuss anything about the Governor’s interactions with anyone outside of the Executive Chamber,<sup>1086</sup> to the point that she was afraid to say anything about the Governor to anyone.<sup>1087</sup> And, as noted above, Trooper #1 was instructed by her supervisor to make sure conversation with the Governor (including his questions about why she wore black and did not wear a dress) “stays in truck,” which Trooper #1 interpreted to mean that the conversation should not leave the Governor’s car.<sup>1088</sup>

The Governor himself enforced this secrecy with a number of the complainants. He instructed Executive Assistant #1 not to show anyone (other than Ms. McGrath) the selfie they had taken together, and “was so firm . . . that . . . [she] was just terrified” to share the photograph.<sup>1089</sup> At another time, the Governor directed Executive Assistant #1, who was close friends with Ms. McGrath, “don’t tell Alyssa anything . . . [a]nything that I do. . . because you know I don’t trust her.”<sup>1090</sup> The Governor also instructed Trooper #1, in December 2019, not to tell her friend, another Trooper in the PSU, anything that the Governor said to Trooper #1, and followed up with, “[a]s a matter of fact, don’t tell anyone about our conversations.”<sup>1091</sup>

Loyalty and service to the Governor were often expected to continue even after employees had left the Executive Chamber and no longer had an official role there, with many former staff members being asked to assist the Governor long after their departure from his administration and State government. This was exemplified by the Executive Chamber’s response to the allegations of sexual harassment against the Governor where a number of former staff members of the Executive Chamber (e.g., Mr. Cohen, Ms. Lacewell, Mr. David, Mr. Vlasto, Mr. Bamberger, and Ms. Lever) and other individuals associated with the Governor’s political

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<sup>1086</sup> *Id.* at 59:9–60:1.

<sup>1087</sup> *Id.* at 68:2–10.

<sup>1088</sup> Trooper #1 Tr. 58:5–60:16.

<sup>1089</sup> Executive Assistant #1 Tr. 120:9–18, 128:5–18.

<sup>1090</sup> *Id.* at 179:2–13. Later, following Ms. Boylan’s public allegations of sexual harassment in December 2020, the Governor also told Executive Assistant #1, “you don’t talk about anything with anyone else, right[?] . . . [Y]ou know, people talk around here. . . . I could get in a lot of trouble.” *Id.* at 134:22–136:6.

<sup>1091</sup> Trooper #1 Tr. 84:23–85:4.

campaigns were enlisted to assist the Governor and the Executive Chamber in responding to Ms. Boylan's and others' allegations, including those made by current and former members of the Executive Chamber.<sup>1092</sup> One former senior staff member observed, "[E]veryone sort of jokes that the [G]overnor's office is like Hotel California. You never really leave."<sup>1093</sup>

Witnesses also described a fear of retaliation or other negative action if they were to disagree with or complain about the Governor or his close advisors. Several State employees, including those outside of the Executive Chamber, told us that they believed their careers in New York State government would be over if they were to cross the Governor or senior staff, including by reporting any misconduct. One former Executive Chamber employee testified that he was concerned about his ability to work in New York State politics were he to disobey any directive by the senior staff or Governor.<sup>1094</sup> One State entity employee was advised by her colleagues to "leave with as little fuss as possible" and "not make waves," because "the Governor could destroy [her] career and [she] would never find a job in the state again." Similarly, Executive Assistant #1 testified that she believed it "was almost as if he knew he could get away with it because, if we were to say anything to anyone, he wasn't the one that was going to get in trouble or go anywhere—it was going to be us."<sup>1095</sup>

We found these concerns were not without basis.<sup>1096</sup> Witnesses spoke of a wide range of negative action taken by the Executive Chamber and the Governor following any disagreement or complaint by employees, ranging from being "cut out of the loop"<sup>1097</sup> or "iced out" to being asked to leave the Executive Chamber. This was true even for members of the PSU, a unit within a separate State agency under the direction of the Superintendent of the New York State Police. Trooper #1 testified, for example, that she had heard "horror stories about people getting kicked off the detail or transfer[red] over like little things."<sup>1098</sup> A former PSU member ("Former Trooper #1") also reported that he was transferred out of the PSU after a series of heated interactions with the Governor, which were seemingly set off by Former Trooper #1 asking the Governor about his schedule for the purposes of performing his PSU duties.<sup>1099</sup> Former Trooper #1 was told by his supervisor that he had done nothing wrong, but that the Governor had requested his removal. The Governor recalled that Former Trooper #1 had asked the Governor about his schedule and the Governor had referred Former Trooper #1 to the scheduler, but denied recollection of why Former Trooper #1 had left the PSU.<sup>1100</sup> Another former PSU member reported that he transferred out of the detail after the Governor had become upset with him for supposedly failing to timely pick up and transport one of the Governor's daughters, although the

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<sup>1092</sup> See, e.g., David Tr. 251:19–252:7, Lever Tr. 259:10–261:16.

<sup>1093</sup> Lever Tr. 369:20–370:5.

<sup>1094</sup> Ball Tr. 50:22–51:21.

<sup>1095</sup> Executive Assistant #1 Tr. 79:21–80:5.

<sup>1096</sup> Trooper #1 Tr. 93:24–94:3.

<sup>1097</sup> Ball Tr. 50:22–51:21.

<sup>1098</sup> Trooper #1 Tr. 93:24–94:3.

<sup>1099</sup> This was corroborated by other former and current members of the PSU, including a fellow PSU member who was present during one of the arguments and the former PSU member's former supervisor.

<sup>1100</sup> Andrew Cuomo Tr. 449:2–15.

former PSU member was told by his supervisor that he had done nothing wrong. Governor Cuomo testified that he did not recall asking that a member of the PSU should be transferred out of the unit, and instead stated that, “[I]f there was a Trooper who . . . did something weird or unprofessional[, the Governor] may have noted that to someone.”<sup>1101</sup> But regardless of what role the Governor may have personally played in State Trooper personnel decisions, we found the perception was widespread within the PSU (including with Trooper #1) that upsetting him or his senior staff (even on minor issues) could result in serious professional harm.

### **C. Poor Enforcement of Sexual Harassment Training and Reporting Mechanism**

Executive Chamber staff also faced greater difficulties in reporting unwelcome conduct by the Governor due to a poor understanding of the policies and procedures for identifying and reporting sexual harassment within the Executive Chamber, which was exacerbated by an inconsistent enforcement of the policies and procedures for reporting sexual harassment—particularly if the alleged conduct was carried out by the Governor or his senior staff.

The handbook for employees of New York State agencies (the “Employee Handbook”) reflects the legal requirement that GOER investigate all complaints of sexual harassment in State agencies, including the Executive Chamber.<sup>1102</sup> Members of the Executive Chamber, including the Governor, are also required to take an annual sexual harassment prevention training.<sup>1103</sup> According to the Director of GOER, the sexual harassment training can be completed online, by reviewing a PDF, or by receiving the training in person in a group; the Executive Chamber maintains a record of each employee’s completion or certification of the sexual harassment training.<sup>1104</sup> A person taking the sexual harassment training for another member of the Executive Chamber does not comply with the latter person’s obligation to complete the training.<sup>1105</sup>

In practice, however, we found that the Governor and members of the Executive Chamber’s understanding of these policies and procedures related to sexual harassment in the workplace varied widely. Many members of the Executive Chamber, particularly the more junior members of the Executive Chamber, did not recall the contents of any trainings on sexual harassment, much less the Chamber’s policies on the issue.<sup>1106</sup> Relatedly, several Executive Chamber staff members reported not knowing how to report an allegation of sexual harassment. Multiple witnesses testified that they were unfamiliar with GOER, the agency designated to investigate potential employee misconduct. One witness testified that she would not have felt

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<sup>1101</sup> *Id.* at 447:6–453:5, 470:18–472:1.

<sup>1102</sup> *See* Ex. 8 at 41–42 (Employee Handbook); *see also* Volforte Tr. 52:23–53:13 (confirming that the Employee Handbook’s policies apply to the Executive Chamber).

<sup>1103</sup> Volforte Tr. 70:17–73:2 (Governor is not an “employee,” but is subject to the training requirement). The annual training was not required in 2020 (due to the COVID-19 pandemic); therefore, the last sexual harassment training in the Executive Chamber was in 2019. *See, e.g., id.* at 73:6–21.

<sup>1104</sup> *See id.* at 67:6–68:16, 69:19–70:16.

<sup>1105</sup> *Id.* at 68:17–69:18.

<sup>1106</sup> Liss Tr. at 81:6–12.

empowered to report an allegation of sexual harassment because she did not know if there was any reporting mechanism within the Chamber.

More senior staff of the Executive Chamber varied in their understanding of the Executive Chamber's policies and procedures on sexual harassment. Certain members of the senior staff—including current and former counsels to the Governor—correctly recalled the reporting mechanisms within the Executive Chamber noted above.<sup>1107</sup> While some recalled taking annual trainings on sexual harassment, the Governor himself testified that he did not recall specifically taking the annual sexual harassment training in any year other than 2019. And in fact, 2019 is the only year when the Executive Chamber was able to produce any record of the Governor taking the sexual harassment training, despite our request for all such records going back to 2013. The attestation of compliance for 2019 was not signed by the Governor, but signed by Ms. Benton on his behalf.<sup>1108</sup> One former staff member also incorrectly recalled that she was not required to report allegations to GOER.<sup>1109</sup> Another former staff member explained her belief that allegations of sexual harassment should be reported to the Chamber's counsel's office and that “[t]hey sort of handled all of that[,]” including any further discussions with GOER.<sup>1110</sup> Yet another former staff member, when asked if she was aware of any reporting procedure for sexual harassment allegations during her time in the Chamber, answered: “I was not.”<sup>1111</sup> Even the Director of Administrative Services, someone who many members of the Executive Chamber designated as someone they would consider reporting allegations of sexual harassment, seemed to have a mistaken understanding of the reporting requirements. She stated that an employee could report sexual harassment to a supervisor, herself, *or* GOER, but that she did not know what a supervisor would have to do if they received such a complaint. The Director of Administrative Services also explained that, if she received a complaint of sexual harassment, she would direct the employee to the Employee Handbook and complaint form, and then call Mr. Volforte, the Director of GOER, to ask advice on whether she had handled the situation correctly. She acknowledged this was not the prescribed process. Importantly, she did not tell us that she would be required to report any allegation of sexual harassment to GOER, but rather would need to research the process for how to handle the situation if it ever arose. As a matter of fact, at least as of December 5, 2019, based on records received from the Executive Chamber, it appears the levels of compliance with the sexual harassment training requirement among senior staff remained sparse.

The lack of a common and consistent understanding within the Executive Chamber of the policies and procedures regarding sexual harassment translated to inconsistencies in enforcing such policies and procedures, including—ultimately—in relation to potential allegations of sexual harassment regarding the Governor. We did not find, for example, that the Executive Chamber generally referred allegations of potential misconduct to GOER, as required. Indeed, Ms. Lacewell, who was often consulted on a range of issues including on sexual harassment, testified that because the Director of GOER was appointed by the Governor, GOER might not be

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<sup>1107</sup> David Tr. 43:7–22, 54:5–55:15.

<sup>1108</sup> *See, e.g.*, Andrew Cuomo Tr. 21:25–22:15; Bennett Tr. 269:24–270:10; Benton Tr. at 106:12–18.

<sup>1109</sup> Lever Tr. 224:3–19, 228:12–23.

<sup>1110</sup> Walsh Tr. 162:20–163:15.

<sup>1111</sup> Collins Tr. 91:4–10.

able to effectively investigate any allegations involving the Governor.<sup>1112</sup> Aside from a couple of instances in which a member of the Executive Chamber reported allegations of potential misconduct (at a different State agency) to GOER, as required,<sup>1113</sup> our investigation indicated that potential misconduct was, at best, investigated internally within the Executive Chamber. In one example, when a staff member reportedly called Ms. DeRosa a “bitch,” an investigation into whether other individuals within the Executive Chamber had had negative experiences working with the same staff member was conducted within the Executive Chamber, and the staff member was “mov[ed] off the floor” where he had originally sat.<sup>1114</sup> Ms. DeRosa confirmed that this employee was transferred because she did not feel comfortable working with him, and noted that the employee received counseling.<sup>1115</sup>

No allegations of sexual harassment by the Governor had ever been reported to GOER prior to the recent allegations of sexual harassment becoming public. It was only on March 11, 2021, after this investigation had begun, that the Executive Chamber finally made a referral to GOER reporting an allegation of potential misconduct by the Governor, on behalf of Executive Assistant #1.

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In addition to the deterrents that women faced in reporting allegations of sexual harassment by the Governor resulting from the culture and practices of the Executive Chamber, the lack of clear understanding and enforcement of the sexual harassment policies and procedures—particularly the mechanism for reporting potential sexual harassment—within the Chamber exacerbated the difficulty that employees experienced in having their allegations of sexual harassment heard and addressed, and their rights protected.

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<sup>1112</sup> Lacewell Tr. 73:14–76:2.

<sup>1113</sup> In one of those instances, an attorney within the Executive Chamber appropriately instructed the complainant in question to formally report her allegations (which involved potential racially and sexually harassing conduct by that person’s supervisor) to GOER. When she learned that the complainant had shared her allegations with the general counsel of the State agency of her employment but had not filed a report with GOER, the Executive Chamber attorney submitted a referral to GOER, which then investigated the allegations.

<sup>1114</sup> DesRosiers Tr. 316:12–316:22, 318:10–319:4, *see also* DeRosa Tr. 142:24–143:18.

<sup>1115</sup> DeRosa Tr. 141:1–144:25.

## RELEVANT LAW

### I. Background

Title VII of the Civil Rights Act of 1964 (“Title VII”) “outlaw[s] discrimination in the workplace on the basis of . . . sex.”<sup>1116</sup> In 1986, the United States Supreme Court recognized that Title VII’s prohibition on sex discrimination prohibits gender-based harassment in the workplace.<sup>1117</sup> Like federal law, the New York State Human Rights Law (the “NYSHRL”),<sup>1118</sup> forbids workplace harassment.<sup>1119</sup>

### II. Gender-Based Harassment

A gender-based hostile work environment<sup>1120</sup> is actionable under federal law when “the workplace [i]s permeated with discriminatory intimidation that [i]s sufficiently severe or pervasive to alter the conditions of her work environment.”<sup>1121</sup> “[A] plaintiff need not show that her hostile working environment was both severe *and* pervasive; only that it was sufficiently severe *or* sufficiently pervasive, or a sufficient combination of these elements, to have altered her working conditions.”<sup>1122</sup> The Second Circuit Court of Appeals has “repeatedly cautioned against setting the bar [for hostile work environment claims] too high, noting that . . . the test is whether the ‘harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse*.’”<sup>1123</sup>

To be unlawful, the employee must perceive the environment to be hostile or abusive, but there is “no need for [the work environment] . . . to be psychologically injurious.”<sup>1124</sup> “Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological

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<sup>1116</sup> *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

<sup>1117</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Congress abrogated the states’ sovereign immunity for claims brought under Title VII. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Sex discrimination also violates the Fourteenth Amendment of the United States Constitution. See *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015). Therefore, “public employees aggrieved by discrimination in the terms of their employment may bring suit under 42 U.S.C. § 1983 against any responsible persons acting under color of state law.” *Id.* This includes claims for gender-based harassment. See *Raspardo v. Carlone*, 770 F.3d 97, 119 (2d Cir. 2014); *Annis v. Cty. of Westchester, N.Y.*, 36 F.3d 251, 255 (2d Cir. 1994). “Once the ‘color of state law’ requirement is met, [a § 1983 claim] parallels a Title VII claim.” *Vega*, 801 F.3d at 87.

<sup>1118</sup> N.Y. Exec. Law § 290 *et seq.*

<sup>1119</sup> See *Ananiadis v. Mediterranean Gyros Prod., Inc.*, 54 N.Y.S.3d 155, 158 (2d Dep’t 2017).

<sup>1120</sup> Gender-based harassment claims are typically grouped into two categories: (1) hostile work environment claims; and (2) quid pro quo claims. Given the nature of the conduct in dispute, we focus our discussion on the principles applicable to gender-based hostile work environment claims. Sexual propositions that do not result in a tangible employment action sufficient to support a quid pro quo claim may nevertheless be conduct supporting a hostile work environment claim. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

<sup>1121</sup> *Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004) (citation omitted).

<sup>1122</sup> *Pucino v. Verizon Wireless Commc’ns, Inc.*, 618 F.3d 112, 119 (2d Cir. 2010) (emphasis in original).

<sup>1123</sup> *Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004) (citation omitted) (emphasis in original).

<sup>1124</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."<sup>1125</sup>

Determining whether conduct is sufficiently "severe or pervasive" requires one to assess "the totality of the circumstances" rather than isolated instances of misconduct.<sup>1126</sup> "[N]o single factor is required," but factors commonly considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>1127</sup>

Examples of "workplace conduct that may be actionable . . . include [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>1128</sup> "Direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment . . ."<sup>1129</sup> Although "[w]hen entering a workplace, reasonable people expect to have their autonomy circumscribed in a number of ways[,] . . . giving up control over who can touch their bod[ies] is usually not one of them."<sup>1130</sup> Harassing conduct, however, "*need not be*

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<sup>1125</sup> *Id.*

<sup>1126</sup> *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir. 1997); *accord Redd*, 678 F.3d at 176 ("The objective hostility of a work environment depends on the totality of the circumstances, viewed from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances [including] the social context in which particular behavior occurs and is experienced by its target." (internal quotation marks, citation, and ellipsis omitted)). Hostile work environment claims can cover conduct that occurs before the applicable statutes of limitations so long as an act contributing to the hostile work environment occurs within the limitations period. *See Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011) (citation omitted); *accord Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117, (2002).

<sup>1127</sup> *Redd*, 678 F.3d at 175 (quoting *Harris*, 510 U.S. at 23).

<sup>1128</sup> *Id.* at 179–81 (concluding that a reasonable jury could find conduct sufficiently severe or pervasive where supervisor "brushed against" or felt employee's breasts on three occasions); *Bailey v. Sheehan*, No. 1:16-CV-1370 (GTS/CFH), 2019 WL 3975453, at \*1 (N.D.N.Y. Aug. 22, 2019) (denying summary judgment where, *inter alia*, plaintiff's supervisor "asked her to spend the night with him" at a company party); *Rice v. Smithtown Volkswagen*, 321 F. Supp. 3d 375, 388 (E.D.N.Y. 2018) (concluding that allegations of a "pattern of overt and unwanted solicitation of sexual intercourse" stated a harassment claim); *Morris v. New York City Health & Hosp. Corp.*, No. 09-CV-5692 (MKB) (ST), 2018 WL 4762247, at \*11 (E.D.N.Y. Sept. 30, 2018) (explaining that a "reasonable person would find an unwelcome attempted kiss, an invitation to dinner, and attempted touching to the groin to be severe, physically threatening, and humiliating"); *Prince v. Madison Square Garden*, 427 F. Supp. 2d 372, 380 (S.D.N.Y. 2006) (denying motion to dismiss hostile work environment claim where manager "initiated unwelcome conversations with [plaintiff and others] about their sex lives"); *Wahlstrom v. Metro-North Commuter R.R. Co.*, 89 F. Supp. 2d 506, 521 (S.D.N.Y. 2000) (finding that attempts to touch and kiss plaintiff may constitute a hostile work environment where "the physical contact between the parties was neither harmless nor accidental").

<sup>1129</sup> *Redd*, 678 F.3d at 180. In addition to violating relevant discrimination laws, certain physical conduct may violate state tort laws for battery. *See Walia v. Vivek Purmasir & Assocs., Inc.*, 160 F. Supp. 2d 380, 393–94 (E.D.N.Y. 2000); *S.R. ex rel. M.R. v. Turnbull*, No. 1:12 C 1052(MEA), 2013 WL 1285411, at \*3 (S.D.N.Y. Mar. 28, 2013); *Black v. ESPN, Inc.*, 139 N.Y.S.3d 523 (Table), 2021 WL 668760, at \*7 (N.Y. Sup. Ct. N.Y. Cty. 2021), and assault, *see S.R.*, 2013 WL 1285411, at \*4; *Black*, 2021 WL 668760, at \*7.

<sup>1130</sup> *Redd*, 678 F.3d at 179 (internal quotation marks and citation omitted); *Johnson v. J. Walter Thompson U.S.A., LLC*, 224 F. Supp. 3d 296, 307–08 (S.D.N.Y. 2016) (concluding that allegations of plaintiff's supervisor often rubbing plaintiff's shoulders, stroking her face, and engaging in other acts of unwanted touching "plausibly allege[d] a pattern wherein [the supervisor] asserted physical power over [plaintiff] without her consent").

*motivated by sexual desire,’ . . . so long as it was motivated by gender.”*<sup>1131</sup> To establish a claim, one need not be able to “recount each and every instance of abuse,”<sup>1132</sup> or “give every detail” to each specific unwanted encounter.<sup>1133</sup>

As the “crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support her claim.”<sup>1134</sup> Similarly, conduct that an employee learns of secondhand may also support her claim.<sup>1135</sup> The “totality of the circumstances” also includes harassing conduct that takes place outside of the physical workplace.<sup>1136</sup> Even if harassing conduct is directed at both men and women, the conduct may still be found to discriminate on the basis of sex.<sup>1137</sup> As harassing conduct need not be sexual or motivated by sexual desire,<sup>1138</sup> differential treatment of members of different sexes is sufficient to establish a harassment claim.<sup>1139</sup>

Not all the conduct underlying a sexual harassment claim, however, need be expressly tied to gender. “[F]acially neutral incidents may be included among the ‘totality of the circumstances’ . . . so long as” there is a basis for “conclud[ing] that they were, in fact, based on sex.”<sup>1140</sup> This can be shown, for example, when “‘the same individual’ engaged in ‘multiple acts of harassment, some overtly sexual and some not’” or if abuse follows denial of a harasser’s sexual advances.<sup>1141</sup>

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<sup>1131</sup> *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547 (2d Cir. 2010) (citation omitted).

<sup>1132</sup> *Pucino*, 618 F.3d at 119–20.

<sup>1133</sup> *Redd*, 678 F.3d at 182.

<sup>1134</sup> *Redd*, 678 F.3d at 175 (internal quotation marks, citation, and alteration omitted)).

<sup>1135</sup> *See Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997) (“The fact that many of [supervisor]’s statements were not made in [plaintiff]’s presence is, in this case, of no matter; an employee who knows that her boss is saying things of this sort behind her back may reasonably find her working environment hostile.”).

<sup>1136</sup> *See, e.g., Tuli v. Brigham & Women’s Hosp.*, 656 F.3d 33, 41 (1st Cir. 2011); *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 350–51 (S.D.N.Y. 2003).

<sup>1137</sup> *Kaytor*, 609 F.3d at 549 (citation omitted) (finding genuine issue of material fact as to whether hostile work environment was gender-based and rejecting employer’s argument that harasser made threatening and graphic comments to “at least one other male employee” in addition to the female plaintiff); *see also Petrosino*, 385 F.3d at 222 (“The fact that much of this offensive material was not directed specifically at [plaintiff]—indeed, her male co-workers would likely have traded sexual insults . . . —does not, as a matter of law, preclude a jury from finding that the conduct subjected [plaintiff] to a hostile work environment based on her sex.”).

<sup>1138</sup> *See Kaytor*, 609 F.3d at 547 (citation omitted); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998).

<sup>1139</sup> *See Oncale*, 523 U.S. at 80–81 (“A . . . plaintiff may . . . , of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”); *see also Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001) (“[T]his court has found workplace situations discriminatory under a hostile work environment theory where the conduct at issue, though lacking any sexual component or any reference to the victim’s sex, could, in context, reasonably be interpreted as having been taken on the basis of plaintiff’s sex.”).

<sup>1140</sup> *Kaytor*, 609 F.3d at 547 (brackets omitted).

<sup>1141</sup> *Id.* at 548 (citation omitted); *see, e.g., Johnson*, 224 F. Supp. 3d at 308–09.



Although a harasser's professed intent may bear on whether his conduct was based on gender,<sup>1142</sup> one is not required to present "direct evidence of her harasser's motivation for discrimination against her" or to prove that "her harasser's intent was to create a discriminatory environment."<sup>1143</sup> "Regardless of what a harasser's intention is, if a plaintiff presents sufficient evidence to give rise to an inference of discrimination by offering proof" that the conduct is because of sex and sufficiently severe or pervasive to alter her work environment, the claim will survive.<sup>1144</sup>

Courts, therefore, long have "rejected the notion that a harasser's innocent intent will defeat liability . . . ."<sup>1145</sup> This includes justifications of innocent intent based on one's upbringing.<sup>1146</sup> The law is not designed "to protect harassers who fail to recognize the hostile or abusive nature of their comments and actions,"<sup>1147</sup> and assessment of "the totality of circumstances and the context of the alleged harassment does not mean that . . . long-standing or traditional hostility toward women . . . excuse[s] . . . harassment."<sup>1148</sup> Focusing the inquiry on the alleged harasser's intent would "reinforc[e] the prevailing level of discrimination," and "[h]arassers could continue to harass merely because a particular discriminatory practice was

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<sup>1142</sup> See, e.g., *Kaytor*, 609 F.3d at 548.

<sup>1143</sup> *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 278 (3d Cir. 2001); see *Harris*, 510 U.S. at 19, 22-23 (vacating dismissal of harassment claim despite alleged harasser's contention that he was only joking and his apology for such conduct); *Meritor*, 477 U.S. at 65 (defining sexual harassment as conduct that "has the purpose or effect of . . . creating an intimidating, hostile or offensive working environment" (internal quotation marks omitted) (quoting 29 C.F.R. § 1604.11(a)(3)) (emphasis added)).

<sup>1144</sup> *Abramson*, 260 F.3d at 278-79 (internal citations omitted) (quoting *Harris*, 510 U.S. at 21); see also *Martin v. Howard Univ.*, No. 99-1175 (TFH), 1999 WL 1295339, at \*5 (D.D.C. Dec. 16, 1999) ("Whether or not [the harasser] intended his behavior to be abusive or threatening is irrelevant . . ."), *aff'd*, 275 F. App'x 2 (D.C. Cir. 2008).

<sup>1145</sup> *Gabrielle M. v. Park Forest-Chicago Heights, IL. Sch. Dist.* 163, 315 F.3d 817, 827 (7th Cir. 2003). See, e.g., *Gallagher v. Delaney*, 139 F.3d 338, 343-45, 347-48 (2d Cir.1998) (holding that a jury could conclude that harasser's gift-giving, meal invitations, and notes, when considered in connection with other conduct, constituted a hostile work environment), *abrogated on other grounds by Ellerth*, 524 U.S. 742; *Batten v. Glob. Contact Servs., LLC*, No. 15-CV-2382(NG)(SJB), 2018 WL 3093968, at \*5 (E.D.N.Y. June 22, 2018) (denying summary judgment on hostile work environment claim based on single incident during which supervisor tightly hugged employee from behind for more than ten seconds and rejecting the employer's characterization of the incident as "casual contact that might be expected among friends"); *Manzo v. Sovereign Motor Cars, Ltd.*, No. 08-CV-1229, 2009 WL 3151094, at \*4 (E.D.N.Y. Sept. 29, 2009) (denying summary judgment where, among other things, supervisor admitted during an internal investigation that he asked plaintiff to his hotel room to tell him a "bedtime story" but that he made the statement "in the context of joking"); *Ackerman v. Nat'l Fin. Sys.*, 81 F. Supp. 2d 434, 435 (E.D.N.Y. 2000) (denying summary judgment on harassment claim where alleged harasser was "overly friendly; sent [plaintiff] cards; sent [plaintiff] a toy; took [plaintiff] on a meaningless trip . . . ; made suggestions of a more intimate relationship; and was constantly around [plaintiff]").

<sup>1146</sup> See, e.g., *Carosella v. U.S. Postal Serv.*, 816 F.2d 638, 641 (Fed. Cir. 1987) (finding sufficient evidence supporting administrative finding that postal service employee sexually harassed his subordinate despite employee's justifications based on his intent, including, *inter alia*, "[i]'m an Italian[:] I have a bad habit of maybe grabbing people by the arm or touching them in the back or something like that whether it's a female or male." (ellipses and brackets omitted)).

<sup>1147</sup> *Abramson*, 260 F.3d at 278.

<sup>1148</sup> *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999).

common . . . ”<sup>1149</sup> Instead, the “rapidly changing and conflicting views of appropriate gender relationships in the workplace” should be considered.<sup>1150</sup>

The standard applied to hostile work environment claims under the NYSHRL is significantly lower.<sup>1151</sup> “[T]he federal severe or pervasive standard of liability” does not “appl[y] . . . , and the severity or pervasiveness of conduct is relevant only to . . . damages.”<sup>1152</sup> “[L]iability is . . . determined simply by the existence of differential treatment (*i.e.*, unwanted gender-based conduct).”<sup>1153</sup> Accordingly, there is a violation of the NYSHRL if the employee is “treated less well at least in part ‘because of her gender.’”<sup>1154</sup> However, even under the current state standard, the law does not “operate as a ‘general civility code.’”<sup>1155</sup> Thus, an employer may avoid liability if it is able to prove affirmatively that the conduct about which the employee is complaining is nothing more than “petty slights or trivial inconveniences.”<sup>1156</sup> Considering this standard, “even a single comment [or action] may be actionable in the proper context.”<sup>1157</sup>

### **A. Employer Liability**

“Under Title VII, an employer’s liability for such harassment may depend on the status of the harasser.”<sup>1158</sup> If the harasser is an employee’s supervisor and the “harassment culminates in a tangible employment action” (*e.g.*, a quid pro quo situation), “the employer is strictly liable.”<sup>1159</sup>

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<sup>1149</sup> *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

<sup>1150</sup> *Gallagher*, 139 F.3d at 343.

<sup>1151</sup> *See Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27 (1st Dep’t 2009). Until recently, the NYSHRL standard for hostile work environment claims tracked the principles applied to hostile work environment claims under Title VII. *See, e.g., Father Belle Cmty. Ctr. v. New York State Div. of Hum. Rts. on Complaint of King*, 642 N.Y.S.2d 739 (4th Dep’t 1996). The NYSHRL, however, was amended in 2019, effective October 11, 2019, to eliminate the “severe or pervasive” requirement, *McHenry v. Fox News Network, LLC*, 510 F. Supp. 3d 51 (S.D.N.Y. 2020), which brought the NYSHRL standard in line with that under the New York City Human Rights Law (the “NYCHRL”), N.Y.C. Admin. Code § 8–101 *et seq.* As the standards under the NYSHRL and NYCHRL are now in agreement, we cite cases concerning application of the NYCHRL as reference for understanding NYSHRL legal obligations.

<sup>1152</sup> *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 113 (2d Cir. 2013).

<sup>1153</sup> *Williams*, 61 A.D.3d at 76; *see Suri v. Grey Glob. Grp., Inc.*, 83 N.Y.S.3d 9, 14 (1st Dep’t 2018) (“In *Williams* we . . . dispensed with the need for much of the nomenclature that has accreted over the years in gender discrimination jurisprudence, such as ‘sexual harassment’ and ‘quid pro quo,’ and instead focused on ‘the existence of differential treatment’ in connection with ‘unwanted gender-based conduct.’”).

<sup>1154</sup> *Mihalik*, 715 F.3d at 110 (emphasis omitted) (quoting *Williams*, 61 A.D.3d at 39, 40 n.27).

<sup>1155</sup> *Williams*, 61 A.D.3d at 79 (quoting *Oncale* 523 U.S. at 81).

<sup>1156</sup> *Id.* at 80.

<sup>1157</sup> *Mihalik*, 715 F.3d at 113; *see, e.g., Feldesman v. Interstate Hotels LLC*, No. 16 Civ. 9352 (ER), 2019 WL 1437576 (S.D.N.Y. Mar. 31, 2019) (denying summary judgment where plaintiff alleged that coworker made various comments about her body and appearance); *Kaplan v. New York City Dep’t of Health & Mental Hygiene*, 142 A.D.3d 1050–51 (2nd Dep’t 2016) (vacating dismissal where plaintiff alleged that her supervisor rubbed his hand back and forth over his groin and inner thigh while making sexual noises).

<sup>1158</sup> *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

<sup>1159</sup> *Id.* A “supervisor” is one “the employer has empowered . . . to take tangible employment actions against the victim, *i.e.*, to effect a ‘significant change in employment status, such as hiring, firing, failing to promote,

Likewise, if the harasser is the “proxy/alter ego” of the employer, there is also strict liability, and the “employer [is held] liable in its own right for [the] wrongful harassing conduct.”<sup>1160</sup>

“In *Faragher*, the Supreme Court suggested that presidents, owners, proprietors, partners, corporate officers, and supervisors with a high position in the management hierarchy are the types of officials who can be considered an organization’s alter ego.”<sup>1161</sup> Under the NYSHRL, the employer is strictly liable for the harassment of all supervisors or managerial employees.<sup>1162</sup>

Because an employer faces civil liability for harassers who do not meet these tests, when it is aware of harassment and fails to act, “management has a good reason to press [an] investigation” and “prevent recurrence or expansion.”<sup>1163</sup> An employer’s imperative to investigate is particularly strong considering the risks that unremedied harassment poses to other employees.<sup>1164</sup> Accordingly, “[p]rudent employers will compel harassing employees to cease all such conduct and will not, even at a victim’s request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.”<sup>1165</sup>

## **B. Executive Chamber Policy**

These legal standards are consonant with the Executive Chamber’s own equal employment policies.<sup>1166</sup>

The Executive Chamber’s policy states that “[s]exual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual’s sex when,” *inter alia*, “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment.”<sup>1167</sup> The policy clarifies that “[a]ctions that may constitute sexual harassment based upon a hostile work environment may include, but are not limited to, words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an

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reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Vance*, 570 U.S. at 431 (citations omitted).

<sup>1160</sup> *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 52 (2d Cir. 2012) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 789-92 (1998)). Where the harasser is not an alter-ego of the employer and his harassment does not culminate in an adverse action, the employer may invoke an affirmative defense under Title VII known as the *Faragher/Ellerth* defense. See *Vance*, 570 U.S. at 424.

<sup>1161</sup> *Townsend*, 679 F.3d at 54 (citation omitted); see also *Donohue v. Finkelstein Mem’l Libr.*, 987 F. Supp. 2d 415, 425 (S.D.N.Y. 2013).

<sup>1162</sup> See *Zarzewska v. New School*, 14 N.Y.3d 469, 479–81 (2010); *Chauhan v. MM Hotel Mgmt. LLC*, No. 18-CV-5963(DRH)(SIL), 2019 WL 6118006, at \*6 n.7 (E.D.N.Y. Nov. 18, 2019).

<sup>1163</sup> *Malik v. Carrier Corp.*, 202 F.3d 97, 106 (2d Cir. 2000).

<sup>1164</sup> See, e.g., *Torres*, 116 F.3d at 639 (“[T]here may be cases in which a supervisor or co-worker is harassing a number of employees, and one harassed employee asks the company not to take action. In those cases, the employer’s duty to other employees would take precedence . . .”).

<sup>1165</sup> *Malik*, 202 F.3d at 106.

<sup>1166</sup> In or about 2011, New York formulated comprehensive equal employment policies for employees in state executive branch agencies, including the executive chamber. See, e.g., *Volforte Tr.* at 52:5–53:13.

<sup>1167</sup> Ex. 8 at 11–12 (Employee Handbook).

individual because of that individual's sex," as well as "any unwanted verbal or physical advances, sexually explicit derogatory statements or sexually discriminatory remarks made by someone which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, or which interfere with the recipient's job performance."<sup>1168</sup> Pursuant to the policy, "[s]exual harassment need not be severe or pervasive to be unlawful" and the underlying conduct need only be "more than petty slights or trivial inconveniences."<sup>1169</sup>

Pursuant to the policy, any employee who experiences or observes sexual harassment should complain promptly to GOER.<sup>1170</sup> Employees may also report "such conduct to a supervisor, managerial employee, or personnel administrator," who should request that the complaining employee file a written complaint with GOER.<sup>1171</sup> If the complaining employee does not file a complaint with GOER, the supervisor or other individual who received the oral complaint must file a complaint with GOER on his own.<sup>1172</sup> "Furthermore, any supervisory or managerial employee who observes or otherwise becomes aware of conduct of a sexually harassing nature must report such conduct so that it can be investigated."<sup>1173</sup> This is true "even if the individual who complained requests that it not be reported" and [f]ailure to comply with the duty to report may result in disciplinary and/or administrative action."<sup>1174</sup> Once informed of a complaint, GOER must "initiate an investigation and recommend prompt and effective remedial action where appropriate."<sup>1175</sup>

### **III. Retaliation**

Federal and state law prohibit retaliating against an employee because she complains about conduct that she reasonably believes violates the law, including complaints about gender-based harassment.<sup>1176</sup> Protection against retaliation extends to both current and former employees.<sup>1177</sup>

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<sup>1168</sup> Ex. 8 at 12.

<sup>1169</sup> *Id.*

<sup>1170</sup> *Id.* at 13. Since December 2018, GOER has been "responsib[le] for conducting investigations of all employment-related discrimination complaints." *Id.* at 1.

<sup>1171</sup> *Id.* at 13.

<sup>1172</sup> *Id.*

<sup>1173</sup> *Id.*

<sup>1174</sup> *Id.* at 41–42.

<sup>1175</sup> Ex. 8 at 13.

<sup>1176</sup> See *Summa v. Hofstra Univ.*, 708 F.3d 115, 126 (2d Cir. 2013) (Title VII); *Vega*, 801, 802 F.3d at 82 (holding that "a state employee may bring a retaliation claim under § 1983"); *Clayton v. Best Buy Co.*, 48 A.D.3d 277, 278, 851 (App. Div. 2008) (NYSHRL prohibits retaliation); see also *Kaytor*, 609 F.3d at 554–56; *Gregory*, 243 F.3d at 701.

<sup>1177</sup> See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that former employees are "employees" for the purposes of Title VII's anti-retaliation provisions and, therefore, a "former employe[e] ... may bring suit against his former employer for postemployment actions allegedly taken in retaliation" for protected activity); see also *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("[P]laintiffs may be able to state a claim for retaliation, even though they are no longer employed by the defendant company . . .").

## **A. Elements of a Claim**

To demonstrate a presumption of retaliation, one must establish: (1) “protected participation or opposition”; (2) “that the employer was aware of this activity”; (3) that the employer took adverse action”; and (4) “that a causal connection exists between the protected activity and the adverse action.”<sup>1178</sup>

To succeed on a retaliation claim, an employee “need not establish that the conduct she opposed was actually a violation of [the law], but only that she possessed a good faith, reasonable belief that the underlying employment practice was unlawful.”<sup>1179</sup> As the inquiry focuses on the reasonableness of the complaining employee’s belief, an employer’s belief that a complaint was made in bad faith does not relieve it of liability for its retaliatory actions.<sup>1180</sup>

### **i. Protected Activity**

“‘Protected activity’ includes opposition to a discriminatory employment practice or participation in any investigation, proceeding, or hearing.”<sup>1181</sup> Oppositional conduct encompasses “informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.”<sup>1182</sup> “When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication’ virtually always constitutes” protected activity.<sup>1183</sup> “[P]rotected activities are not limited to complaints involving discrimination against the complainant herself, but also extend to complaints of discrimination on behalf of other employees and complaints of discriminatory practices generally . . . .”<sup>1184</sup>

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<sup>1178</sup> *Kessler v. Westchester Cty. Dep’t of Soc. Servs.*, 461 F.3d 199, 205–06 (2d Cir. 2006); accord *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010) (internal quotation marks omitted).

<sup>1179</sup> *Summa*, 708 F.3d at 126 (internal quotation marks and citation omitted).

<sup>1180</sup> See, e.g., *Sanders v. Madison Square Garden, L.P.*, 525 F. Supp. 2d 364, 367 (S.D.N.Y. 2007) (“If an employer were permitted to fire employees who protested alleged illegal discrimination, simply because the employer believed the complaints were unfounded or malicious, the employees’ protection would be illusory.”); *Ayala v. Summit Constructors, Inc.*, 788 F. Supp. 2d 703, 722 (M.D. Tenn. 2011) (upholding jury verdict in favor of plaintiff on retaliation claim despite employer’s president’s opinion that plaintiff’s complaint was false and brought in bad faith).

<sup>1181</sup> *Hubbard v. Total Commc’ns, Inc.*, 347 F. App’x 679, 680–81 (2d Cir. 2009).

<sup>1182</sup> *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990); see, e.g., *Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 557, 563 (S.D.N.Y. 2013) (explaining that an employee has engaged in protected activity when “her employer was aware of her complaint and that it ‘understood, or could reasonably have understood, that the plaintiff’s opposition was directed at conduct prohibited by Title VII.’” (quoting *Galdieri-Ambrosini v. Nat’l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998))).

<sup>1183</sup> *Crawford v. Metro. Gov’t of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 276 (2009) (citing 2 EEOC Compliance Manual §§ 8–II–B(1), (2), p. 614:0003 (Mar. 2003) (emphasis in original)).

<sup>1184</sup> *Littlejohn v. City of New York*, 795 F.3d 297, 317 (2d Cir. 2015).

## ii. Knowledge

To establish that an employer has knowledge of the employee's protected activity, "[n]othing 'more is necessary than general corporate knowledge.'" <sup>1185</sup> An employee need not "show that the particular individuals who carried out an adverse action knew of the protected activity." <sup>1186</sup> This prong is satisfied when the existence of the employee's protected activity is communicated to a high-level official or supervisor. <sup>1187</sup>

## iii. Adverse Action

The antiretaliation laws protect[] an individual not from all retaliation, but from retaliation that produced an injury or harm." <sup>1188</sup> An adverse action for purposes of a retaliation claim is any action that is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." <sup>1189</sup> An adverse action need not affect "the terms or conditions of employment." <sup>1190</sup> Rather, "[t]he scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." <sup>1191</sup> However, the law does not protect against the "petty slights or minor annoyances that often take place at work and that all employees experience." <sup>1192</sup> "Whether a particular [action] is materially adverse depends upon the circumstances . . . , and [an employer's actions] should be judged from the perspective of a reasonable person in the [employee]'s position, considering all the circumstances." <sup>1193</sup> "[I]n determining whether conduct amounts to an adverse employment action, the alleged acts of retaliation need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently 'substantial in gross' as to be actionable." <sup>1194</sup> Blacklisting an employee, disseminating confidential or sensitive information concerning an employee, or making undesirable public statements about an employee can constitute adverse actions. <sup>1195</sup>

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<sup>1185</sup> *Summa*, 708 F.3d at 125–26 (2d Cir. 2013) (citation omitted)); accord *Papelino*, 633 F.3d at 92; *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 147–48 (2d Cir. 2010).

<sup>1186</sup> *Henry*, 616 F.3d at 148.

<sup>1187</sup> See, e.g., *Zann Kwan*, 737 F.3d at 844; *Summa*, 708 F.3d at 125–26; *Barnett v. Nat'l Passenger R.R. Corp. (Amtrak)*, No. 17 Civ. 2682 (KPF), 2018 WL 6493098, at \*11 (S.D.N.Y. Dec. 10, 2018) (collecting cases), *aff'd sub nom. Barnett v. Nat'l R.R. Passenger Corp. (Amtrak)*, 799 F. App'x 82 (2d Cir. 2020).

<sup>1188</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

<sup>1189</sup> *Hicks*, 593 F.3d at 169 (internal quotation marks omitted) (quoting *White*, 548 U.S. at 67).

<sup>1190</sup> *Id.*

<sup>1191</sup> *White*, 548 U.S. at 67.

<sup>1192</sup> *Id.* at 68.

<sup>1193</sup> *Id.* at 71 (internal citation and quotation marks omitted).

<sup>1194</sup> *Hicks*, 593 F.3d at 165.

<sup>1195</sup> See, e.g., *Noonan v. Kane*, 698 F. App'x 49, 54 (3d Cir. 2017) (concluding that plaintiffs sufficiently pled First Amendment retaliation claim predicated on, *inter alia*, threats to release private e-mails and to disclose selective damaging or embarrassing information to humiliate and impugn plaintiffs); *Lore v. City of Syracuse*, 670 F.3d 127, 167 (2d Cir. 2012) (upholding jury verdict on retaliation claim predicated on negative public statements about plaintiff); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 178–79 (2d Cir. 2005) (concluding that employer's false statement to plaintiff's prospective employer potentially leading to denial of employment could constitute an

#### iv. Causation

Causation is established if an employee's protected activity was the "but for" cause of the adverse employment action.<sup>1196</sup> "[B]ut-for" causation does not require proof that retaliation was the only cause of the employer's action, but only that the [adverse action] would not have occurred in the absence of the retaliatory motive."<sup>1197</sup> There can be "multiple 'but-for' causes, each one of which may be sufficient to support liability."<sup>1198</sup> "Causation may be shown by direct evidence of retaliatory animus or inferred through temporal proximity to the protected activity."<sup>1199</sup>

Direct evidence may include statements by the employer that "show retaliatory animus against [an employee] for [her] complaints."<sup>1200</sup> Temporal proximity, if close enough, may be sufficient in isolation to establish the requisite causal connection.<sup>1201</sup>

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adverse action); *Wanamaker*, 108 F.3d at 466 ("[P]laintiffs may be able to state a claim for retaliation, even though they are no longer employed by the defendant company, if, for example, the company 'blacklists' the former employee" or "wrongfully refuses to write a recommendation to prospective employers[.]" (internal citations omitted)); *Kiernan v. Town of Southampton*, No. 14-CV-1831 (SJF) (AKT), 2015 WL 1258309, at \*13 (E.D.N.Y. Mar. 17, 2015) (denying dismissal of a First Amendment retaliation claim predicated on disclosure of plaintiff's confidential personnel records); see also *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166 (D.C. Cir. 2010) (holding that supervisor's posting of plaintiff's EEO complaint on employer's intranet site for plaintiff's coworkers to access could constitute an adverse action); *Franklin v. Loc. 2 of the Sheet Metal Workers Int'l Ass'n*, 565 F.3d 508, 521 (8th Cir. 2009) (denying summary judgment where union publicized the names of those who filed EEOC charges against the union and the union's associated legal costs); cf. *Hughes v. Twenty-First Century Fox, Inc.*, 304 F. Supp.3d 429, 441, 449 (SDNY 2018) (concluding that releasing statement to the press that, *inter alia*, neither named complainant nor maligned her character was not retaliatory); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014) (in whistleblower case finding supervisor telling peers that plaintiff had reported their conduct to the SEC was adverse action as it sent message that co-workers should shun him, particularly where plaintiff was criticized for not being more of a "team player"); *Mogenhan*, 613 F.3d at 1166 (retaliation where plaintiff's supervisor posted her EEO complaint on the intranet where other employees could access it); *Shafer v. Am. Univ. in Cairo*, No. 12-CV-9439 (VEC), 2014 WL 3767007, at \*16 (S.D.N.Y. July 31, 2014) (finding adverse action where Dean announced that he was recording faculty meeting because plaintiff filed an EEOC charge; Dean's actions "sent a clear signal to [plaintiff] and to the other faculty members present that complaints about discrimination will be met with hostility and will turn the complaining faculty member into a pariah").

<sup>1196</sup> See *Wolf v. Time Warner, Inc.*, 548 F. App'x 694, 695 (2d Cir. 2013). There is uncertainty whether the "but for" causation standard or a relaxed motivating factor causation standard applies to retaliation claims brought under the NYSHRL. See *Gordon v. City of New York*, No. 14-CV-6115 (JPO), 2018 WL 4681615, at \*16 n.10 (S.D.N.Y. Sept. 28, 2018).

<sup>1197</sup> *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013).

<sup>1198</sup> *Id.* at 846 n.5.

<sup>1199</sup> *Duplan v. City of New York*, 888 F.3d 612, 625 (2d Cir. 2018).

<sup>1200</sup> *Kazolias v. Ibew Lu 363*, 806 F.3d 45, 49-50 (2d Cir. 2015).

<sup>1201</sup> See, e.g., *Zann Kwan*, 737 F.3d at 845 (concluding that "[t]he three-week period from [plaintiff's] complaint to her termination is sufficiently short to make a prima facie showing of causation"); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (finding causation established where retaliatory discharge occurred "within a month" of protected activity); *Gorman-Bakos v. Cornell Co-op Extension of Schenectady Cty.*, 252 F.3d 545, 555 (2d Cir. 2001) (explaining that five months was "not too long" to support inference of causal connection)

## **B. Employer's Rationale and Pretext**

In response to a presumptive case of retaliation, an employer may “articulate a legitimate, non-retaliatory reason” for its action.<sup>1202</sup> Assuming the employer does so, the employee can rebut that explanation with evidence demonstrating that the employer’s proffered explanation is pretextual.<sup>1203</sup> An employee does so by submitting evidence “demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer’s proffered legitimate, nonretaliatory reasons for its action.”<sup>1204</sup> As there may be multiple “but for” factors for an adverse action, one need not prove that the employer’s professed rationale is false and did not play any role in the adverse action.<sup>1205</sup>

## **C. Executive Chamber Policy**

The Executive Chamber’s equal employment policies again are in agreement with this legal standard. The policy prohibits retaliation against “any individual who has filed a complaint, testified or assisted in any discrimination complaint investigation, or opposed any discriminatory practices forbidden by the Human Rights Law, federal anti-discrimination laws or pursuant to the anti-discrimination provisions of” the policy.<sup>1206</sup> “Even if a discrimination complaint is not substantiated as a violation . . . , the individual is protected if they filed a discrimination complaint, participated in a discrimination-related investigation, or opposed discrimination with [a] good faith belief that the practices were discriminatory on the basis of a protected class status.”<sup>1207</sup> “The adverse action does not need to be job related or occur in the workplace.”<sup>1208</sup> Rather, the policy’s prohibition on retaliation encompasses “any action, more than trivial, that would have the effect of dissuading a reasonable person from making or supporting an allegation of discrimination.”<sup>1209</sup>

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<sup>1202</sup> *Id.* at 845.

<sup>1203</sup> *Id.*

<sup>1204</sup> *Id.* at 846.

<sup>1205</sup> See, e.g., *Kirkland v. Cablevision Sys.*, 760 F.3d 223, 227 (2d Cir. 2014) (explaining that a “jury could . . . conclude that, despite [plaintiff]’s negative performance reviews, his firing was ‘more likely than not based in whole or in part on discrimination’”).

<sup>1206</sup> Ex. 8 at 39.

<sup>1207</sup> *Id.* The Director of GOER testified that GOER takes retaliation very seriously, and if it finds that someone engaged in retaliation, it will seek the termination of his employment. *Joint Public Hearing To Examine Sexual Harassment Issues In The Workplace*, 2019 Leg. at 232:15–19 (N.Y. 2019) (Testimony of Michael Volforte, Director of NYS Governor’s Office of Employee Relations), <https://www.nysenate.gov/transcripts/public-hearing-05-24-19-nys-senate-sexual-harassment-workplace-finaltxt> (“Volforte Leg. Testimony”).

<sup>1208</sup> Ex. 8 at 39.

<sup>1209</sup> *Id.*



## **D. Individual Liability**

### **i. Section 1983**

“Under § 1983, an individual defendant may be held liable . . . if he or she was ‘personally involved’ in the deprivation of the [employee]’s rights.”<sup>1210</sup> One is personally involved when she (1) “participated directly in the alleged constitutional violation”; (2) “after being informed of the violation through a report or appeal, failed to remedy the wrong”; (3) “created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom”; (4) “was grossly negligent in supervising subordinates who committed the wrongful acts”; or (5) “exhibited deliberate indifference by failing to act on information indicating that unconstitutional acts were occurring.”<sup>1211</sup>

### **ii. NYSHRL**

Under the NYSHRL, an employee may be held individually liable if he personally engages in conduct that violates the NYSHRL.<sup>1212</sup> The NYSHRL also subjects those who aid and abet conduct that violates the NYSHRL to individual liability.<sup>1213</sup> Aider and abettor liability extends to those who “actually participate[] in the conduct giving rise to a discrimination claim.”<sup>1214</sup> “[A]n individual need not himself take part in the primary violation” to be liable.<sup>1215</sup> An aider and abettor also need not have a specific intent to discriminate and “may incur . . . liability in connection with a primary violation of another employee, not just that of the employer.”<sup>1216</sup> Aider and abettor liability extends to those who are not employees so long as they participate in the unlawful conduct.<sup>1217</sup> “[F]ailure to investigate [discriminatory acts] can constitute ‘active participation’ to support an ‘aiding and abetting’ claim.”<sup>1218</sup>

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<sup>1210</sup> *Burhans v. Lopez*, 24 F. Supp. 3d 375, 381 (S.D.N.Y. 2014) (quoting *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)); see *Feingold*, 366 F.3d at 159.

<sup>1211</sup> *Burhans*, 24 F. Supp. 3d at 381 (ellipsis omitted) (quoting *Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir. 2013)).

<sup>1212</sup> See *Moazzaz v. MetLife, Inc.*, No. 19-CV-10531 (JPO), 2021 WL 827648, at \*15 (S.D.N.Y. Mar. 4, 2021) (citing *Doe v. Bloomberg, L.P.*, 36 N.Y.3d 450, 459, 167 N.E.3d 454, 460 (2021)).

<sup>1213</sup> See N.Y. Exec. Law § 296(6); *Malena*, 886 F. Supp. 2d at 367.

<sup>1214</sup> *Feingold*, 366 F.3d at 157 (internal quotation marks and citation omitted); see *Dillon v. Ned Mgmt., Inc.*, 85 F. Supp. 3d 639, 658-59 (E.D.N.Y. 2015).

<sup>1215</sup> *Schaper v. Bronx Lebanon Hosp. Ctr.*, 408 F. Supp. 3d 379, 395 (S.D.N.Y. 2019).

<sup>1216</sup> *Int’l Healthcare Exch., Inc. v. Glob. Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 363 (S.D.N.Y. 2007).

<sup>1217</sup> See, e.g., *Heskin v. Insite Advertising, Inc.*, No. 03 Civ. 2598 (GDB)(AJP), 2005 WL 407646, at \*25 (S.D.N.Y. Feb. 22, 2005) (holding that individual who harassed plaintiff and asked that she be fired could be individually liable, even though he worked for a different company); *Dunson v. Tri-Maint. & Contractors, Inc.*, 171 F. Supp. 2d 103, 114-16 (E.D.N.Y. 2001) (concluding that independent contractors could be aiders and abettors).

<sup>1218</sup> *Delisi v. Nat’l Ass’n of Pro. Women, Inc.*, 48 F. Supp. 3d 492, 496 (E.D.N.Y. 2014).

## **THE INVESTIGATION’S CONCLUSIONS**

### **I. The Governor Engaged in Conduct that Constituted Sexual Harassment Under Federal and State Law**

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As detailed above in our factual findings section, we conclude that the Governor, on multiple occasions, engaged in conduct and conversations that were offensive and sexual in nature that constituted sex-based harassment. Specifically, with respect to physical contact with complainants, we find that the Governor engaged in the following forms of offensive touching, among others:

#### **Executive Assistant #1**

- On November 16, 2020, the Governor hugged Executive Assistant #1 and then reached under her blouse and grabbed her breast.
- On multiple occasions in 2019 and 2020, the Governor engaged in close and intimate hugs with Executive Assistant #1 during which he, on occasion, grabbed her butt.
- On December 31, 2019, the Governor took a “selfie” with Executive Assistant #1, during which he put his hand on and then rubbed and grabbed her butt.

#### **Trooper #1**

- On one occasion in an elevator, the Governor ran his finger down the center of Trooper #1’s back from the top of her neck down the center of her spine, while saying, “hey you.”<sup>1219</sup>
- At an event on September 23, 2019, the Governor touched Trooper #1 on the stomach, running his hand across it from her belly button to her right hip while she was holding a door open for him.

#### **State Entity Employee #1**

- In September 2019, at an event in New York City where the Governor spoke and then took pictures with certain of the attendees, the Governor grabbed the butt of an employee of a State entity while having his picture taken with the employee.

#### **Women Not Employed by the State**

- There were complainants whose allegations are not of workplace harassment (because they were not employed by the State) who nonetheless were subjected to the Governor’s unwelcome, offensive, and physical conduct.
  - In May 2017, at an event where the Governor spoke and then greeted attendees, the Governor pressed and ran his fingers across the chest of

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<sup>1219</sup> Trooper #1 Tr. 87:20–88:9.

Virginia Limmiatis (who was attending the event for her job), while reading the name of her company (which was written across the chest).

- On the evening of September 14, 2019, at the wedding of one of his senior aides, the Governor approached a guest, Anna Ruch, and put his hand on her back in an area where there was a cutout in the dress. After Ms. Ruch grabbed his wrist and removed his hand from her back, the Governor remarked, “wow, you’re aggressive” and then proceeded to cup her face with his hands and kiss her after asking “can I kiss you?”

### **Hugs, Kisses, and Other Touching**

- Over the years, the Governor has hugged and kissed staff members in ways that made them uncomfortable or were unwelcome, including kissing Executive Assistant #1 at least once on the lips, kissing Ms. Boylan on the lips on one occasion, kissing Trooper #1 on the cheek in the presence of her colleague, a man, while she was working on the Governor’s protective detail, kissing various staff members (including Executive Assistant #1 and Ms. McGrath) on the cheeks and forehead, and engaging in uncomfortably close hugs with Executive Assistant #1.
- The Governor also regularly touched staff members in ways that made them uncomfortable, including touching their arms, legs, and back, kissing their hands, squeezing their waists for pictures as Executive Assistant #1, Ms. Boylan, Ms. Liss, Ms. McGrath, and Kaitlin, among others, have described.<sup>1220</sup>

In addition to the physical touching outlined above, we find that the Governor regularly engaged in conversation and conduct with Executive Chamber staff members and other State employees that were offensive and gender-based. Those conversations include, among others, the following:

### **Charlotte Bennett**

- Over the course of a number of conversations, the Governor made inappropriate and offensive comments of a sexual nature to Ms. Bennett, including: (1) in talking about potential girlfriends for him, telling her that he would be willing to date someone who was as young as 22 years old (knowing that she was 25 at the time); (2) asking her whether she had been with older men; (3) saying to her during the pandemic that he was “lonely” and wanted to be “touched;”<sup>1221</sup> (4) telling her that he wanted to ride his motorcycle into the mountains with a woman; (5) asking whether she was monogamous and what she thought about monogamy; (6) joking about the size of his

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<sup>1220</sup> Ms. Liss and Kaitlin have said that they have come forward to support and corroborate the other women. Liss Tr. 127:6–11, 206:8–11; Kaitlin Tr. 147:3–7, 158:11–17. Although the conduct they endured occurred too long ago for them to assert civil claims in court, we find that the conduct did constitute sexual harassment and does corroborate other women’s allegations. We also note the EEO Policy applicable to the Executive Chamber has no limitations period.

<sup>1221</sup> Bennett Tr. 166:20–167:9; Ex. 2; Ex. 3.

hands; (7) telling her that she should get a tattoo on her butt where it could not be seen; and (8) asking whether she had any piercings other than in her ears.

- The Governor also had detailed conversations with Ms. Bennett about her experiences with sexual assault, and did so in a way that—on certain occasions—made her feel extremely uncomfortable, as if he were “grooming” her.<sup>1222</sup>

### **Trooper #1**

- When Trooper #1 informed the Governor that she was getting married, the Governor asked her why she would want to get married, because “it always ends in divorce, and you lose money, and your sex drive goes down.”<sup>1223</sup>
- On another occasion, after he had become single again, the Governor discussed with Trooper #1 age differences in relationships, joking that she was “too old”<sup>1224</sup> for him. He then asked her what age difference for him and a girlfriend she thought would be acceptable to the public. When she asked what criteria he was looking for in a girlfriend, in order to deflect the conversation, the Governor said he was looking for someone who “can handle pain.”<sup>1225</sup>
- In September 2018, when told by Trooper #1 that she would be going to Albany for her sister’s wedding, the Governor made Trooper #1 uncomfortable by offering her a tour of the Governor’s Mansion, “unless it [was] against protocols.”<sup>1226</sup>
- In August 2019, the Governor asked Trooper #1 why she did not wear a dress, to which Trooper #1 stated that she would have nowhere to put her gun. The Governor also asked her why she only wore dark colors and on another occasion told her that her suit made her look like an “Amish person.”<sup>1227</sup>

### **Lindsey Boylan**

- On a number of occasions, the Governor commented on Ms. Boylan’s attractiveness, including comparing her appearance to that of an ex-girlfriend and on another occasion saying that she was more attractive than various actresses.
- The Governor made comments and paid so much attention to Ms. Boylan that Mr. Zemsky, the CEO of ESD and Ms. Boylan’s supervisor at the time, told her that

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<sup>1222</sup> Bennett Tr. 111:20–112:2, 113:3–2.

<sup>1223</sup> Trooper #1 Tr. 85:8–14.

<sup>1224</sup> Trooper #1 Tr. 102:24–103:10.

<sup>1225</sup> Trooper #1 Tr. 103:14–104:11.

<sup>1226</sup> Trooper #1 Tr. 77:12–18.

<sup>1227</sup> Trooper #1 Tr. 128:9–11.

he thought the Governor had a “crush” on her and asked her if she wanted him to intervene in some way.<sup>1228</sup>

- On one occasion around 2017, when they were on an airplane, the Governor stated jokingly to Ms. Boylan, “let’s play strip poker,” to which Ms. Boylan responded in a sarcastic way to deflect the comment. Mr. Zemsky has testified that he recalled hearing this comment.<sup>1229</sup>

### **Executive Assistant #1 and Alyssa McGrath**

- The Governor had several conversations with Executive Assistant #1 about her personal life and her relationships, including, as described below, calling her and Ms. McGrath “mingle mamas”<sup>1230</sup> and inquiring multiple times about whether she had cheated on or would cheat on her husband and asking her to help find him a girlfriend.
- The Governor on a number of occasions asked Ms. McGrath about her personal life, including her marital status and divorce, saying that he wanted to “go out”<sup>1231</sup> with Ms. McGrath and Executive Assistant #1 when they went out together.
- On one occasion, the Governor asked whether Ms. McGrath would tell on Executive Assistant #1 if she were to cheat on her husband during a trip to Florida and then called them “mingle mamas”<sup>1232</sup> for the rest of the day.
- On another occasion, the Governor stared down Ms. McGrath’s loose shirt and then commented on her necklace (which was inside her blouse) when Ms. McGrath looked up.

### **Kaitlin**

- After Kaitlin joined the Executive Chamber, the Governor instructed her to act like a “sponge” to soak up knowledge and then proceeded to call her by the name “sponge,” a name that she found humiliating.<sup>1233</sup>

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<sup>1228</sup> Zemsky Tr. 28:12–20.

<sup>1229</sup> *Id.* at 33:14–37:14.

<sup>1230</sup> Executive Assistant #1 Tr. 95:9–16.

<sup>1231</sup> Alyssa McGrath Tr. 105:16–24.

<sup>1232</sup> *Id.* at 50:15–52:3.

<sup>1233</sup> Kaitlin Tr. 77:14–17.

- The Governor commented on her appearance on a number of occasions, including saying that an outfit she wore made her look like a “lumberjack”<sup>1234</sup> and asking on days she did not wear makeup, whether she “didn’t get ready”<sup>1235</sup> for work.
- On one occasion, the Governor asked Kaitlin to look up car parts on eBay on his computer while he sat directly behind her in his office, making her feel uncomfortable because she was wearing a skirt and heels.

### **Ana Liss**

- During the years that Ana Liss worked as an aide in the Executive Chamber from 2013 to 2015, the Governor addressed her almost exclusively as “sweetheart” or “darling.”<sup>1236</sup>
- On occasion, the Governor kissed her on the cheeks and hand, touched and held her hands, and slid his hand around her lower waist.
- The Governor commented on her appearance and asked her whether she had a boyfriend.

### **State Entity Employee #2**

- In preparing for a press conference on March 17, 2020 during which he was to receive a live COVID-19 nasal swab, the Governor made a joke about the manner in which State Entity Employee #2 would handle the test saying, “gentle but accurate[, I’ve] heard that before.”<sup>1237</sup> State Entity Employee #2 felt that the Governor intended to convey a joke of an implied sexual nature. Then, at the press conference, in front of all of the press and cameras, the Governor stated, “nice to see you, Doctor—you make that gown look good.”<sup>1238</sup> State Entity Employee #2 found the exchange with the Governor inappropriate and one that would not have been made to a physician who was a man.

We conclude the above-described conduct—both the unwelcome and inappropriate touching, as well as the suggestive jokes and comments—constituted sexual harassment that created a hostile work environment for State employees.

*First*, the direct contact with intimate body parts—including the touching of Executive Assistant #1’s breast, the grabbing and touching of the butts of various women (including Executive Assistant #1 and State Entity Employee #1), and the Governor’s touching of Trooper

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<sup>1234</sup> *Id.* at 83:20–24.

<sup>1235</sup> *Id.* at 84:14–16.

<sup>1236</sup> Liss Tr. 99:17–24.

<sup>1237</sup> State Entity Employee #2 Tr. 159:18–20.

<sup>1238</sup> *Andrew Cuomo New York May 17 COVID-19 Press Conference Transcript*, Rev (May 17, 2020), <https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-may-17-covid-19-press-conference-transcript>.

#1's stomach and back—unquestionably amounted to sexual harassment.<sup>1239</sup> In fact, the law provides that “[d]irect contact with an intimate body part constitutes one of the most severe forms of sexual harassment.”<sup>1240</sup> The Governor denies or states that he does not recall any of these allegations of physical contact, but we find (as discussed above) that the credible evidence establishes that the Governor in fact touched these complainants in the way they have described. Those incidents amount to conduct that clearly constitutes sexual harassment.

*Second*, the Governor's numerous comments of a sexually suggestive nature—including discussions about age differences in partners at the same time as the Governor asked about finding a girlfriend (Ms. Bennett and Trooper #1), the criteria for the girlfriend being someone who “can handle pain”<sup>1241</sup> (Trooper #1), experiences with and views about monogamy (Ms. Bennett), whether an employee had been with an older man (Ms. Bennett), feeling “lonely” and wanting to be “touched”<sup>1242</sup> (Ms. Bennett), the attractiveness of the employee and comparing her to an ex-girlfriend (Ms. Boylan), wanting to go out with two assistants and calling them “mingle mamas”<sup>1243</sup> (Executive Assistant #1 and Ms. McGrath), whether an aide would be willing to cheat on her partner (Executive Assistant #1 and Ms. McGrath), playing “strip poker”<sup>1244</sup> (Ms. Boylan), putting a tattoo on the butt as opposed to the shoulder (Ms. Bennett), and locations of piercings other than the ears (Ms. Bennett)—individually and collectively constitute unlawful sexual harassment. We find these comments—some of which the Governor denied, others of which he claimed were merely misinterpreted—to be, by any reasonable measure, gender-based, offensive, and harassing. The law provides that comments such as these need not have been overtly sexual or motivated by sexual desire,<sup>1245</sup> although we find that these specific comments were plainly of a sexual nature. And the Governor's intent need not have been to harass the complainants, if the effect was the creation of a hostile work environment, which these comments unquestionably did.<sup>1246</sup> The law is clear that these types of sexually suggestive comments—if made as a “joke” or otherwise—particularly when part of a pattern of comments and conduct, as it was with the Governor, constitute unlawful sexual harassment.<sup>1247</sup>

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<sup>1239</sup> We understand that certain criminal authorities, including the Albany Police Department, have been alerted to the most egregious allegations of physical touching, including the groping of Executive Assistant #1. While concluding that the Governor engaged in unlawful sexual harassment, we do not reach in this report a conclusion as to whether the conduct amounts to or should be the subject of criminal prosecution.

<sup>1240</sup> *Redd v. New York Div. of Parole*, 678 F.3d 166, 180 (2d Cir. 2012).

<sup>1241</sup> Trooper #1 Tr. 103:14–104:11.

<sup>1242</sup> Bennett Tr. 166:20–167:9.

<sup>1243</sup> Executive Assistant #1 Tr. 95:9–16; Alyssa McGrath Tr. 50:15–52:3.

<sup>1244</sup> Zemsky Tr. 33:14–37:14.

<sup>1245</sup> *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547 (2d Cir 2010).

<sup>1246</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

<sup>1247</sup> See, e.g., *Manzo v. Sovereign Motor Cars, Ltd.*, No. 08-CV-1229, 2009 WL 3151094, at \*4 (E.D.N.Y. Sept. 29, 2009) (denying summary judgment where, among other things, supervisor admitted during an internal investigation that he asked plaintiff to his hotel room to tell him a “bedtime story” but that he made the statement “in the context of joking”); *Ackerman v. Nat’l Fin. Sys.*, 81 F. Supp. 2d 434, 437–38 (E.D.N.Y. 2000) (denying summary judgment on harassment claim where alleged harasser was “overly friendly; sent [plaintiff] cards; sent [plaintiff] a toy; took [plaintiff] on a meaningless trip . . .; made suggestions of a more intimate relationship; and was constantly around [plaintiff]”).

The complainants—not surprisingly—said that these types of suggestive comments made them feel “very uncomfortable,” “deeply humiliat[ed],” “unsettled,” taken “advantage of,” “uncomfortable,” and “creeped out.”<sup>1248</sup> For the recipients of these inappropriate comments and jokes from the Governor, we find the Governor indeed created a hostile work environment.<sup>1249</sup>

*Third*, we find that under the totality of the circumstances, even the Governor’s less overtly sexual comments that were nonetheless gender-based, also created a hostile work environment. Although the Governor (and certain of his senior staff) sought to downplay what the evidence has revealed as frequent gender-based comments and conduct by the Governor as simply “old fashioned”<sup>1250</sup> or “cultural,”<sup>1251</sup> neither explains nor justifies his behavior, nor makes it non-harassing. For example, referring to female staff as “honey,” “sweetheart,” and “darling,”<sup>1252</sup> kissing staff members on the forehead and some of the senior staff on the lips, holding them tightly around the waist for pictures and other occasions, allowing senior staff members to sit on his lap at official functions, and lying down with his head on the lap of staff members who are women we find, based on our interviews with numerous Executive Chamber employees, did in fact create a hostile work environment for many staff who were women. As a matter of law, claiming that the gender-based behavior is simply a function of being old-fashioned or culturally more affectionate is not a defense to sexual harassment.<sup>1253</sup> As Ms. McGrath succinctly put it, the Governor “makes all this inappropriate and creepy behavior normal.”<sup>1254</sup> Ms. Liss experienced the work environment similarly, stating:

[F]or whatever reason, in his office, the rules were different. It was just, you should view it as a compliment if the Governor finds you aesthetically pleasing enough . . . so even though it was strange and uncomfortable and technically not permissible in a typical workplace environment, I was in this mindset that it was the twilight zone and . . . the typical rules did not apply.<sup>1255</sup>

What these witnesses—and many others—described is not just old-fashioned, affectionate behavior, it was sexual harassment.

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<sup>1248</sup> Bennett Tr. 133:8–19; Boylan Tr. 89:25–91:23; Executive Assistant #1 Tr. 114:23–115:4; Trooper #1 Tr. 76:22–25.

<sup>1249</sup> Ms. McGrath testified that because of the overall environment of the Executive Chamber, it was “hard to describe every single inappropriate incident” that had occurred. Alyssa McGrath Tr. 199:17–23.

<sup>1250</sup> Andrew Cuomo Tr. 242:22–243:3.

<sup>1251</sup> *Id.* at 81:13.

<sup>1252</sup> *Id.* at 242:22–243:3.

<sup>1253</sup> See, e.g., *Carosella v. U.S. Postal Serv.*, 816 F.2d 638, 641 (Fed. Cir. 1987) (finding sufficient evidence supporting administrative finding that postal service employee sexually harassed his subordinate despite employee’s justifications based on his intent, including, *inter alia*, “I’m an Italian[;] I have a bad habit of maybe grabbing people by the arm or touching them in the back or something like that whether it’s a female or male” (ellipses and brackets omitted)).

<sup>1254</sup> Alyssa McGrath Tr. 199:17–200:2.

<sup>1255</sup> Liss Tr. 80:11–22.



## **II. The Executive Chamber’s Failure to Report and Investigate Allegations of Sexual Harassment Violated Their Own Internal Policies**

We conclude that the Executive Chamber failed to follow its own policies and procedures related to sexual harassment in responding to several of the complaints. These failures by the Executive Chamber when allegations of harassment potentially implicated the Governor, in our view, were a symptom of an overall culture that allowed the Governor’s harassing behavior to occur and enabled it to continue.

We find that the problem did not rest with the Executive Chamber’s written policies, which were robust and consistent with the requirements of New York State law, but in the Executive Chamber’s failure to follow them. Specifically, as noted above, the policies properly explained what constitutes sexual harassment and set forth the obligation of supervisory personnel to report possible harassment to GOER, even if the target of the harassment does not wish to file a complaint.<sup>1256</sup> In August 2018, the Governor himself issued Executive Order 187 (incorporated by reference into the State’s sexual harassment policies), which required all investigations into employment-related complaints by employees of all agencies and departments over which the Governor has executive authority to be conducted by GOER.<sup>1257</sup> The stated purpose of the Executive Order was to “promote the effective, complete and timely investigation of complaints of employment-related protected class discrimination.”<sup>1258</sup> The goal was to achieve “more independent investigations.”<sup>1259</sup> The policies were not followed with respect to the allegations of misconduct against the Governor until after our investigation began and public scrutiny was focused on allegations of sexual harassment against the Governor.

### **A. The Executive Chamber’s Handling of Charlotte Bennett’s Complaint**

The handling of Ms. Bennett’s complaint illustrates the deficiencies in the Executive Chamber’s response to allegations against the Governor. Ms. Bennett went to Ms. DesRosiers on June 10, 2020, to tell her about her recent interactions involving conversations of a sexual nature with the Governor that made Ms. Bennett so uncomfortable she no longer wanted to interact with him.<sup>1260</sup> Ms. DesRosiers did not ask Ms. Bennett follow up questions at that time—including not asking her what about her interactions with the Governor specifically had made her uncomfortable—nor did she explain to Ms. Bennett the policies of the Chamber, including that she would be protected from retaliation for making a complaint.<sup>1261</sup> Instead, Ms. DesRosiers told Ms. DeRosa and Ms. Mogul about her conversation with Ms. Bennett and arranged a transfer for Ms. Bennett within days.<sup>1262</sup> Ms. DesRosiers, Ms. DeRosa, and Ms. Mogul did not take any

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<sup>1256</sup> Ex. 8.

<sup>1257</sup> No. 187: *Ensuring Diversity and Inclusion and Combating Harassment and Discrimination in the Workplace*, New York State (Aug. 3, 2018), <https://www.governor.ny.gov/news/no-187-ensuring-diversity-and-inclusion-and-combating-harassment-and-discrimination-workplace>.

<sup>1258</sup> *Id.*

<sup>1259</sup> Volforte Leg. Testimony 208:15–21.

<sup>1260</sup> Bennett Tr. 202:21–204:25; DesRosiers Tr. 222:15–21.

<sup>1261</sup> Bennett Tr. 203:23–204:10; DesRosiers Tr. 225:20–226:4, 227:3–23.

<sup>1262</sup> Bennett Tr. 205:10–12, 207:21–208:20; DesRosiers Tr. 223:4–9, 231:9–233:4, 235:7–22.

other action at that time. On June 29, 2020, Ms. Bennett told a group of junior staff members about some of her inappropriate and sexually suggestive interactions with the Governor and became very upset in their presence.<sup>1263</sup> The next day, on June 30, one of those staff members told Ms. DesRosiers about what Ms. Bennett had said.<sup>1264</sup> Ms. DesRosiers then advised Ms. DeRosa and Ms. Mogul about what the junior staff member reported.<sup>1265</sup> As a result, it was not until more than two full weeks after Ms. Bennett had first raised the issue and had already been transferred to a new position in which she did not have to interact with the Governor did they decide that they needed to interview Ms. Bennett.<sup>1266</sup> Ms. DesRosiers got in touch with Ms. Bennett and pulled her into a meeting that day.<sup>1267</sup>

On the evening of June 30, 2020, Ms. Bennett spoke with Ms. DesRosiers and Ms. Mogul.<sup>1268</sup> Her description of her interactions with the Governor, memorialized in detailed contemporaneous notes taken by Ms. DesRosiers and Ms. Mogul, is consistent with the account she later shared publicly and reflect the plainly sexually suggestive comments that Ms. Bennett has reported publicly and to us.<sup>1269</sup> Ms. DesRosiers noted that Ms. Bennett became emotional when discussing what had happened to her, and that she “was tearing up” during the conversation.<sup>1270</sup> Ms. Bennett expressed fear of what would happen if the Governor knew she had told anyone.<sup>1271</sup> Ms. DesRosiers and Ms. Mogul found Ms. Bennett to be credible.<sup>1272</sup> Ms. Mogul told the Governor and Ms. DeRosa about her conversation with Ms. Bennett, although it is unclear whether she conveyed the details of Ms. Bennett’s allegations.<sup>1273</sup>

On July 1, 2020, a staff member sent Ms. Bennett a copy of the Executive Chamber’s EEO Policy.<sup>1274</sup> The staff member later told Ms. Bennett that Ms. Mogul had asked him for a copy on that day.<sup>1275</sup> Ms. Mogul testified that she reviewed the policy and also consulted with Alphonso David, who at that point did not work for the Executive Chamber and had not worked

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<sup>1263</sup> Bennett Tr. 109:7–110:16; DeRosa Tr. 13–20.

<sup>1264</sup> DesRosiers Tr. 242:14–243:11.

<sup>1265</sup> *Id.* at 246:3–8..

<sup>1266</sup> *Id.* at 236:9–21, 245:25–246:8.

<sup>1267</sup> Bennett Tr. 215:13–17.

<sup>1268</sup> *Id.* at 216:6–24.

<sup>1269</sup> As detailed above, there are a few additional incidents she remembered later, sometimes after her contemporaneous text messages refreshed her recollection.

<sup>1270</sup> DesRosiers Tr. 254:14–17; Mogul Tr. 104:11–14; Ex. 2; Ex. 3.

<sup>1271</sup> Bennett Tr. 227:17–228:13; Ex. 2; Ex. 3.

<sup>1272</sup> DesRosiers Tr. 228:22–23; Mogul Tr. 60:2–4.

<sup>1273</sup> Mogul Tr. 88:10–89:10. The Governor testified that at the time he was told that Ms. Bennett supposedly reported only that he did not sexually harass or make inappropriate advances, that she considered him a friend and mentor, and that he was “paternalistic.” Andrew Cuomo Tr. 174:13–17. Such a description is inconsistent with the detailed description memorialized in Ms. DesRosiers’ and Ms. Mogul’s notes about the parts of the conversation that had made Ms. Bennett so uncomfortable she did not want to even interact with the Governor any more.

<sup>1274</sup> Bennett Tr. 222:17–21.

<sup>1275</sup> *Id.* 229:3–7.

for the State for almost a year.<sup>1276</sup> Ms. Mogul testified that she determined that she did not have to report Ms. Bennett’s concerns to GOER, even though the policy on its face required that any supervisor who becomes aware of conduct of a “sexually harassing nature” must report it to GOER.<sup>1277</sup> Ms. Mogul decided that rather than reporting Ms. Bennett’s concerns to GOER, she would do her own screening first to determine if what Ms. Bennett described constituted unlawful sexual harassment.<sup>1278</sup> She concluded it did not, although she believed and acknowledged in her testimony that some of the Governor’s conduct was inappropriate.<sup>1279</sup> In doing so, rather than looking at the “totality of the circumstances,” she parsed each comment or incident.<sup>1280</sup> She also failed to acknowledge the breadth of the definition of harassment.<sup>1281</sup> For example, as for the discussion about the lowest age cut-off for the Governor’s potential girlfriend, Ms. Mogul stated that was not harassment because it was not sexually explicit.<sup>1282</sup> When the Governor forcefully said to Ms. Bennett, “you were raped, you were raped, you were raped,” that was purportedly about sexual violence, not sex.<sup>1283</sup> And when Ms. Bennett initially discussed her history of sexual assault with the Governor, that too did not count, because Ms. Bennett said that at the time of the conversation she did not find it unwelcome.<sup>1284</sup> She characterized the Governor calling Ms. Bennett “Daisy Duke,”<sup>1285</sup> a commonly understood sex symbol (as any quick internet search would reveal), as merely a reference to her wearing shorts.<sup>1286</sup>

On July 1, 2020, Ms. Bennett got in touch with Ms. DesRosiers to follow up on the prior night’s call; Ms. DesRosiers patched in Ms. Mogul.<sup>1287</sup> Ms. Bennett said that after reading the policy, it seemed that the Governor’s behavior would have to be reported to GOER and an investigation conducted (as any reasonable reading of the policy would indicate).<sup>1288</sup>

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<sup>1276</sup> Mogul Tr. 80:12–20. *Cf.* David Tr. 80:6–7.

<sup>1277</sup> Mogul Tr. 131:3–10; Ex. 8 (Employee Handbook).

<sup>1278</sup> Ms. Mogul, unlike GOER’s investigators, has no training in conducting such investigations and did not do anything other than speak with Ms. Bennett. Mogul Tr. 77:3–78:6, 136:9–14.

<sup>1279</sup> *Id.* at 115:6–19. In his testimony, the Governor also implied the policy required each manager with knowledge of such conduct to first determine if it actually constituted sexual harassment. Andrew Cuomo Tr. 46:16–49:1.

<sup>1280</sup> In determining whether conduct is “severe or pervasive” one must examine “the totality of the circumstances” rather than isolated instances of misconduct. *See Perry*, 115 F.3d at 150–51.

<sup>1281</sup> Ms. Mogul had an alternate theory of why she did not report to GOER—that the Governor had discussed with Ms. Bennett the assault of someone close to him and Ms. Mogul was concerned for the privacy of that assault victim. Mogul Tr. 433:6–23. Of course, she could have reported Ms. Bennett’s complaint without revealing that information.

<sup>1282</sup> *Id.* at 116:25–117:11. Ms. Mogul denied that Ms. Bennett had conveyed that the Governor asked her if she had been involved with older men. *Id.* at 122:18–23. The Governor admits he asked Ms. Bennett the question and that she did not answer it. Andrew Cuomo Tr. 309:4–310:15.

<sup>1283</sup> Mogul Tr. 118:11–13.

<sup>1284</sup> *Id.* at 97:5–14.

<sup>1285</sup> *Id.* at 143:12–144:8.

<sup>1286</sup> *Id.*

<sup>1287</sup> Bennett Tr. 216:4–21; DesRosiers Tr. 68:10–17.

<sup>1288</sup> Mogul Tr. 104:25–105:5.

Ms. Bennett told us during her testimony that she did not want that to happen, she was scared to even see the Governor in the hallway, and was “just terrified,” as she had “no concept of how far” senior staff would “go to protect [the Governor] and didn’t want to find out.”<sup>1289</sup> Ms. Mogul told her that Ms. Mogul was very familiar with the policy and had reviewed the law, and that they did not need to report it because Ms. Bennett had taken action to stop the Governor’s offensive conduct before it crossed a line.<sup>1290</sup> On July 1, Ms. Bennett expressed her appreciation to Ms. DesRosiers and Ms. Mogul; she was relieved she did not have to deal with possible retaliation.<sup>1291</sup> Ms. Bennett testified that in responding to Ms. Mogul and Ms. DesRosiers she was trying to be as agreeable as possible and convey to the Governor and the Executive Chamber that she was not a threat.<sup>1292</sup>

Given the legal standard under state law and the sexual harassment policy, we conclude that the purported determination by Ms. Mogul, Ms. DesRosiers, and Ms. DeRosa—and others informed of Ms. Bennett’s allegations at the time—that the comments reported by Ms. Bennett did not constitute sexual harassment, or were not even of a “sexually harassing nature” under the policies, was wrong. Indeed, the Governor himself signed a bill just one year earlier changing New York State law to eliminate the requirement that the conduct be “severe or pervasive” to constitute actionable sexual harassment, a standard that he declared “absurd.”<sup>1293</sup> But even if the standard had still been the higher “severe or pervasive” one (which under state law, it was not), an effective policy encourages survivors and requires managers to report conduct of a potentially harassing nature so that it can be investigated such that a proper determination can be made and that illegal harassment is not allowed to persist.<sup>1294</sup> The Director of GOER testified that GOER investigates all allegations of discrimination, even a single sexual comment or joke.<sup>1295</sup>

We also conclude that it is not a fair reading of the Executive Chamber policy that counsel or any supervisor to whom allegations are reported should serve a screening role in the way that Ms. Mogul, Ms. DesRosiers, Ms. DeRosa, and others did. The Executive Order and the policy make it mandatory for GOER to investigate all allegations of a sexually harassing nature.<sup>1296</sup> The Executive Chamber’s policy requirement that GOER be involved in issues of

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<sup>1289</sup> Bennett Tr. 227:11–228:9.

<sup>1290</sup> *Id.* at 224:16–20; Mogul Tr. 130:3–131:10; Ex. 2.

<sup>1291</sup> *Id.* at 225:13–226:2.

<sup>1292</sup> *Id.*

<sup>1293</sup> See Assemb. B. A8421, Gen. Assemb., 2019-2020 Leg. Sess. (N.Y. 2019); *Governor Cuomo Signs Legislation Enacting Sweeping New Workplace Harassment Protections*, Office of Governor Andrew Cuomo (Aug. 12, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-enacting-sweeping-new-workplace-harassment-protections>.

<sup>1294</sup> Ex. 8 (Employee Handbook); see Chai R. Feldblum & Victoria A. Lipnic, Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace, Part Three, C; Volforte Leg. Testimony 260:4–8.

<sup>1295</sup> Volforte Leg. Testimony 214:1–9, 236:11–22.

<sup>1296</sup> See Ex. 8; No. 187: *Ensuring Diversity and Inclusion and Combating Harassment and Discrimination in the Workplace*, New York State (Aug. 3, 2018), <https://www.governor.ny.gov/news/no-187-ensuring-diversity-and-inclusion-and-combating-harassment-and-discrimination-workplace>; Volforte Leg. Testimony 218:10–225:4, 228:11–18, 229:10–11. Although GOER’s policy leaves open the possibility that the agency itself may conduct the investigation pursuant to the agency’s procedures, as the Governor admitted, the Executive Chamber does not have an alternative policy for investigating harassment complaints. See Andrew Cuomo Tr. 46:11–15.

potential sexual harassment is designed to avoid exactly what occurred with respect to Ms. Bennett. And while the Governor appoints the Director of GOER and that person reports to the Governor's senior staff, we do not believe that was a sufficient reason not to involve GOER in Ms. Bennett's allegations, as Ms. Lacewell, the Superintendent of the Department of Financial Services who also was consulted regularly on sexual harassment issues by the Executive Chamber, suggested in her testimony.<sup>1297</sup> At a minimum, GOER would have provided a more objective and experienced view on how to handle Ms. Bennett's allegations, which is exactly why the EEO Policy had been changed by the Executive Order to refer complaints to GOER.<sup>1298</sup> While no one can state how, if at all, the Governor's conduct would have changed had formal action been taken in response to Ms. Bennett's complaint,<sup>1299</sup> we note that it was about five months later that the Governor groped the breast of Executive Assistant #1.

## **B. The Executive Chamber's Handling of Other Complaints**

Similarly, but for different reasons, we find that the Executive Chamber did not follow its policy and refer Ms. Boylan's December 2020 allegation of sexual harassment to GOER. No one in the Executive Chamber took Ms. Boylan's complaint seriously—characterizing it immediately as “crazy,”<sup>1300</sup> and “made [] up,” The Executive Chamber did not even consult or consider the EEO Policy with respect to Ms. Boylan despite at least Ms. DeRosa and Ms. Mogul being aware that Ms. Bennett had made credible claims about the Governor's conduct just six months earlier.<sup>1301</sup> Ms. Mogul shared the information about Ms. Bennett with Ms. Lacewell and Mr. Cohen as well, who also immediately discounted Ms. Boylan's sexual harassment allegations as politically motivated.<sup>1302</sup> The main focus of this team of current and former senior staff members and other trusted confidantes was not on determining the truth of Ms. Boylan's assertions or whether there may be a pattern of inappropriate conduct by the Governor that could be emerging (in light of Ms. Bennett's prior allegations), but on protecting the Governor. They simply assumed the allegation false and focused on attacking and neutralizing Ms. Boylan by distributing disparaging information about Ms. Boylan to the press and conducting outreach to

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<sup>1297</sup> GOER set up a process to retain an outside law firm to investigate if a GOER employee complains of discrimination or harassment. Volforte Leg. Testimony 256:25–257:16. Cf. Lacewell Tr. 74:2–22.

<sup>1298</sup> GOER has experienced staff conduct investigations and has a standard process for conducting investigations, which includes interviewing the parties and witnesses and requesting and reviewing documents, including emails. Volforte Leg. Testimony 210:15–23, 212:4–5, 223:9–13, 244:22–245:11, 246:13–247:7.

<sup>1299</sup> At some point, possibly in June or July 2020, they took steps to prevent the Governor from meeting alone with junior staff members who were women, but did so, according to Ms. Mogul and Ms. DeRosa, to protect the Governor from allegations of harassment. Mogul Tr. 254:6–17; DeRosa Tr. 423:3–21. Ms. Mogul also testified that in December 2020 she asked another attorney on staff to start conducting informal exit interviews. Mogul Tr. 252:18–25.

<sup>1300</sup> DeRosa Tr. 524:15.

<sup>1301</sup> *Id.* at 342:7–18; Mogul Tr. 79:11–14.

<sup>1302</sup> Mogul Tr. 82:6–14, 208:3–12.

former staff members to determine whether there might be any other women who might share negative information about the Governor.<sup>1303</sup>

Ms. Mogul testified that after talking to senior staff members about other women who might have had concerns about the Governor's conduct, she determined that she needed to follow up only with Kaitlin.<sup>1304</sup> Kaitlin came to the attention of the Executive Chamber because she tweeted in support of Ms. Boylan and because, after she discussed these tweets and her experiences with the Governor with the head of the agency for which she was working, the head of the agency and its general counsel reached out to attorneys in the Chamber.<sup>1305</sup> Ms. Mogul spoke with the head of the agency and its general counsel multiple times, and sometimes with Ms. Lacewell.<sup>1306</sup> The head of the agency and the general counsel conveyed that Kaitlin had shared with them the details of incidents with the Governor that had made her uncomfortable, including how she was hired and the incident when the Governor asked her to help him look up car parts while seated behind her, and said she had retained an attorney to possibly pursue a sexual harassment claim.<sup>1307</sup> They also conveyed that Kaitlin was worried about losing her job.<sup>1308</sup> Kaitlin was scared after seeing that Ms. Lacewell checked her LinkedIn page and after a former colleague called Kaitlin out of the blue to tell her that reporters were asking about her and tried to get her to agree that Kaitlin had not experienced sexual harassment by the Governor.<sup>1309</sup> When Kaitlin found out the Executive Chamber was told she was claiming sexual harassment and had retained an attorney, she became very upset and told the head of her agency that she was not claiming sexual harassment, had not hired an attorney, and wished to convey that to the Chamber.<sup>1310</sup> Ms. Mogul spoke to Kaitlin with Kaitlin's supervisor.<sup>1311</sup> When Kaitlin told Ms. Mogul that she was not claiming sexual harassment and had not hired an attorney, Ms. Mogul did nothing more. She did not ask Kaitlin about any of the incidents Kaitlin had shared with the head of her agency.<sup>1312</sup> Ms. Mogul did not report the specific allegations Kaitlin had made to GOER, did not tell Kaitlin that she could make a report to GOER, and did not tell Kaitlin about protection from retaliation.<sup>1313</sup> As with Ms. Bennett, upon learning that the target of the harassment was not taking action, the Executive Chamber considered the matter resolved.

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<sup>1303</sup> Moretoni Tr. 228:14–20; Walsh Tr. 273:8–11. Ms. Benton claimed that the purpose was to make former employees aware that Ms. Boylan had been reaching out to former staff members in an effort to gather support for her allegations. Benton Tr. 241:10–14.

<sup>1304</sup> Mogul Tr. 218:10–17.

<sup>1305</sup> DeRosa Tr. 608:2–11, 624:15–625:8.

<sup>1306</sup> Lacewell Tr. 178:10–183:6; Mogul Tr. 307:7–324:16.

<sup>1307</sup> Mogul Tr. 311:19–313:19, 331:2–5.

<sup>1308</sup> *Id.* at 314:9–12.

<sup>1309</sup> Kaitlin Tr. 147:9–148:11, 152:6–153:12; Ex. 69.

<sup>1310</sup> Kaitlin Tr. 162:2–164:6.

<sup>1311</sup> *Id.* at 164:7–11; Mogul Tr. 339:2–3.

<sup>1312</sup> Kaitlin Tr. 164:8–165:9; Mogul Tr. 339:2–6, 353:24–354:6, 354:18–355:9. Ms. Mogul testified that Kaitlin seemed upset and she did not want to “cross-examine” her. Mogul Tr. 354:8–17.

<sup>1313</sup> Kaitlin Tr. 166:3–166:18; Mogul Tr. 357:10–21.

The Executive Chamber’s failure to report any allegations against the Governor to GOER prior to March of this year or to take any meaningful action in response thereto in relation to the Governor himself stands in contrast to how the Executive Chamber handled a rumor about a former staff member who was accused of referring to Ms. DeRosa as a “bitch,” where although GOER was not notified, action was swift and resolute.<sup>1314</sup> According to Ms. DesRosiers, after Ms. DeRosa heard that this staff member had referred to her as a “bitch” the Executive Chamber investigated promptly by asking his subordinates if they had had any negative interactions with him<sup>1315</sup> and transferred him out of his role.<sup>1316</sup> Ms. DeRosa confirmed that this employee was transferred because Ms. DeRosa told Ms. Garvey and Ms. Mogul that she did not feel comfortable working with him, and further stated that the employee received counseling on his behavior.<sup>1317</sup>

The Executive Chamber has also changed how it handles such allegations since March 2021. Unlike how Ms. Bennett, Ms. Boylan, and Kaitlin’s allegations were handled in June and December 2020, when the Executive Chamber learned first of Executive Assistant #1’s allegations and then Ms. McGrath’s, Ms. Garvey filed complaints on their behalf with GOER. In sum, as the Executive Chamber now seems to recognize, the Executive Chamber’s EEO Policy makes clear that allegations of potential sexual harassment must be reported to GOER for an investigation.

### **III. The Response to Lindsey Boylan’s Allegation of Sexual Harassment Constituted Unlawful Retaliation**

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We conclude that the Executive Chamber engaged in prohibited retaliation against Ms. Boylan in response to the allegation she made on December 13, 2020 that the Governor had sexually harassed her. Unlawful retaliation occurs when an employer takes an adverse action against an employee or former employee (one that would dissuade a reasonable worker from making or supporting a charge of discrimination) because that person made a good faith complaint (formal or informal) of unlawful discrimination or harassment.<sup>1318</sup> We find that this occurred with respect to Ms. Boylan.

As detailed above, the incidents Ms. Boylan later described in her Medium article and her testimony have largely been admitted and corroborated. Under both federal and State law, Ms. Boylan is protected from retaliation so long as she had a “good faith, reasonable” belief that the conduct about which she complained constituted unlawful harassment.<sup>1319</sup> The Governor and some of his senior staff questioned at the time (and continue to question) Ms. Boylan’s motivations, claiming that she made her allegations of sexual harassment for political reasons, *i.e.*, to bolster her political campaign, or generally to be vindictive or retaliatory herself. But retaliation is unlawful regardless of whether the employer believes the complainant is acting with

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<sup>1314</sup> DesRosiers Tr. 315:21–316:21.

<sup>1315</sup> *Id.*

<sup>1316</sup> *Id.* at 318:19–318:23.

<sup>1317</sup> DeRosa Tr. 141:1–144:25.

<sup>1318</sup> *Hicks*, 593 F.3d at 164.

<sup>1319</sup> *Summa*, 708 F.3d at 126.

a good faith belief that she was harassed.<sup>1320</sup> Even if Ms. Boylan decided to go public with the allegations when she did with the hope of boosting her profile during her political campaign,<sup>1321</sup> it does not justify, as a matter of law, an employer taking what amounts to retaliatory action. In addition, whatever her motivations for making the allegation, it does not alter our finding that she also had a good faith belief that the Governor’s conduct constituted sexual harassment.

Ms. Boylan engaged in conduct protected by the civil rights laws when she tweeted in December 2020 that the Governor sexually harassed her. Social media is a well-recognized forum for engaging in protected activity.<sup>1322</sup> That Ms. Boylan had left the Executive Chamber before December 13, 2020 is also not relevant because the law—and the State’s sexual harassment policy—protects former employees such as Ms. Boylan from retaliation.<sup>1323</sup> Despite a number of Executive Chamber witnesses’ claims that their retaliatory actions were in response to other claims made by Ms. Boylan, it is undisputed that the Executive Chamber did not take the actions we find retaliatory after Ms. Boylan’s earlier negative tweets regarding the Executive Chamber, including tweets in which she described the Chamber as “toxic,”<sup>1324</sup> but rather acted only and immediately after her December 13, 2020 tweet alleging the Governor sexually

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<sup>1320</sup> See *Sanders*, 525 F. Supp. 2d at 367.

<sup>1321</sup> Ms. Boylan testified that after her tweets, Ms. Bennett reached out to her and told her that she had been harassed as well, Boylan Tr. 208:3–209:2, which was corroborated not only by Ms. Bennett’s testimony, Bennett Tr. 248:11–249:5, but by a Twitter direct message from Ms. Bennett to Ms. Boylan sent on December 8, 2020. It reads:

Thank you for speaking up about Gov. I just left last month (the privilege of being able to leave is so real—currently unemployed) after two years in the chamber. I was his assistant and senior briefer (two sep roles for little \$, couldn’t even afford to move out of my parents’ house even though I held two positions). The verbal abuse, intimidation and living in constant fear were all horribly toxic—dehumanizing and traumatizing. And then he came onto me. I was scared to imagine what would happen if I rejected him, so I disappeared instead. My time in public service ended because he was bored and lonely. It still breaks my heart. Thank you for sharing truth that others are scared to share. I am still healing. It is nice to hear that I am not alone.

Ex. 55. Ms. Boylan testified that hearing about Ms. Bennett motivated her to gather her thoughts and tell her full story. Boylan Tr. 209:3–18. Whether Ms. Boylan was in fact motivated by learning about Ms. Bennett, raising the profile of her political campaign, or some combination of both (or some other reason altogether), because we find that she had a good faith reasonable basis for her allegation of sexual harassment, it is not relevant to our ultimate determination.

<sup>1322</sup> See *Sumner*, 899 F.2d at 209 (protected activity includes acts such as writing critical letters to customers); *Kane v. Fin. Am. Reverse, LLC*, 2018 WL 2001810, at \*4 (S.D. Ind. Apr. 30, 2018) (Facebook post is protected activity); see also *Crawford*, 555 U.S. at 276 (“opposition” means to “[t]o resist or antagonize ...; to contend against; to confront; resist; withstand”) (quoting Webster’s New Int’l Dictionary 1710 (2d ed. 1957)).

<sup>1323</sup> The Executive Chamber has argued in a written submission to us that, in order to constitute retaliation against a former employee, there must be some connection to current or prospective employment. However, the Supreme Court has explicitly held that anti-retaliation protections extend “beyond workplace-related or employment related retaliatory acts and harms.” *White*, 548 U.S. at 67. The Executive Chamber has relied on cases that pre-date *White*, or lower court cases that rely on outdated law. See, e.g., *Marchuk v. Faruqi & Faruqi LLP*, 100 F. Supp. 3d 302, 311 (S.D.N.Y. 2015) (relying on *Galabaya v. New York City Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000), a case the Second Circuit has repeatedly held does not apply to retaliation claims, see *Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30, 43–44 (2d Cir. 2019)).

<sup>1324</sup> Ex. 63 (Ms. Boylan Dec. 5, 2020 tweets).



harassed her.<sup>1325</sup> In fact, senior staff within the Executive Chamber acknowledged that they had debated responding to Ms. Boylan's tweets regarding the toxicity of the Executive Chamber but decided not to. They only changed their view after Ms. Boylan tweeted that the Governor sexually harassed her.<sup>1326</sup> In response to Ms. Boylan's tweet, several current and former Executive Chamber employees engaged in a flurry of communication, the Confidential Files about Ms. Boylan drafted by Mr. David were retrieved from counsel's office, Mr. Azzopardi hunted for Wite-Out to redact the names of other employees from the Confidential Files (while leaving Ms. Boylan's name), and Mr. Azzopardi began transmitting the documents to reporters.<sup>1327</sup> They also asked reporters to hold off writing a story until they had received the documents.<sup>1328</sup> This frenzied activity occurred only and immediately after Ms. Boylan made the allegation of sexual harassment.

The actions taken by the Executive Chamber in (1) leaking to the press confidential records relating to an internal investigation into Ms. Boylan on unrelated issues, and then (2) disseminating the substance of the disparaging letter or op-ed drafted by the Governor to numerous people outside the Chamber who were not previously aware of the substance therein, is the type of conduct that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."<sup>1329</sup> Making negative statements generally about a complainant or releasing sensitive confidential information can constitute retaliation.<sup>1330</sup> Here, the files and draft letter contained such sensitive, confidential information and were prominently marked "Privileged and Confidential" throughout. Indeed, Ms. Boylan described the actions as the "destroy Lindsey phase" of the Executive Chamber's response,<sup>1331</sup> launched after her allegation of sexual harassment. Not surprisingly, these actions also sent a chilling message to other would be complainants. As Executive Assistant #1, who personally observed the retaliatory activity, noted after Ms. Boylan's tweet alleging sexual harassment:

I would be in the room when they were actively trying to discredit her. They were actively trying to portray a different story of it. Trying to make her seem like she was crazy and wanting to get her personnel file out. That was the first time that I had seen someone

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<sup>1325</sup> See *Zann Kwan*, 737 F.3d at 845 (finding a three-week gap between protected activity and an adverse action to suffice for causation).

<sup>1326</sup> Azzopardi Tr. 80:14–81:1; DeRosa Tr. 533:3–542:17.

<sup>1327</sup> Executive Assistant #1 Tr. 128:23–130:19, 133:2–10; Vlasto Tr. 187:12–188:14; Ex. 61; Ex. 77; Ex. 106.

<sup>1328</sup> Ex. 78.

<sup>1329</sup> *Hicks*, 593 F.3d at 69 (quoting *White*, 548 U.S. at 57). The Executive Chamber has argued to us that because Ms. Boylan was not in fact deterred from further protected activity, its actions cannot constitute retaliation. However, "[i]f the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal." *EEOC Enforcement Guidance on Retaliation and Related Issues*, EEOC-CVG-2016-1 (August 25, 2016), citing *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997); *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) ("[A]n employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result.").

<sup>1330</sup> One of the attorneys who participated in the drafting of one of the leaked personnel memoranda noted surprise that a memorandum she thought was protected by attorney-client privilege (and clearly marked so) was leaked without her knowledge and was "dismayed" at its broad dissemination. Ex. 14.

<sup>1331</sup> Boylan Tr. 210:23–211:6.

publicly come out and saying something against him and sexually harassing them and them going behind the scenes and trying to discredit her.<sup>1332</sup>

Those involved in the decision to release the document tried to justify their actions by claiming that the leaked Confidential Files did not specifically address Ms. Boylan's sexual harassment allegation made on December 13, 2020, but rather her December 5, 2020 tweet that she had "tried to quit three times before it stuck."<sup>1333</sup> But, as long as Ms. Boylan's December 13 tweet accusing the Governor of sexual harassment was a determining factor in the Executive Chamber's decision to release the personnel file and circulate the draft letter—which we find to be the case—such action is unlawful. That the Executive Chamber might have had other reasons for taking their actions does not make it lawful.<sup>1334</sup> The timing and testimony ties the response clearly to the sexual harassment tweet—in other words, had the sexual harassment tweet not occurred, the Executive Chamber would not have engaged in its retaliatory activity. Ms. DeRosa, the person who decided to release the Confidential Files, testified that while there was discussion about whether to release the documents before December 13, 2020, she decided not to release them previously. But as soon as she saw the December 13 sexual harassment tweet, she had the documents sent to reporters.<sup>1335</sup>

Further, the Executive Chamber witnesses are not correct that the released files establish that Ms. Boylan's pre-December 13 tweets were "false."<sup>1336</sup> A number of them have taken the position that the pre-December 13 tweets were false in the following respects: (1) that Ms. Boylan tweeted that she resigned after trying to resign three prior times, and suggested that her resignation was tied to the "toxic" work environment; and (2) that she did not sign the document they asked her to sign when she left, giving the impression that she was asked to sign a non-disclosure agreement. In discussing his reason for releasing the documents to the press, Mr. Azzopardi claimed that Ms. Boylan had been fired, and in fact told reporters that she "had been fired after being confronted" about complaints.<sup>1337</sup> However, the evidence shows that Ms. Boylan did in fact resign, even if her resignation was not prompted by a sexual harassment incident and even if it was prompted by being confronted with certain complaints made against her. Those involved in the meeting that prompted Ms. Boylan's resignation said that the purpose of the meeting was to obtain her response to the issues that had been raised, not fire her.<sup>1338</sup> In fact, the memorandum that was released to the press specifically stated, under the header "Ms. Boylan's Resignation" that "[d]uring the meeting Mr. David was clear that she was not being asked to resign, fired or pushed out in any way. In no uncertain terms he said that she was simply being counseled in response to the complaints that have been made about her from

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<sup>1332</sup> Executive Assistant #1 Tr. 128:25–129:10.

<sup>1333</sup> Azzopardi Tr. 79:1–81:23.

<sup>1334</sup> There can be multiple "but for" causes so long as the adverse action would not have been taken absent the protected activity. *Zann Kwan*, 737 F.3d at 846 & n.5.

<sup>1335</sup> DeRosa Tr. 522:16–542:17.

<sup>1336</sup> See, e.g., Azzopardi Tr. 81:18–21; Cohen Tr. 111:16–23.

<sup>1337</sup> Azzopardi Tr. 84:13–85:6.

<sup>1338</sup> Mr. David testified that when Ms. Boylan responded to the allegations by saying that she resigned, they told her that they were not asking her to resign. David Tr. 216:15–24.

multiple sources.”<sup>1339</sup> There is also evidence that Ms. Boylan had resigned, or at least walked out, on prior occasions and that senior staff members urged her to return to work.<sup>1340</sup> For example, Ms. DeRosa admitted that in July 2018, a couple months before Ms. Boylan resigned, Ms. Boylan left the office and Ms. DeRosa called her to ask her to return.<sup>1341</sup> Mr. Zemsky also recalled a time when Ms. Lacewell called him saying that Ms. Boylan had resigned and asking if he would call her and convince her to stay.<sup>1342</sup>

Executive Chamber witnesses also justified the release of the memoranda as correcting the allegedly “false” statement in Ms. Boylan’s December 13 tweet that her work was “very good.”<sup>1343</sup> But the Governor himself testified that, based on his observations of the quality of Ms. Boylan’s work, he “thought she was very good,” and that Mr. Zemsky also thought she was “very good.”<sup>1344</sup> And in any event, the memoranda that they released did not relate to or discuss the quality of her substantive work, but rather her interactions with her colleagues and compliance with agency protocols.

The final allegation the Executive Chamber claims it was correcting in releasing the confidential documents was Ms. Boylan’s statement in her December 5 tweet that she did not sign “whatever they told her to sign when she left.”<sup>1345</sup> The leaked personnel memoranda do not relate to the paperwork, if any, that attended the end of Ms. Boylan’s employment, so the claim that releasing the confidential memoranda countered that part of Ms. Boylan’s tweet also lacks credibility. More importantly, it is clear from the timing and from Ms. DeRosa’s and Mr. Azzopardi’s testimony (as well as common sense and the other factual circumstances) that the December 13 “sexual harassment” tweet was the impetus for the release of the personnel file.<sup>1346</sup>

Significantly, those involved in releasing the Confidential Files specifically stated that they gave no thought to whether their actions constituted retaliation.<sup>1347</sup> Some stated that they consulted with lawyers and that Ms. Mogul and Ms. Lacewell spoke with the Director of GOER, and then asserted privilege over all of those conversations during our investigation.<sup>1348</sup> But those involved testified that they did not consider the question of retaliation at all, and the Director of GOER testified that he was never shown the memoranda, told the type or substance of the

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<sup>1339</sup> Ex. 61.

<sup>1340</sup> DeRosa Tr. 228:12–238:12; Zemsky Tr. 70:5–21.

<sup>1341</sup> DeRosa Tr. 228:12–238:12. When the Executive Chamber was debating how to respond to an upcoming press story about that particular incident in March 2021, Ms. Garvey cautioned that responding about a true incident by attacking Ms. Boylan’s workplace conduct could constitute unlawful retaliation. Cohen Tr. 78:18–82:6; Ex. 107; Ex. 108; Ex. 109; Ex. 110.

<sup>1342</sup> Zemsky Tr. 70:5–21.

<sup>1343</sup> Garvey Tr. 107:17–108:11.

<sup>1344</sup> Andrew Cuomo Tr. 61:2–14.

<sup>1345</sup> Ms. Garvey testified that she did not know if there was any exit paperwork in Ms. Boylan’s file and had not looked into it. Garvey Tr. 109:3–110:8.

<sup>1346</sup> DeRosa Tr. 533:3–542:17.

<sup>1347</sup> *Id.* at 543:20–22; Mogul Tr. 178:7–15; Vlasto Tr. 140:2–141:14.

<sup>1348</sup> Azzopardi Tr. 86:6–87:14; DeRosa Tr. 542:23–543:13.

specific documents being released, or told the circumstances. He was just asked general questions about disclosing “personnel records.”<sup>1349</sup> The Director of GOER testified that the release of “documents concerning an investigation against Ms. Boylan for complaints that had been made against Ms. Boylan” would potentially violate the employee handbook.<sup>1350</sup> To the extent any individual involved in the decision to release the Confidential Files seeks to claim that their actions were lawful because they consulted with the other counsel, they will need to disclose the actual advice given—and because those involved testified that they did not consider the question of retaliation, we do not find it credible that legal advice was sought or relied on as to the question of retaliation.<sup>1351</sup> In any event, regardless of the involvement of counsel, we find that the result of the Executive Chamber’s release of the Confidential Files related to Ms. Boylan constituted unlawful retaliation.

We also find that the draft letter or op-ed attacking Ms. Boylan—particularly when combined with the release of the confidential internal records to the press—constitutes retaliation. There were several iterations of the letter, the first of which a number of witnesses have testified was drafted by the Governor.<sup>1352</sup> The letter attacked Ms. Boylan for alleged conduct at work and for alleged interactions with men other than the Governor, as well as postulating various political conspiracies. While this letter or op-ed was not published,<sup>1353</sup> it was sent to or read to a variety of people outside the Executive Chamber, either to get their advice on its contents or to ask the recipient to agree to sign the statement.<sup>1354</sup> At Ms. DeRosa’s direction, Ms. Mogul tried to fact-check the letter and was unable to find support for many of its allegations.<sup>1355</sup> The draft was written with a few purported authors included, among them Mr. David. Mr. David testified that he did not agree to have his name attached to the statement because he did not know if the statements in it were true and he did not think it was a good response.<sup>1356</sup> He nonetheless agreed to read it and convey its substance to other former employees to see if they would sign it.<sup>1357</sup> Contemporaneous documents reflect that some of those reviewing the letter thought it was a terrible idea, with some noting that it was victim shaming.<sup>1358</sup> Ms. DeRosa testified that the Governor nonetheless strongly advocated releasing

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<sup>1349</sup> Volforte Tr. 132:8–144:21.

<sup>1350</sup> *Id.* at 153:25–154:14.

<sup>1351</sup> *Cf. Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d 555, 562–63 (SDNY 2008), *aff’d*, 344 F. App’x 628 (2d Cir. 2009) (rejecting defense based on undisclosed advice of counsel).

<sup>1352</sup> Benton Tr. 194:18–25; DeRosa Tr. 632:17–20. The Governor did not specifically recall drafting the first draft of the letter, but testified that he was involved in drafting the proposed letter or op-ed. Emails among those involved in its drafting show that various drafts came from the email account of Ms. Benton, which many, including the Governor and Ms. Benton, have acknowledged indicates the Governor’s involvement in the draft. Benton Tr. 353:22–356:16.

<sup>1353</sup> As the letter and op-ed were not publicly released, we will not provide further details of the disparaging contents of the document and have redacted portions of documents that reveal the substance.

<sup>1354</sup> *See, e.g.*, Benton Tr. 226:3–9; Lacewell Tr. 154:22–155:13.

<sup>1355</sup> DeRosa Tr. 652:13–653:14; Mogul Tr. 198:22–202:16.

<sup>1356</sup> David Tr. 262:19–263:4. Ms. DeRosa testified that while initially Mr. David said he would not sign the letter, he later said, “If you need me to, I will.” DeRosa Tr. 656:5–18.

<sup>1357</sup> David Tr. 263:11–265:3.

<sup>1358</sup> *See, e.g.*, Ex. 111; *see also* DeRosa Tr. 645:11–646:14, 651:12–655:17, 657:3–13, 659:15–20.

the statement, over numerous objections, and directed that they try to get people to agree to sign;<sup>1359</sup> the Governor denies doing so.<sup>1360</sup> Ms. DeRosa directed Mr. Vlasto to provide part of the information from the letter to a reporter,<sup>1361</sup> and the New York Post ultimately obtained a copy.<sup>1362</sup> While not as widely disseminated as the personnel memoranda, the malicious statements about Ms. Boylan were shared widely enough that they could dissuade a reasonable person from speaking out. Thus, we find the drafting and sharing of this op-ed or letter, particularly combined with the other actions taken against Ms. Boylan, including the dissemination of the Confidential Files to the press, constituted unlawful retaliation.

#### **IV. The Culture and Environment of the Executive Chamber Contributed to the Conditions that Led to Sexual Harassment and the Problematic Responses to Allegations of Harassment**

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Many witnesses interviewed during our investigation—and certainly the complainants who worked in the Executive Chamber—raised the challenging and difficult culture and environment in the Executive Chamber as a factor that heavily impacted their interactions with the Governor and his senior staff. Other than a handful of senior staff within the Governor’s closest inner circle, most of the current and senior staff described a work environment that they found to be extremely tense, fearful, and intimidating. Witnesses also often used the words “toxic” and “abusive.”

Although some explained and justified this culture as a function of the importance of the work and the Governor’s perfectionist nature—and certainly those appear to have been contributing factors—much of what we learned during our investigation about the Executive Chamber’s culture could not be explained or justified by those circumstances alone. For example, many current and former Chamber employees described: (1) a pattern and culture of bullying, intimidation, and retaliation that appeared to not only to be condoned, but expected and even promoted as an effective management technique and as evidence of strength and commitment; (2) a common understanding, based on personal and collective experiences, that disagreements with the Governor and the senior staff could, and did, result in severe, negative consequences; and (3) an intense and overriding focus on secrecy and loyalty that meant that any and all perceived acts of “disloyalty,” including criticism of the Governor or his senior staff, would be met with attacks of a personal and professional nature.

We found in our investigation that experiences with this culture of intimidation and retribution were not limited to those within the Executive Chamber. Many witnesses, including those who worked at other New York State agencies, including the New York State Troopers and elsewhere, described interactions that they perceived to be threatening and bullying to the extreme. Indeed, most witnesses—again, other than those with close ties to the Chamber’s

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<sup>1359</sup> DeRosa Tr. 661:20–662:7.

<sup>1360</sup> The Governor testified that he followed the example of Abraham Lincoln, who would write out long responses to negative press and then throw the response away, and that it was merely cathartic. Andrew Cuomo Tr. 152:11–22. In light of the numerous drafts circulated among numerous people, as well as Ms. DeRosa’s testimony, the Governor’s explanation is not credible.

<sup>1361</sup> DeRosa Tr. 642:2–643:16.

<sup>1362</sup> See, e.g., Ex. 85.

leadership—expressed concern and fear that providing any negative information to us in our investigation would lead to harm and retribution. Their trepidation arose from the way in which they observed the Executive Chamber respond to anyone who might do or say anything that was damaging to the Governor. Their fear was exacerbated by the recognition that, as Governor of New York, he remained extremely powerful and that he was known to have a “vindictive” nature.<sup>1363</sup> As Ms. Bennett explained after she raised her complaint to senior staff, “I was scared even to see him in the hallway, which was a rare occurrence any way. I was honestly—I was just terrified . . . I feel like I sat next to senior staff as they worked and I have no concept of how far they’d go to protect him and didn’t want to find out.”<sup>1364</sup>

This culture of fear, intimidation, and retribution co-existed in the Executive Chamber with one that accepted and normalized everyday flirtations and gender-based comments by the Governor. As Ms. McGrath noted, “he makes all this inappropriate and creepy behavior normal and like you should not complain.”<sup>1365</sup> Ms. Liss put it this way, “I thought it was weird but typical of him . . . [F]or whatever reason in his office the rules were different. It was just, you should view it as a compliment if the Governor finds you aesthetically pleasing enough . . . It was like we were in a different decade.”<sup>1366</sup> In fact, the Governor himself admitted that he was “a little old fashioned,” and had been changing his behavior “recently” because of “shifting norms,” but “there are times” when he still slips.<sup>1367</sup> A number of our complainants noted how this confluence of fear and flirtation affected how they received and responded to the Governor’s conduct and contributed to the overall hostile work environment. As Executive Assistant #1 described her reaction after the Governor groped her breast:

I knew what just went on, I knew and he knew too that that was wrong. And that I, in no way, shape or form, invited that nor did I ask for it . . . Who am I going to tell? My supervisor was Stephanie Benton . . . the Governor’s right-hand person and if I told her I was going to be asked to go somewhere else or transferred to [another] agency. And the sad part of this whole thing, I actually like my job. I was proud to work, especially during this pandemic.<sup>1368</sup>

Trooper #1 noted that the Governor had “a habit of being creepy and flirtatious” and no one can say anything because for fear that they will be “retaliated against . . . . And everybody, for the most part, gets promoted because they’re in the good graces of the Governor. So if they stay quiet or give him information, they’ll get promoted, or something good will happen to them. That’s just like the culture again in PSU.”<sup>1369</sup>

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<sup>1363</sup> Trooper #1 Tr. 139:8–9 (“Everyone knows he’s very vindictive.”).

<sup>1364</sup> Bennett Tr. 228:2–9.

<sup>1365</sup> Alyssa McGrath Tr. 199:17–200:2.

<sup>1366</sup> Liss Tr. 80:6–81:5.

<sup>1367</sup> Andrew Cuomo Tr. 83:12–19, 242:18–243:16.

<sup>1368</sup> Executive Assistant #1 Tr. 145:18–146:15.

<sup>1369</sup> Trooper #1 Tr. 81:20–22, 139:19–140:6.

As noted above, the Executive Chamber's response to the allegations of sexual harassment not only confirmed and informed the complainants' fears, but also evidenced the influence of the culture of fear and normalization. When Ms. Bennett raised her complaints in June 2020—by any measure serious and disturbing—the Executive Chamber's reaction was to find a way not to report it or to do any investigation. Instead, they kept the incident secret (although informing the Governor), moved Ms. Bennett to a position where she would not need to interact with the Governor, and put in measures to keep the Governor from being alone with junior staff members who are women. Even that protective measure, the senior staff noted, was in their minds, to protect the Governor. No one expressed concern about protecting young staff members from what were (at a minimum) plainly inappropriate comments from the Governor.<sup>1370</sup> Knowing what we now know about the Executive Chamber's culture, we recognize that it would have taken courage for anyone (even within the senior staff) to report Ms. Bennett's allegations to GOER, and anyone who did so would likely have faced risk of retribution from the Governor and those closest to him. But no one appears to have even seriously considered such a step; they found a way to justify not reporting it.

Similarly, six months after Ms. Bennett had made credible allegations of inappropriate and sexual comments by the Governor, the Executive Chamber reacted to Ms. Boylan's public allegation of sexual harassment with an effort to disparage her and protect the Governor. Focusing exclusively on what they perceived to be political motivations and a retaliatory intent on her part—no one appears to have questioned, even for a moment, whether any of the Governor's interactions with Ms. Boylan may have been unwelcome and offensive. The reaction again—we believe informed by the overall culture of the Executive Chamber—was to protect and attack.

We also find it revealing and consistent with the Executive Chamber's overall approach that, when faced with allegations of sexual harassment brought against the Governor, the inner circle of confidantes brought in to control and direct the response included a number of individuals with no official role in the Executive Chamber. For example, in response to the sexual harassment allegations, the Governor and the Executive Chamber actively consulted Ms. Lacewell, Mr. Cohen, Ms. Smith, Mr. Bamberger, Mr. Vlasto, Ms. Lever, Mr. Pollock, Mr. David, and Chris Cuomo. Ms. Lacewell at the time did not have any official role in the Executive Chamber; she had a full-time job heading a separate state agency as the Superintendent of the Department of Financial Services. The rest were not State employees at all, although Mr. Cohen had a role on the Board of ESD at the time. Some had never served in the Executive Chamber, and others, like Mr. Cohen, had not served there in a decade. None of them was officially retained in any capacity by the Executive Chamber or any of the individuals involved.<sup>1371</sup> Nonetheless, they were regularly provided with confidential and often privileged information about state operations and helped make decisions that impacted State business and employees—all without any formal role, duty, or obligation to the State.

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<sup>1370</sup> DeRosa Tr. 422:25–423:21; Mogul Tr. 256:18–25.

<sup>1371</sup> The Governor claimed that although he has never had to pay Mr. Cohen for the legal services he has received over the last ten years, one day, he may get a large bill for Mr. Cohen's services. Andrew Cuomo Tr. 123:2–125:24 (“We kid about the bill, when the bill comes due . . . [Cohen] has not yet sent me a bill. But he threatens the bill is going to be very large when it comes.”).

The common thread among all of these individuals was a proven, personal loyalty to the Governor. Their inclusion in the deliberations and the significant role they had in decision-making reflect how loyalty and personal ties were valued as much, if not more, than any official function or role in State government. And because they did not have any formal position within the Executive Chamber, they could not reasonably have been relied upon to protect its interests as an institution or the interest of its current and former employees (including some who were complainants or witnesses), especially if those interests did not align with the Governor's personal interests. A result of this dynamic is that State employees who are not part of this inner circle of loyalists would rightfully believe—and did believe—that any complaint or allegation about the Governor would be handled by people whose overriding interest is in protecting the Governor, over the interests of any potential complainant, any witness with relevant information that might be damaging to the Governor, or any supervisor whose obligation it was to report allegations of misconduct by the Governor.

We find that all of these aspects of the Executive Chamber's culture—*e.g.*, the use of fear, intimidation and retribution, the acceptance of everyday flirtation and gender-based comments by the Governor as just “old fashioned,” the overriding focus on loyalty and protecting the Governor and attacking any detractors, and the reliance on loyal confidantes regardless of their official role in State government (or lack thereof)—contributed to creating an environment where the Governor's sexually harassing conduct was allowed to flourish and persist. It also interfered with the Executive Chamber's ability—and responsibility—to respond to allegations of sexual harassment in a proper way by taking them seriously, reporting them, and having GOER investigate them. Instead, whether driven by fear or blinded by loyalty, the senior staff of the Executive Chamber (and the Governor's select group of outside confidantes) looked to protect the Governor and found ways not to believe or credit those who stepped forward to make or support allegations against him.



## **CONCLUSION**

Upon completion of our independent investigation into allegations of sexual harassment brought against Governor Andrew Cuomo and the surrounding circumstances, we have reached the conclusion that the Governor sexually harassed a number of State employees through unwelcome and unwanted touching, as well as by making numerous offensive and sexually suggestive comments. We find that such conduct was part of a pattern of behavior that extended to his interactions with others outside of State government.

We also find the Executive Chamber's response to allegations of sexual harassment violated its internal policies and that the Executive Chamber's response to one complainant's allegations constituted unlawful retaliation. In addition, we conclude that the culture of fear and intimidation, the normalization of inappropriate comments and interactions, and the poor enforcement of the policies and safeguards, contributed to the sexual harassment, retaliation, and an overall hostile work environment in the Executive Chamber.

# PLENARY 4

## THE JUDICIARY STEPS UP TO THE WORKPLACE CHALLENGE

*Hon. M. Margaret McKeown*

**ABSTRACT**—As the #MeToo movement swept the country, the federal judiciary faced its reckoning in light of allegations against several judges. In short order, with the backing of Chief Justice Roberts, workplace issues took center stage. This Essay highlights workplace risks relevant to the judiciary, then details the significant changes adopted by the federal judiciary to foster a healthy, harassment-free, and productive work environment. Major undertakings include the establishment of a national Office of Judicial Integrity; circuit-wide Directors of Workplace Relations; multiple avenues to report misconduct, including anonymous reporting; revamped employment dispute policies; revised ethics, reporting, and discipline rules; and targeted workshops and trainings. While realizing the full potential of these reforms will require continued focus and deliberate attention across our workplace of 30,000 employees nationwide, the federal judiciary—with the backing of Chief Justice Roberts—remains committed to a workplace that treats everyone with respect and dignity.

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## INTRODUCTION

In October 2017, more than a decade after activist and sexual violence survivor Tarana Burke began using the phrase “me too,” the hashtag “#MeToo” went viral on Twitter.<sup>1</sup> Revelations of sexual harassment, violence, bullying, and other misconduct flooded social media and the press as survivors shared stories and support.<sup>2</sup>

As the #MeToo movement gained momentum, stories of harassment and assault surfaced across industries, implicating some of the most powerful

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<sup>1</sup> See TARANA BURKE, UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT 6–10 (2021); see also *History & Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/DW6F-4L9J>]; Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created It — 10 Years Ago*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [<https://perma.cc/HG47-GXBA>].

<sup>2</sup> See Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html> [<https://perma.cc/RJ28-KVQN>].

individuals in sectors as varied as entertainment,<sup>3</sup> banking,<sup>4</sup> fashion,<sup>5</sup> food,<sup>6</sup> and technology.<sup>7</sup> Hollywood became front and center with accusations against influential film producer Harvey Weinstein.<sup>8</sup> Once allegations of misconduct became ubiquitous, these industries and others were forced to grapple with pervasive sexual misconduct.

The federal judiciary was not immune. In December 2017, the United States Court of Appeals for the Ninth Circuit learned of multiple allegations of sexual misconduct against then-Judge Alex Kozinski.<sup>9</sup> He resigned ten days later.<sup>10</sup>

As an independent branch of the United States government, the judiciary is tasked with making decisions and taking actions that affect everyone in the country. The judiciary's effectiveness is dependent on its highly accomplished judges and the respect and regard citizens have for the institution. With approximately 2,300 judges, the federal judiciary includes the United States Supreme Court, circuit courts of appeals, district courts, bankruptcy courts, other specialized courts, and federal defenders, and it

<sup>3</sup> See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/K4K4-L35Q>]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/6K24-V73T>].

<sup>4</sup> See Bethany McLean, "We All Wear All Black Every Day": Inside Wall Street's Complex, Shameful, and Often Confidential Battle with #MeToo, VANITY FAIR (Feb. 27, 2018), <https://www.vanityfair.com/news/2018/02/inside-wall-street-complex-shameful-and-often-confidential-battle-with-metoo> [<https://perma.cc/YM8A-C5S4>].

<sup>5</sup> See Emilia Petrarca, *Fashion's #MeToo Movement Is Loudest on Instagram: Models Are Sharing Devastating Stories of Abuse in DMs*, THE CUT (Apr. 5, 2018), <https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html> [<https://perma.cc/WQ9U-2VLU>].

<sup>6</sup> See Maura Judkis & Emily Heil, *Rape in the Storage Room. Groping at the Bar. Why Is the Restaurant Industry So Terrible for Women?*, WASH. POST (Nov. 17, 2017), [https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e\\_story.html](https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html) [<https://perma.cc/AAP2-4DN2>].

<sup>7</sup> See Alyssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017, 2:30 PM), <https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271> [<https://perma.cc/KTS5-GAPC>].

<sup>8</sup> See generally Kantor & Twohey, *supra* note 3 (documenting allegations against Weinstein by employees and members of the film industry).

<sup>9</sup> See Matt Zapotosky, *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?utm\\_term=.33f68db99ef1](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?utm_term=.33f68db99ef1) [<https://perma.cc/S95P-PKSL>].

<sup>10</sup> 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/XZ3S-3MNM>].

operates clerks' offices, libraries, pretrial services, probation departments, and administrative units.<sup>11</sup> With over 30,000 employees nationwide in workplaces of different sizes,<sup>12</sup> the judiciary is committed to a workplace that treats everyone with respect, recognizes everyone's dignity, and fosters inclusivity. As an institution, the judiciary has the responsibility to address workplace misconduct and recognizes that a sea change in approach is in order.

In response to the allegations against Kozinski, the federal judiciary recognized the need to do more to prevent and combat harassment, and it took action. Even before Kozinski's swift resignation following the allegations, Ninth Circuit Chief Judge Sidney R. Thomas appointed the Ad Hoc Committee on Workplace Environment (Ninth Circuit Committee), which was charged with conducting a comprehensive review of workplace practices and policies in the Ninth Circuit and making recommendations for improvement.<sup>13</sup> Other circuits followed suit.<sup>14</sup> And in his 2017 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts of the United States Supreme Court tasked the Director of the Administrative Office of the U.S. Courts (the AO) with forming a working group to undertake "a careful evaluation of whether [the federal judiciary's] standards of conduct and its procedures for investigating and correcting inappropriate behavior [were]

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<sup>11</sup> This number was compiled from data provided on judicial statistics. See, e.g., *Judicial Business 2020*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judicial-business-2020> [<https://perma.cc/HK6G-MC7G>] (noting the number of Article III judges, bankruptcy judges, and magistrate judges); *Judges of the United States Court of International Trade*, U.S. CT. OF INT'L TRADE, <https://www.cit.uscourts.gov/judges-united-states-court-international-trade> [<https://perma.cc/UN38-CXQQ>] (noting the sixteen Court of International Trade judges); *Judges - Biographies*, U.S. CT. OF FED. CLAIMS, <https://uscfc.uscourts.gov/judicial-officers> [<https://perma.cc/Q3V3-KBWS>] (noting twenty-four judges on the Court of Federal Claims).

<sup>12</sup> See James C. Duff, *Annual Report 2018: Director's Message*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/annual-report-2018> [<https://perma.cc/B9TP-APA5>].

<sup>13</sup> See Press Release, U.S. Cts. for the Ninth Cir., Ninth Circuit Committee to Review Workplace Environment Policies (Jan. 12, 2018), [http://cdn.ca9.uscourts.gov/datastore/ce9/2018/01/14/R3\\_Ninth\\_Circuit\\_Workplace\\_Environment\\_Committee\\_Announcement.pdf](http://cdn.ca9.uscourts.gov/datastore/ce9/2018/01/14/R3_Ninth_Circuit_Workplace_Environment_Committee_Announcement.pdf) [<https://perma.cc/FS46-BSMZ>].

<sup>14</sup> This Essay focuses primarily on the Ninth Circuit and national responses. Since 2017, other circuits have formed their own groups and committees and implemented similar reforms designed to address workplace issues. See, e.g., Press Release, U.S. Cts. for the D.C. Cir., Chief Judges Announce Adoption of Workplace Conduct Policies (Nov. 28, 2018), [https://www.dcd.uscourts.gov/sites/dcd/files/NewsRelease\\_WorkplaceConductPolicies11282018.pdf](https://www.dcd.uscourts.gov/sites/dcd/files/NewsRelease_WorkplaceConductPolicies11282018.pdf) [<https://perma.cc/MLB7-WLXS>]; Press Release, Off. of the Cir. Exec., U.S. Cts. for the First Cir., First Circuit Court of Appeals Forms Workplace Conduct Committee, Appoints Christine Guthery Director of Workplace Relations (Mar. 5, 2019), <https://www.ca1.uscourts.gov/sites/ca1/files/Workplace%20Conduct%20Press%20Release%202.pdf> [<https://perma.cc/Q7UE-GZFZ>]. By 2021, all circuits had Directors of Workplace Relations or similar roles. See *Director of Workplace Relations Contacts by Circuit*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/workplace-conduct/director-workplace-relations-contacts-circuit> [<https://perma.cc/2TX5-XX83>].

adequate to ensure an exemplary workplace for every judge and every court employee.”<sup>15</sup> The following month, in January 2018, the federal courts established the Federal Judiciary Workplace Conduct Working Group (National Working Group), a national counterpart to the Ninth Circuit Committee.<sup>16</sup>

Now, more than three years later, there have been substantial changes in workplace policies and visible improvements in the workplace environment. Ethics and discipline rules have been significantly revised, the national Office of Judicial Integrity and circuit Directors of Workplace Relations were established, and employees now have new avenues to seek confidential advice and guidance with multiple formal, informal, and anonymous reporting options and a judiciary that is more prepared to take prompt, fair action. This Essay catalogues many of these procedural and process improvements while recognizing that transforming workplace conduct is not instantaneous or simply a matter of revising policies. Most importantly, with the backing of Chief Justice Roberts, the issue has taken center stage in the judiciary, which is mindful that fostering an exemplary workplace is an ongoing process and that the judiciary must be vigilant about addressing continuing and novel challenges.

This Essay begins with a description of the EEOC’s research on sexual harassment, which provides a foundation to explore the risk factors that are present in an institution such as the judiciary. The most salient factor is the power disparity that exists between judges and their clerks and staff, coupled with an often-isolated workplace. By leveraging that research, plus surveys and outreach to relevant stakeholders including current and former law clerks, court employees, and law schools, the past three years have resulted in major institutional changes. Though allegations of sexual harassment catalyzed the initial action, the changes extend more broadly to include *proactive* improvements to the workplace climate. And although the initial allegations stemmed from law clerks, the judiciary’s response embraced the voices of the entire 30,000-plus employee workforce.

This Essay then surveys the key structural changes in workplace policies, procedures, and practices, ranging from the appointment of a national Judicial Integrity Officer and circuit Directors of Workplace Relations to revision of confidentiality policies, the ethics and disciplinary

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<sup>15</sup> JOHN G. ROBERTS, 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017) [hereinafter 2017 YEAR-END REPORT], <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> [https://perma.cc/YL57-ELL5].

<sup>16</sup> See *Federal Judiciary Workplace Conduct Working Group Formed*, U.S. CTS. (Jan. 12, 2018), <https://www.uscourts.gov/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed> [https://perma.cc/P6GB-MFJ6].

codes, and employment dispute resolution policies. These changes seek to address the calls to interrogate the institutional structures that led to this moment, such as those made by Professor Leah Litman and Deeva Shah in their Essay, *On Sexual Harassment in the Judiciary*.<sup>17</sup>

Finally, while this Essay reflects on the strides the judiciary has made over the past three years, it also recognizes that there is no such thing as “victory.” The policies and practices, the people who implement them, and the leaders who insist upon them must constantly assess performance, listen to constructive feedback on our efforts,<sup>18</sup> and address new and remaining challenges.<sup>19</sup>

This Essay does not attempt to distance the federal judiciary from the harassment events that have been publicly debated or from the genuine risk factors present. Rather, it endeavors to highlight in considerable detail the ways in which the judiciary has systematically evaluated, identified, and responded to workplace misconduct, including sexual harassment and bullying.

# I. LINKING THE NATURE OF HARASSMENT IN EMPLOYMENT GENERALLY WITH EMPLOYMENT IN THE JUDICIARY

## A. EEOC Report on Risk Factors for Harassment in the Workplace

Five years ago, in the face of rising claims of sexual harassment nationwide and before the Kozinski allegations surfaced, the Co-Chairs of the EEOC’s Select Task Force on the Study of Harassment in the Workplace (the Select Task Force) published a report documenting the persistence of workplace harassment and offering potential solutions (EEOC Report).<sup>20</sup> This report was the culmination of eighteen months spent examining the complex issues associated with harassment in the workplace.<sup>21</sup> During that time, the Select Task Force examined tens of thousands of charges and complaints received by the EEOC; reviewed research; and convened experts

<sup>17</sup> Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 601 (2020).

<sup>18</sup> See, e.g., Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 HARV. L. REV. F. 446, 453 (2021).

<sup>19</sup> The COVID-19 pandemic intervened during the period following the adoption of the structural and policy changes. While most court proceedings went remote and employees worked from home, the courts took the opportunity to solidify the structural changes adopted earlier and enhance training and education on workplace policies and procedures.

<sup>20</sup> CHAIR R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE ii (2016) [hereinafter EEOC REPORT], [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) [https://perma.cc/PTP6-WBEB].

<sup>21</sup> *Id.* at iv.



from law, sociology, psychology, employment, and more to better understand workplace harassment and how to prevent it.<sup>22</sup>

It is well understood that harassment harms its targets and, when mishandled or overly cumbersome, reporting can cause additional harm, as these individuals may experience psychological distress from the reporting process itself and from the fear and reality of adverse job repercussions.<sup>23</sup> It is therefore important to emphasize *prevention* and to develop systems that will minimize these harms.

The Select Task Force thus endeavored to identify risk factors—“elements in a workplace that might put a workplace more at risk for harassment”—in order to “give employers a roadmap for taking proactive measures to reduce harassment in their workplaces.”<sup>24</sup>

The EEOC Report catalogued a nonexhaustive, nonexclusive list of organizational conditions that are risk factors, including: “homogenous workforces,” “workplaces where some workers do not conform to workplace norms,” “cultural and language differences in the workplace,” “coarsened social discourse outside the workplace,” “workforces with many young workers,” “workplaces with ‘high value’ employees,” “workplaces with significant power disparities,” “workplaces that rely on customer service or client satisfaction,” “workplaces where work is monotonous or consists of low-intensity tasks,” “isolated workspaces,” “workplace cultures that tolerate or encourage alcohol consumption,” and “decentralized workplaces.”<sup>25</sup> The EEOC Report explains that most workplaces will contain some of these factors, and the presence of risk factors alone does not guarantee that harassment is occurring in that workplace.<sup>26</sup> But the presence of risk factors—especially multiple risk factors—does suggest that a workplace “may be fertile ground for harassment.”<sup>27</sup>

### *B. Understanding the Risk Factors for the Judiciary*

The nature of the federal judiciary informs how these risk factors map onto the judicial environment. Judicial independence is a foundational tenet of the judiciary as the third branch of government.<sup>28</sup> Judicial decision-

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<sup>22</sup> See *id.* at iv, 3, 6–8.

<sup>23</sup> See *id.* at 16–17.

<sup>24</sup> *Id.* at 25.

<sup>25</sup> *Id.* at 26–30 (capitalization altered).

<sup>26</sup> See *id.* at 25.

<sup>27</sup> *Id.*

<sup>28</sup> See JUD. CONF. OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 4 (1996) [hereinafter JUDICIAL CONFERENCE REPORT] (“The judiciary’s internal governance system is a necessary corollary to judicial independence.”).

making is, and must be, independent of the executive and legislative branches and from political or other outside influences.<sup>29</sup> This independence is essential to ensure that judicial decisions remain legitimate, impartial, and transparent.<sup>30</sup>

Stemming from the need to protect and ensure judicial independence, the federal judiciary has several unique features. First, under the Constitution, federal judges have lifetime tenure, or more accurately, “hold their Offices during good Behaviour.”<sup>31</sup> The life tenure of federal judges is intended to insulate them from shifting political winds and outside pressures in reaching their decisions and to further support their independence.<sup>32</sup>

Second, federal courts operate under a regionalized governance structure developed to support the core tenet of judicial independence and maintain a certain level of autonomy within the courts at the district and circuit levels.<sup>33</sup> While the Judicial Conference of the United States makes national policy for the federal courts, district courts and circuit courts manage their own employees, and individual judges have significant autonomy in how they organize and manage their personal staff and interact with other court employees.<sup>34</sup> In addition, the judiciary is distributed across a wide variety of geographic regions serving vastly different communities across the country.

Although the unique features of the federal judiciary provide important benefits, they also create several risk factors for harassment as described by the EEOC and others.<sup>35</sup> While life tenure guards the integrity of the judiciary, it nonetheless contributes to a power disparity between judges and employees—particularly law clerks and others who work in the judges’ chambers. Research conducted in university settings has shown that “[h]ierarchical work environments . . . where there is a large power differential between organizational levels and an expectation [] not to question those higher up, tend to have higher rates of sexual harassment than

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<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> U.S. CONST. art. III, § 1.

<sup>32</sup> *See* JUDICIAL CONFERENCE REPORT, *supra* note 28, at 4.

<sup>33</sup> *See id.* (“The judiciary’s internal governance system is a necessary corollary to judicial independence.”).

<sup>34</sup> *See id.* (“From the beginning of the federal court system, the hallmarks of judicial branch governance have been local court management and individual judge autonomy, coupled with mechanisms for ensuring accountability . . .”).

<sup>35</sup> *See, e.g.*, THE NAT’L ACADS. OF SCIS., ENG’G & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 65 (Paula A. Johnson, Sheila E. Widnall & Frazier F. Benya eds., 2018) [hereinafter NATIONAL ACADEMIES REPORT] (recognizing that hierarchical relationships and isolated environments create higher levels of risk for sexual harassment); *see also* Litman & Shah, *supra* note 17, at 616–20.

organizations that have less power differential between the organizational levels.”<sup>36</sup> Sexual harassment is more pervasive in these environments because high-status employees may be more likely to exploit lower status employees, who may not understand the complaint mechanisms or may fear retaliation in response to reporting.<sup>37</sup>

This research informs potential areas of concern within the federal judiciary. Though the individual workplace environments of the 30,000 judiciary employees have widely diverse characteristics, judicial chambers (which employ about one-fifth of these individuals)<sup>38</sup> are a focal point for power disparity. Federal judges oversee their chambers, often with one judicial assistant and several law clerks. Law clerks, many at the beginning of their legal careers and typically in one- or two-year positions, depend on judges for future job opportunities, recommendations, and networking connections.<sup>39</sup> Other chambers employees, like judicial assistants, often work for a single judge during their career and are thus dependent on that judge for their livelihood and for recommendations for future job opportunities. Judges thus have expansive power over their chambers and the employees who work there.

In addition to having a potential power disparity between their employees, some judicial chambers can be relatively isolated workplaces. This is a byproduct of a geographically dispersed judiciary and judges’ autonomy in managing their chambers.<sup>40</sup> As the EEOC noted, harassment is more likely to occur in situations where employees may be physically isolated from their colleagues or where coworkers are less likely to report harassment.<sup>41</sup>

Understanding the unique facets of the judiciary and how they relate to the EEOC Report risk factors was, and remains, central in the work of the National Working Group and the Ninth Circuit Committee tasked with improving the workplace. These risk factors served as a road map for the judiciary’s efforts, discussed next, to implement reforms designed to respond to harassment in the workplace.

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<sup>36</sup> NATIONAL ACADEMIES REPORT, *supra* note 35, at 48.

<sup>37</sup> See EEOC REPORT, *supra* note 20, at 28.

<sup>38</sup> This information is drawn from an internal judiciary human resources database.

<sup>39</sup> See, e.g., Litman & Shah, *supra* note 17, at 616 (“A judge can both help a clerk find a job and tank a clerk’s prospects with just one call.”).

<sup>40</sup> See EEOC REPORT, *supra* note 20, at 29.

<sup>41</sup> See *id.*

## II. REFORM IN THE FEDERAL JUDICIARY

A. *Benchmarking the Need for Reform*

Though some academics and former employees have expressed concern that the legal profession has not examined and reformed the structures that have allowed for harassment in the past,<sup>42</sup> the first step in the judiciary's process was a top-to-bottom review of its employment structure and policies.<sup>43</sup> Responding to Chief Justice Roberts's push to address workplace conduct, the judiciary's priority was "to examine the sufficiency of the safeguards currently in place within the Judiciary to protect all court employees from inappropriate conduct in the workplace" and to recommend any necessary changes and reforms.<sup>44</sup> As a complement to this review, beginning in early 2018 and still ongoing, the judiciary conducted extensive outreach and consultation with judges, employees (including court unit executives, managers, and supervisors), advisory committees within the judicial branch, law clerks, interns, externs, and volunteers to obtain valuable feedback from an employee perspective.<sup>45</sup> This outreach included expansive efforts to reach current and former law clerks and employees through focus groups, surveys, and anonymous email reporting.<sup>46</sup> Additionally, the judiciary solicited reviews from other stakeholders and interested constituencies including law schools, the EEOC, Law Clerks for Workplace Accountability, and employment experts from outside of the judiciary.<sup>47</sup>

The results of these research and outreach efforts reflected some common themes. While the vast majority of employees were satisfied with their workplaces and did not report pervasive inappropriate conduct, three key areas emerged as opportunities for improvement:

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<sup>42</sup> See Litman & Shah, *supra* note 17, at 601; Warren, *supra* note 18, at 453.

<sup>43</sup> See FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 3–5 (2018) [hereinafter WORKING GROUP REPORT], [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/JF28-2JYX].

<sup>44</sup> *Id.* at 1.

<sup>45</sup> See NINTH CIR. AD HOC COMM. ON WORKPLACE ENV'T, NINTH CIRCUIT AD HOC COMMITTEE ON WORKPLACE ENVIRONMENT REPORT 4, 6–7 (2019) [hereinafter NINTH CIRCUIT COMMITTEE REPORT], <https://cdn.ca9.uscourts.gov/assets/workplace/committee-report/Ninth-Circuit-Workplace-Environment-Committee-Report.pdf> [https://perma.cc/6AHF-PTLK]; see also WORKING GROUP REPORT, *supra* note 43, at 3–4, 6–7.

<sup>46</sup> NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 6–10.

<sup>47</sup> *Id.* at 6; WORKING GROUP REPORT, *supra* note 43, at 4. Law Clerks for Workplace Accountability is an organization comprised of "current and former law clerks" who "believe that significant changes are necessary to address the potential for harassment of employees who work in the federal court system." @ClerksForChange, TWITTER (July 20, 2018, 12:01 PM), <https://twitter.com/ClerksForChange/status/1020171891003162624> [https://perma.cc/K8V3-SMD3].

- Multiple options for discussing and reporting workplace concerns;
- Coverage and clarity of workplace policies and procedures; and
- Training on workplace conduct issues.<sup>48</sup>

More specifically, some employees articulated their reluctance to report workplace concerns through then-available channels, the lack of information about policies or work expectations, the need for more specific training and education, and a desire for a more collegial and interactive workplace environment to counteract feelings of isolation.<sup>49</sup> Others indicated a need for establishing, improving, and communicating policies related to antibullying and sexual harassment and a need to change the overall judicial culture to one where judges took more responsibility to stop and prevent inappropriate behavior.<sup>50</sup> And other stakeholders raised the desire for informal and confidential avenues outside the local chain of command to address inappropriate conduct.<sup>51</sup> In terms of training topics, antibullying, civility, leadership, and bystander intervention were commonly requested.<sup>52</sup>

This extensive feedback plus additional research served as a blueprint for the judiciary's approach to changes and improvement in these areas. The National Working Group's 2018 Report to the Judicial Conference of the United States included recommendations that were based on the EEOC Report and other research, input from several circuits' workplace conduct working groups, and the feedback from employees, former law clerks, and interest groups.<sup>53</sup> Over the fifteen months following this report, the judiciary engaged in an intensive effort to revise policies and implement changes that would improve the workplace by generating confidence in a confidential and fair system to prevent, reduce, and address inevitable workplace issues. The National Working Group issued a 2019 Status Report that summarized the progress and extensive revisions that the judiciary implemented, and the key reforms are outlined in detail below.<sup>54</sup> Each structural change, policy amendment, and revision was, of necessity, approved by the appropriate

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<sup>48</sup> See WORKING GROUP REPORT, *supra* note 43, at 5–7; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7–8.

<sup>49</sup> See NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7–8.

<sup>50</sup> See *id.* at 9.

<sup>51</sup> See WORKING GROUP REPORT, *supra* note 43, at 17; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7.

<sup>52</sup> See NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 8 (reporting that survey respondents “recommended developing and implementing trainings on harassment, bullying, implicit bias, leadership, and management techniques”); WORKING GROUP REPORT, *supra* note 43, at 41–42.

<sup>53</sup> See WORKING GROUP REPORT, *supra* note 43, at 4–7.

<sup>54</sup> See FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1–4 (2019) [hereinafter 2019 STATUS REPORT], [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/2WSC-G9A9>].

governing body, and that process, too, led to wide acceptance and adoption of the reforms.

### *B. Judiciary Workplace Reforms*

Judiciary policies regarding workplace conduct live in three places: the Model Employment Dispute Resolution Plan (Model EDR Plan) (procedures for reporting and resolving complaints related to all employees, including judges),<sup>55</sup> the ethics codes for the judiciary (the Code of Conduct for United States Judges and the separate Code of Conduct for Judicial Employees), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules) (rules governing misconduct complaints against judges).<sup>56</sup> The different policies are meant to function both independently as well as interdependently, as they complement each other. In response to the findings and recommendations of the National Working Group and the circuit committees, each of these three policy areas has been overhauled. In March 2019, the Judicial Conference of the United States approved revisions to the ethics codes and the JC&D Rules.<sup>57</sup> Individual courts began revising their EDR plans soon after the reports of sexual harassment, and the revised Model EDR Plan was approved in September 2019.<sup>58</sup>

#### *1. Revamped Confidentiality Policy*

Considering the sensitive and confidential nature of information entrusted to the judiciary, it is a given that employees are bound by various confidentiality obligations. Through law clerk and employee feedback, the National Working Group and circuit committees learned, however, that there was confusion and ambiguity about whether those obligations impeded the reporting of harassment.<sup>59</sup> The National Working Group stressed that the “confidentiality obligations [of judiciary employees] must be clear so both judges and judicial employees understand these obligations never prevent

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<sup>55</sup> Although titled a *model* plan, the Model EDR Plan, with certain modifications, is the actual plan of the individual courts.

<sup>56</sup> The Judicial Conference of the United States promulgated the JC&D Rules under the Judicial Conduct and Disability Act, 28 U.S.C. § 358. RULES FOR JUD.-CONDUCT & JUD.-DISABILITY PROCS. r. 1 cmt. (JUD. CONF. OF THE U.S. 2019) [hereinafter JC&D RULES], [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/5RD5-7JFV].

<sup>57</sup> *Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-conduct-judges-judicial-conduct-disability-rules> [https://perma.cc/2U34-KB7B].

<sup>58</sup> JUD. CONF. OF THE U.S., MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN 14 (2019) [hereinafter MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN], [https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a\\_oji-2019-09-17-post-model-edr-plan.pdf](https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a_oji-2019-09-17-post-model-edr-plan.pdf) [https://perma.cc/D4D6-VW6Z].

<sup>59</sup> See WORKING GROUP REPORT, *supra* note 43, at 15.

any employee—including a law clerk—from revealing abuse or misconduct by any person.”<sup>60</sup> Not surprisingly, research demonstrates that “[d]eveloping and disseminating clear anti-harassment policies is crucial”<sup>61</sup> because lack of clarity in these policies can stymie reporting.<sup>62</sup>

To dispel any ambiguity, policies were immediately revised to make clear that, although information received in the course of judicial business remains confidential, reports of workplace harassment and misconduct are not subject to confidentiality restrictions.<sup>63</sup> The Code of Conduct for Judicial Employees was revised to clarify that the “general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.”<sup>64</sup> The law clerk handbook was similarly revised, the JC&D complaint process was amended to include a new provision, and related commentary emphasizing that nothing in the confidentiality provisions in the JC&D Rules or the Code of Conduct for Judicial Employees prevents a judicial employee from reporting or disclosing misconduct or disability.<sup>65</sup>

## 2. *Creation of the Office of Judicial Integrity and Directors of Workplace Relations*

The most frequent recommendation from current and former employees “was for a clearly identifiable and independent person of high stature to whom they could report misconduct and discuss other workplace concerns.”<sup>66</sup> Key to this position, employees noted, was that it be outside of the supervisory chain of command.<sup>67</sup> And yet, employees did not favor reporting to an entity or person outside the judiciary. Two of the most significant changes in response to these comments were the AO’s establishment of the Office of Judicial Integrity, and the Ninth Circuit Committee’s appointment of the first Director of Workplace Relations.<sup>68</sup>

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<sup>60</sup> 2019 STATUS REPORT, *supra* note 54, at 6.

<sup>61</sup> NATIONAL ACADEMIES REPORT, *supra* note 35, at 143.

<sup>62</sup> See EEOC REPORT, *supra* note 20, at 38.

<sup>63</sup> See WORKING GROUP REPORT, *supra* note 43, at 27.

<sup>64</sup> 2019 STATUS REPORT, *supra* note 54, at 6 (quoting CODE OF CONDUCT FOR JUD. EMPS. Canon 3D(3) (JUD. CONF. OF THE U.S. 2019)).

<sup>65</sup> See 2019 STATUS REPORT, *supra* note 54, at 2, 9 (citing JC&D RULES, *supra* note 56, at r. 23(c)); see also JC&D RULES, *supra* note 56, at r. 4 cmt., 6 cmt.

<sup>66</sup> NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 2.

<sup>67</sup> See *id.* at 7.

<sup>68</sup> See *id.* at 7, 14–15; WORKING GROUP REPORT, *supra* note 43, at 17–18, 36–38.

Other circuits soon adopted this approach, and now there is a director (or analogous role) for every circuit.<sup>69</sup>

The national Office of Judicial Integrity, headed by the national Judicial Integrity Officer, serves as an independent resource outside of the courts' traditional chain of command.<sup>70</sup> It provides confidential help, information, referral, and guidance in complaint options to address workplace harassment, abusive conduct, or other misconduct. This office also monitors recurring workplace issues to identify trends and conduct systemic reviews.

Modeled in part after an organizational ombudsman, each Director of Workplace Relations is an independent circuit-wide position that acts as a confidential resource within the circuit. They confidentially talk through issues with employees (including clerks, supervisors, managers, court unit executives, and judges), provide information about policies and procedures, set out options for early-stage resolution and the complaint process, offer guidance, receive reports of workplace issues, and monitor the workplace environment for trends and patterns.<sup>71</sup>

Directors serve all court units within a circuit—court of appeals, district and bankruptcy courts, probation and pretrial offices, and federal public defender offices. They do not report directly to any chief judges or judges, nor do they report to other court unit supervisory personnel such as the clerk of court, chief probation or pretrial officer, or chief federal public defender. Instead, directors report to the Circuit Executive yet maintain considerable autonomy.<sup>72</sup>

The Directors of Workplace Relations and the Judicial Integrity Officer bring relevant and wide-ranging experience to their roles with backgrounds as former federal circuit court law clerks, Title IX officers, mediators, and

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<sup>69</sup> The D.C. Circuit has two Workplace Relations Coordinators rather than one director, but the positions are considered analogous. See *Director of Workplace Relations Contacts by Circuit*, *supra* note 14 (providing contact information for the directors and including the D.C. Circuit's Workplace Relations Coordinators).

<sup>70</sup> See *Workplace Conduct in the Federal Judiciary*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary> [<https://perma.cc/LFT2-S8KT>].

<sup>71</sup> See MARY ROWE, TIMOTHY HEDEEN & JENNIFER SCHNEIDER, INT'L OMBUDSMAN ASS'N, WHAT DO ORGANIZATIONAL OMBUDS DO? AND NOT DO? 1–5 (2020), <https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=7572> [<https://perma.cc/M3BT-42CV>]; see also Marsha L. Wagner, *The Organizational Ombudsman as Change Agent*, 16 NEGOT. J. 99, 103–05 (2000).

<sup>72</sup> See, e.g., Press Release, U.S. Ct. of Appeals for the Sixth Cir., Sixth Circuit Announces Appointment of First Director of Workplace Relations (May 8, 2020), <https://www.ca6.uscourts.gov/sites/ca6/files/Announcement%20of%20Director%20of%20Workplace%20Relations.pdf> [<https://perma.cc/857X-8R6N>].



EEOC attorneys.<sup>73</sup> One of the benefits of this diverse collective experience is that it provides the judiciary with an internal group of experts who can see the workplace from a bird's eye view and who are well-positioned to collaboratively assess trends and feedback for additional improvements to the judiciary's policies, processes, and structures for addressing workplace issues. The Judicial Integrity Officer and directors from across the nation serve on the national Directors of Workplace Relations Advisory Group and meet frequently to discuss emerging issues, share information, and develop best practices. They draw on direct and indirect feedback to continue improving: it is an iterative process of making changes, assessing their effectiveness, adjusting as necessary, and disseminating information to national, circuit, and local court unit leadership as appropriate.

The creation of these new positions not only addresses one of the top employee requests, but it also serves to mitigate at least two other risk factors identified by the EEOC—decentralization and isolation. Because these individuals are available to employees in all court units, they function as centralized and uniform resources for employees to learn about their rights and options without fear that their local leadership will be informed of their confidential conversations.<sup>74</sup> And, importantly, the directors look beyond individual employees and workplaces to identify institutional trends.

### 3. *Multiple Avenues for Advice, Reporting, and Resolution*

Another key change was the development of multiple avenues to report, discuss, and resolve workplace concerns. The EEOC recommends that an anti-harassment policy include a “clearly described complaint process that provides multiple, accessible avenues of complaint.”<sup>75</sup> This recommendation is supported by research that demonstrates the efficacy of providing both

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<sup>73</sup> See, e.g., Press Release, U.S. Ct. of Appeals for the First Cir., *supra* note 14 (appointing Christine Guthery as Director of Workplace Relations, who had been the Assistant Director of the First Circuit Gender, Race, and Ethnic Bias Task Force); Press Release, U.S. Ct. of Appeals for the Third Cir., Third Circuit Forms Workplace Conduct Committee and Announces Appointment of First Director of Workplace Relations (Sept. 10, 2019), [https://www.ca3.uscourts.gov/sites/ca3/files/DWR\\_Announcement.pdf](https://www.ca3.uscourts.gov/sites/ca3/files/DWR_Announcement.pdf) [<https://perma.cc/5CRV-T6GB>] (appointing Julie Todd as Director of Workplace Relations, who was an Administrative Judge for the EEOC); Press Release, U.S. Ct. of Appeals for the Sixth Cir., *supra* note 72 (appointing Kelly Roseberry as Director of Workplace Relations, who had served in the Wyoming government including as Interim Administrator for the Workforce Standards Division, the Deputy Administrator for Labor Standards, and the Executive Secretary for the Wyoming Medical Commission); Press Release, U.S. Cts. for the Ninth Cir., Ninth Circuit Announces Appointment of First Director of Workplace Relations (Nov. 13, 2018), [http://cdn.ca9.uscourts.gov/datastore/general/2019/02/15/PR\\_11132018.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2019/02/15/PR_11132018.pdf) [<https://perma.cc/FL9D-GVDN>] (appointing Yohance Edwards as Director of Workplace Relations, who was the associate director and deputy Title IX officer at the University of California, Berkeley).

<sup>74</sup> See EEOC REPORT, *supra* note 20, at 87–88.

<sup>75</sup> *Id.* at 38.

formal and informal dispute resolution options in combatting workplace harassment.<sup>76</sup> “Increasing informal, confidential options within the complaint–response system is important . . . to create more supportive environments for those who have experienced sexual harassment.”<sup>77</sup> Employees feel more confident pursuing grievances when informal advice and multiple communication channels are available to them.<sup>78</sup> In accordance with these recommendations and the supporting research, the judiciary undertook significant reforms to its complaint processes in 2019.

Prior to the 2019 reforms, a clerk or other employee seeking to report a judge’s misconduct primarily had two formal options: to file a complaint via an EDR Coordinator or file a formal JC&D complaint with the clerk’s office or the Chief Circuit Judge.<sup>79</sup> EDR Coordinators are locally designated employees within each court unit who, in addition to their full-time jobs, provide guidance and administrative support for individuals and employing offices participating in the judiciary’s internal employment dispute resolution process.<sup>80</sup>

While nothing prevented a law clerk or other employee from reporting to another judge or supervisor, some employees did not see that as a realistic option.<sup>81</sup> Outside of chambers, other judicial employees who wanted to report misconduct of judges or other employees had the options of reporting directly to a supervisor or manager, to human resources, or to EDR Coordinators.

Having only formal options hindered reporting. Employee feedback reflected a reluctance to report workplace concerns out of fear of retaliation from superiors and harm to their future career prospects.<sup>82</sup> Employees further expressed concerns about “whether details of their complaint would be kept private, reported misconduct would be adequately investigated, and

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<sup>76</sup> NiCole T. Buchanan, Isis H. Settles, Angela T. Hall & Rachel C. O’Connor, *A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U. S. Military*, 70 J. SOC. ISSUES 687, 690 (2014); Paula McDonald, Sara Charlesworth & Tina Graham, *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment*, 53 ASIA PAC. J. HUM. RES. 41, 44, 48 (2015); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCH. 497, 503 (1991).

<sup>77</sup> NATIONAL ACADEMIES REPORT, *supra* note 35, at 141. Tarana Burke’s personal story also serves to emphasize the importance of ensuring that informal support and resources are available for those who have experienced abuse. See BURKE, *supra* note 1, at 153–59, 214–17.

<sup>78</sup> McDonald et al., *supra* note 76, at 44.

<sup>79</sup> WORKING GROUP REPORT, *supra* note 43, at 9–10; 2019 STATUS REPORT, *supra* note 54, at 8, 13.

<sup>80</sup> WORKING GROUP REPORT, *supra* note 43, at app. 8; MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at app. 1.

<sup>81</sup> WORKING GROUP REPORT, *supra* note 43, at 12–13.

<sup>82</sup> NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 7.

reporting would lead to a satisfactory resolution.”<sup>83</sup> Employees likewise expressed a desire for a confidential reporting avenue outside of the direct chain of command.<sup>84</sup>

The changes were tailored to all of these concerns. Now employees can *explicitly* pursue multiple options: confidential informal advice, assisted resolution, and formal complaint.<sup>85</sup> To further assure that employees understand the reporting routes available, materials were developed to communicate the procedures. One such example is the following chart, created internally—a graphic outline of these options:

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> 2019 STATUS REPORT, *supra* note 54, at 13–14.

FIGURE 1: OPTIONS FOR WORKPLACE ADVICE AND COMPLAINTS IN THE FEDERAL JUDICIARY.



“Informal Advice” is an option that allows an employee to receive confidential advice and guidance from a *local* EDR Coordinator, a *circuit* Director of Workplace Relations, or the *national* Judicial Integrity Officer.<sup>86</sup> This confidential guidance may include providing information on the employee’s rights, providing perspective on the conduct, discussing ways to respond to the conduct, and providing an outline of potential options for resolution.<sup>87</sup> A primary purpose of informal advice is to confidentially provide employees with relevant information so they can make informed decisions about how to proceed with their concerns. As explained by the

<sup>86</sup> *Id.* at 14.

<sup>87</sup> MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at app. 5.

EEOC, engaging in a reporting process can cause psychological distress.<sup>88</sup> The aim of the informal advice channel is to reduce the psychological distress of reporting. Accordingly, the conversations remain confidential unless the employee seeks or requests further action.<sup>89</sup> In this way, employees pursuing the “Informal Advice” option generally control the level of confidentiality that attaches to their conversations.<sup>90</sup>

The “Assisted Resolution” avenue available under the EDR is an interactive and flexible process that may include discussions with the source of the conduct, preliminary investigations including interviewing the witness, and resolution by agreement.<sup>91</sup> Consistent with the EEOC Report, this option gives employees an informal method to resolve a workplace matter, typically at an early stage.

Finally, filing a formal complaint remains an option as well. The conduct of a judge or an employee may be the subject of an EDR complaint, while a complaint under the JC&D process is limited to complaints against judges.<sup>92</sup> Through formal resolution, a complainant may pursue remedies such as back pay, reinstatement, promotion, records modification, granting of family and medical leave, any reasonable accommodations, and any other appropriate remedy to address the wrongful conduct.<sup>93</sup>

The Office of Judicial Integrity and Directors of Workplace Relations are key channels in the multiple avenues of reporting and receiving confidential guidance now available to judiciary employees. In addition to these newly created roles, the judiciary has also retained and revamped the EDR Coordinator role as a point of contact for employees who wish to report and resolve workplace concerns at a local level.<sup>94</sup>

Early evidence indicates that the creation of multiple and confidential informal avenues for reporting has been successful in removing barriers to

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<sup>88</sup> EEOC REPORT, *supra* note 20, at 16–17; *cf.* BURKE, *supra* note 1, at 156–59, 218–24 (describing the psychological difficulties experienced by the author in articulating the abuse she had suffered).

<sup>89</sup> MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 4.

<sup>90</sup> The only time a conversation cannot be kept completely confidential is when the employee raises an issue that indicates reliable information of a threat to an individual’s safety or security, or of a threat to the integrity of the judiciary. *Id.* Materials are provided to employees alerting them to the level of confidentiality they can expect according to their circumstances. *See id.* at 4, app. 2 at 3.

<sup>91</sup> *Id.* at 5.

<sup>92</sup> NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at app. 1 at 8 n.3 (citing 28 U.S.C. §§ 351–364).

<sup>93</sup> MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 10–11. Back pay and associated benefits are available when the statutory criteria of the Back Pay Act are satisfied. Those criteria “include: (1) a finding of an unjustified or unwarranted personnel action; (2) by an appropriate authority; (3) which resulted in the withdrawal or reduction of all or part of the [e]mployee’s pay, allowances, or differentials.” *See id.* at 11 & n.2 (citing 5 U.S.C. § 5596(b)(1)).

<sup>94</sup> 2019 STATUS REPORT, *supra* note 54, at 15–16.

reporting. Multiple Directors of Workplace Relations have reported that they spend more of their time on confidential informal advice than anything else—albeit on a range of workplace issues, not only harassment.<sup>95</sup> Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were not comfortable coming forward. The interventions have included informal actions to stop the inappropriate behavior, targeted trainings, policy revisions, mediations and facilitated conversations, and investigations.<sup>96</sup> These informal, confidential, and flexible options mitigate some of the impacts of the power disparities inherent in the judiciary.

These reporting avenues are not mutually exclusive and can be pursued simultaneously. And pursuing these options does not preclude the filing of a formal complaint. The net result is that structural barriers are removed, confidentiality is protected to the greatest extent possible, and it is anticipated that employees will gain confidence in the system.

#### 4. *Major Revision of Harassment-Related Policies*

##### a. *Promoting Civility and Prohibiting Abusive Conduct*

The Codes of Conduct and JC&D Rules now make clear that all judiciary employees, including judges, have an affirmative duty to promote civility both in the courtroom and throughout the courthouse. The Code of Conduct for judges emphasizes that its canons regarding civility—requiring that judges be patient, dignified, respectful, and courteous—extend not just to those coming before the court but also to all court personnel including chambers employees.<sup>97</sup> In a similar vein, the JC&D Rules now expressly protect judicial employees from “demonstrably egregious and hostile” treatment.<sup>98</sup>

The codes of conduct for both judges and judiciary employees now expressly cover sexual harassment, discrimination, abusive behavior, and retaliation for reporting or disclosing judicial misconduct. A new section in the JC&D Rules, entitled “Abusive or Harassing Behavior,” provides that cognizable misconduct includes “engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault” as well as

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<sup>95</sup> This observation is drawn from conversations between the author and circuit Directors of Workplace Relations and representatives of the Office of Judicial Integrity.

<sup>96</sup> This observation is likewise drawn from conversations between the author and circuit Directors of Workplace Relations and representatives of the Office of Judicial Integrity.

<sup>97</sup> 2019 STATUS REPORT, *supra* note 54, at 5 (citing CODE OF CONDUCT FOR U.S. JUDGES Canons 2A cmt., 3 intro., 3B(4), 3B(4) cmt. (JUD. CONF. OF THE U.S. 2019)).

<sup>98</sup> JC&D RULES, *supra* note 56, at r. 4(a)(2)(B).

creating a hostile work environment.<sup>99</sup> These changes expand the workplace-conduct obligations for federal judges and employees.

The judiciary's policies have long protected against "discrimination and harassment based on race, color, national origin, sex, gender, pregnancy, religion, and age (40 years and over)," but they were expanded in 2019 to include gender identity and sexual orientation within the definition of "protected categor[ies]."<sup>100</sup> As a consequence of employee feedback and consistent with the reality of today's workplace, the Model EDR Plan also added "[a]busive conduct" as a form of wrongful conduct, defined as "a pattern of demonstrably egregious and hostile conduct not based on a [p]rotected [c]ategory that unreasonably interferes with an [e]mployee's work and creates an abusive working environment."<sup>101</sup> Judiciary employees are thus now protected not only from discriminatory harassment but also from any form of harassment that unreasonably interferes with the work environment, regardless of motivation. Indeed, the revised Model EDR Plan includes a clear policy statement setting forth "wrongful conduct" prohibited in the workplace, including discrimination; "sexual, racial, and other discriminatory harassment;" abusive conduct; retaliation; and violations of specific employment laws.<sup>102</sup> This expansion of wrongful conduct was significant in that the judiciary not only recognized harassment but also the closely related misconduct of abusive behavior.

*b. Retaliation Protection and Bystander Reporting Obligation*

The concern about "closed-door" interactions and a victim's reluctance to report misconduct is understandable, so the Working Group recommended that the JC&D Committee "provide additional guidance . . . on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation" and "reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct."<sup>103</sup> In response, the Judicial Conference expanded the JC&D Rules to define judicial misconduct "to include retaliation for reporting or disclosing judicial misconduct or disability."<sup>104</sup> It "also added a new provision that includes a judge's failure to bring 'reliable information reasonably likely to constitute judicial misconduct' to the attention of the relevant chief district judge or chief circuit

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<sup>99</sup> *Id.* at r. 4(a)(2).

<sup>100</sup> 2019 STATUS REPORT, *supra* note 54, at 9, 13 (citing JC&D RULES, *supra* note 56, at r. 4(a)(2), 4(a)(3)).

<sup>101</sup> MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 2–3 (emphasis omitted); *see also* NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 13.

<sup>102</sup> MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 1–2.

<sup>103</sup> WORKING GROUP REPORT, *supra* note 43, at 31.

<sup>104</sup> 2019 STATUS REPORT, *supra* note 54, at 8 (citing JC&D RULES, *supra* note 56, at r. 4(a)(4)).

judge within the definition of cognizable misconduct.”<sup>105</sup> Because sexual harassment and abusive behavior fall within such misconduct, judges now have an affirmative obligation in specific circumstances to come forward. This change is significant as the information ultimately must be shared with chief circuit judges who, apart from an individual complainant, have the authority to initiate a complaint against a judge.<sup>106</sup>

Before recent changes, judges were advised to “take appropriate action” against misconduct.<sup>107</sup> The Code of Conduct for judges was amended to put teeth into this standard. As the commentary to the amended Code provision states:

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>108</sup>

That commentary also clarifies that these provisions are read in conjunction with the JC&D Rules on misconduct.<sup>109</sup> The Code of Conduct for employees was correspondingly revised, emphasizing employees’ “duty to promote appropriate workplace conduct, prohibit workplace harassment, take appropriate action to report and disclose misconduct, and prohibit retaliation for reporting or disclosing misconduct.”<sup>110</sup> These changes coupled with increased training and widespread dissemination of related information have resulted in judges, law clerks, and employees coming forward to report inappropriate comments and conduct. Virtually all of these have been resolved through informal means, further investigation, mediation, and/or remedial action.

### *c. Complete Overhaul of Model EDR Plan*

Before recent amendments, a reading of the existing Model EDR Plan revealed that it was dense, required exhaustion of mediation before filing a complaint, and was more procedurally complicated.<sup>111</sup> A wholesale revision to the plan resulted in a streamlined, easy-to-understand document that

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<sup>105</sup> 2019 STATUS REPORT, *supra* note 54, at 8–9 (citing JC&D RULES, *supra* note 56, at r. 4(a)(6) & cmt., 23 cmt.).

<sup>106</sup> Judicial Conduct and Disability Act, 28 U.S.C. § 351(b); JC&D RULES, *supra* note 56, at r. 5.

<sup>107</sup> 2019 STATUS REPORT, *supra* note 54, at 5.

<sup>108</sup> *Id.* at 6 (quoting CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 97, at Canons 3B(6) & cmt.).

<sup>109</sup> CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 97, at Canon 3B(6) cmt.

<sup>110</sup> 2019 STATUS REPORT, *supra* note 54, at 6–7 (citing CODE OF CONDUCT FOR JUD. EMPS., *supra* note 64, at Canons 3C, 3D).

<sup>111</sup> WORKING GROUP REPORT, *supra* note 43, at 33, app. 8; 2019 STATUS REPORT, *supra* note 54, at 13–14.



encourages the reporting of workplace misconduct and provides multiple, more flexible options for resolving claims. As discussed above, the revised Model EDR Plan encourages reports of wrongful conduct by making clear that confidentiality requirements do not prohibit reporting workplace misconduct.<sup>112</sup> Revisions made to the Model EDR Plan increased the time to file a formal EDR complaint from 30 to 180 days from the alleged wrongful conduct or the time an employee becomes aware of such wrongful conduct and extended “EDR coverage to all paid and unpaid interns and externs.”<sup>113</sup>

The revised Model EDR Plan provides that the appropriate chief judge be notified of claims against a judge and that the chief judge oversees a request for assisted resolution or a formal complaint process that includes allegations against a judge or court unit executive.<sup>114</sup>

Importantly, the revised Model EDR Plan offers a process that is impartial and free of conflicts of interest.<sup>115</sup> It provides that those managing or presiding over an EDR process must recuse if they participated, witnessed, or were otherwise involved in the conduct giving rise to the claim.<sup>116</sup> It also requires recusal if the matter creates an actual or perceived conflict of interest.<sup>117</sup> Where appropriate, it allows for a judge from a different court to be brought in to preside over a complaint.<sup>118</sup> And, it further prohibits judges and unit executives from serving as EDR Coordinators.<sup>119</sup>

To ensure its efficacy, in January 2020, the Office of Judicial Integrity and EDR Working Group issued an internal EDR interpretive guide and handbook for all employees, managers, and judges, so that EDR claims can be processed in a uniform, conflict-free manner nationwide.<sup>120</sup>

#### *d. Revisions to the JC&D Rules*

In addition to the revisions discussed above, the JC&D Rules were further revised to eliminate barriers to reporting and increase accountability

<sup>112</sup> 2019 STATUS REPORT, *supra* note 54, at 12.

<sup>113</sup> *Id.* at 11.

<sup>114</sup> This notification process ensures that reporting goes to an individual who is superior in rank to the person about whom the complaint is made. If the complaint relates to the chief judge, then the notice goes to a different judge. MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 7.

<sup>115</sup> *Id.* at 4.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 7.

<sup>119</sup> *Id.* at 12.

<sup>120</sup> See generally EDR WORKING GRP. & OFF. OF JUD. INTEGRITY, EMPLOYMENT DISPUTE RESOLUTION INTERPRETIVE GUIDE & HANDBOOK: A GUIDE TO THE 2019 MODEL EDR PLAN (2020), [https://www.tnwb.uscourts.gov/PDFs/conduct/EDR\\_HANDBOOK\\_2020.pdf](https://www.tnwb.uscourts.gov/PDFs/conduct/EDR_HANDBOOK_2020.pdf) [<https://perma.cc/SF4Y-9BBX>] (providing guidance on navigating the EDR).

for judges, including clarification that confidentiality requirements do not limit disclosure of misconduct.

The National Working Group emphasized the judiciary's "institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition."<sup>121</sup> By law, Congress has provided that a judge who no longer holds a judicial commission is not subject to disciplinary proceedings under the Judicial Conduct and Disability Act.<sup>122</sup> But that does not mean that the judiciary is stymied from a "look back" to learn from a misconduct complaint. To this end, the judicial conduct rules now highlight the authority of both the Judicial Conference and the relevant judicial council to evaluate the underlying circumstances that contributed to the misconduct, thus promoting appropriate review of what precautionary or curative steps need be undertaken to prevent its recurrence.<sup>123</sup> In addition, the judiciary may make referrals to law enforcement and licensing authorities even after a judge resigns.<sup>124</sup>

Finally, the amendments were designed to increase transparency. For example, certain disclosures are allowed for details of a complaint that are already in the public realm (thus minimizing the need for confidentiality during the complaint proceedings), such as when key facts about the matter, such as a judge's identity, have been publicly released.<sup>125</sup>

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<sup>121</sup> WORKING GROUP REPORT, *supra* note 43, at 39.

<sup>122</sup> See Judicial Conduct and Disability Act, 28 U.S.C. § 351(d)(1); JC&D RULES, *supra* note 56, at r. 1(b); see also *In re Complaints Under the Jud. Conduct & Disability Act*, C.C.D. No. 19-02, at 10 (U.S. Jud. Conf. Mar. 3, 2020).

<sup>123</sup> JC&D RULES, *supra* note 56, at r. 11 cmt. (noting that "the Judicial Conference and the judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint . . . . Such an assessment might include an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence" (citations omitted)). Thus, for example, despite the resignation of then-Judge Carlos Murguía, the Committee on Judicial Conduct and Disability issued a written decision noting "the instructive value of providing guidance regarding the statutory standard for Congressional referral for consideration of impeachment." *In re Complaints Under the Jud. Conduct & Disability Act*, C.C.D. No. 19-02, at 8. The Committee concluded that "the underlying misconduct" related to sexual misconduct and harassment was "serious enough to have warranted our deliberations over a referral to Congress for its consideration of impeachment." *Id.* at 9. The Committee further observed that despite the former judge's resignation, "[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.

<sup>124</sup> JC&D RULES, *supra* note 56, at r. 23 cmt.

<sup>125</sup> 2019 STATUS REPORT, *supra* note 54, at 10; JC&D RULES, *supra* note 56, at r. 23(b)(8) & cmt.; see, e.g., *id.* at r. 24.

*e. Congressional Outreach*

Over the last several years, the judiciary has communicated often with various congressional offices and committees regarding its continuing work on workplace environments. This ongoing dialogue has included judiciary representatives providing testimony and documentation for congressional hearings,<sup>126</sup> providing written answers to questions for the record,<sup>127</sup> keeping Congress apprised of the judiciary's substantial efforts through its 2018 and 2019 reports, and responding to specific inquiries.<sup>128</sup> These responses capture the policy and procedural changes described in this Essay. In addition, the judiciary has acknowledged areas for improvement and reviewed how reported incidents are investigated and resolved.<sup>129</sup>

### III. TRAINING AND EDUCATION

Survey responses and other feedback revealed that, prior to 2018, many employees were unaware of policies prohibiting misconduct, their rights under those policies, or to whom they could turn with workplace misconduct concerns. In addition, some judges, managers, and supervisors were unsure of their obligations and responsibilities if they observed or otherwise became aware of misconduct.<sup>130</sup> In response, the judiciary has greatly expanded its training and educational opportunities consistent with the EEOC Report's recommendation that training is "an essential component of an anti-harassment effort."<sup>131</sup>

The revised Model EDR Plan now requires annual EDR training to be provided for all employees, including judges and law clerks.<sup>132</sup> That training

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<sup>126</sup> See *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (responses to questions for the record of James C. Duff, Dir., Admin. Off. of the U.S. Cts.), <https://www.judiciary.senate.gov/meetings/confronting-sexual-harassment-and-other-workplace-misconduct-in-the-federal-judiciary> [<https://perma.cc/5WLB-56Y7>]; *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2791> [<https://perma.cc/FJ9U-EJUR>].

<sup>127</sup> See *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary*, *supra* note 126.

<sup>128</sup> See Letter from James C. Duff, Sec'y, Jud. Conf. of the U.S., to Jerrold Nadler, Chairman, Comm. on the Jud., Henry C. Johnson, Chairman, Comm. on the Jud., Mary Gay Scanlon, Vice Chair, Comm. on the Jud., and James Sensenbrenner, Jr., Rep., U.S. House of Representatives (Mar. 3, 2020), [https://judiciary.house.gov/uploadedfiles/letter\\_from\\_the\\_judicial\\_branch\\_responding\\_to\\_hjc\\_inquiry\\_regarding\\_judiciary\\_workplace\\_misconduct.pdf](https://judiciary.house.gov/uploadedfiles/letter_from_the_judicial_branch_responding_to_hjc_inquiry_regarding_judiciary_workplace_misconduct.pdf) [<https://perma.cc/5BHZ-3PPD>].

<sup>129</sup> See WORKING GROUP REPORT, *supra* note 43, at 10–13; 2019 STATUS REPORT, *supra* note 54, at 1–4.

<sup>130</sup> See WORKING GROUP REPORT, *supra* note 43, at 19–20, 25–28, 40–41.

<sup>131</sup> EEOC REPORT, *supra* note 20, at 45.

<sup>132</sup> MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 13.

includes “bystander intervention,” which encourages those who recognize or witness misconduct to take action.<sup>133</sup> This may include reporting through the multiple channels available for assistance.<sup>134</sup> Judges, in particular, are advised that they are *required* to take appropriate action if they learn of wrongful conduct by any judicial employee, and they are *required* to report a fellow judge’s misconduct to the chief judge.<sup>135</sup>

The Office of Judicial Integrity has developed a uniform national training and certification curriculum for EDR Coordinators. All EDR Coordinators in the judiciary must now be trained and certified on the information and skills necessary to fulfill their function. This training is in addition to the annual training required for all employees.<sup>136</sup>

The Federal Judicial Center regularly organizes educational programs for judges, court unit executives, managers and supervisors, and judiciary staff.<sup>137</sup> It has conducted trainings and programs on respect in the workplace, civility, and implicit bias, and provided trainings and resources on other workplace topics.<sup>138</sup> Expanded training, such as on bystander intervention and the development of “soft skills” for managers and supervisors, is anticipated to supplement the traditional discrimination and harassment training programs already conducted. This expanded training will focus on broader themes and topics that promote a civil, respectful, and collaborative work environment.<sup>139</sup>

Because of their unique roles and often short tenure, the Ninth Circuit has developed special initiatives targeting law clerks—expanded law clerk orientation agendas that include sessions on discrimination and harassment policies and employee dispute procedures, and sample chambers checklists on workplace expectations. Both endeavors encourage more transparency and communication about appropriate expectations of law clerks.<sup>140</sup> Training

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<sup>133</sup> WORKING GROUP REPORT, *supra* note 43, at 20, 42.

<sup>134</sup> *See id.*

<sup>135</sup> JC&D RULES, *supra* note 56, at r. 4(a)(6).

<sup>136</sup> *See* EDR WORKING GRP. & OFF. OF JUD. INTEGRITY, *supra* note 120, at 35; MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN, *supra* note 58, at 12.

<sup>137</sup> *See Education Programs*, FED. JUD. CTR., <https://www.fjc.gov/education/education-programs> [<https://perma.cc/XRT6-TK8Y>]; WORKING GROUP REPORT, *supra* note 43, at 18–19.

<sup>138</sup> *See Programs and Resources for All Court Employees*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-all-court-employees> [<https://perma.cc/E3Y4-22FL>]; 2019 STATUS REPORT, *supra* note 54, at 3.

<sup>139</sup> *See* 2019 STATUS REPORT, *supra* note 54, at 19–21; *Programs & Resources for Executives*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-executives> [<https://perma.cc/PA2R-BHEU>].

<sup>140</sup> NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 3.

for new judges begins at seminars following their confirmation hearings.<sup>141</sup> And specialized workplace conduct training is offered for chief judges and others in supervisory roles focusing on their unique responsibilities as court leaders with respect to workplace conduct.<sup>142</sup> A number of training and educational opportunities are offered online and through meetings, symposia, conferences, informal sessions with employees, reading clubs, and newsletters.<sup>143</sup> The Judicial Integrity Officer, chief judges, and Directors of Workplace Relations are seeing the impact of increased communications and training through additional inquiries and reports. Indeed, multiple employees have stated that these trainings alerted them to the inappropriate nature of certain behaviors and to the resources available to address them. And Directors of Workplace Relations have reported seeing an increase in the number of misconduct reports after holding trainings.<sup>144</sup>

Increased education about the workplace makes employees aware of their rights, makes judges aware of their obligations and responsibilities, reinforces behavioral expectations, and sends a clear message that these issues matter and are taken seriously. Increased training also reduces the negative impacts of isolated workplaces. When employees, including clerks, are informed—early, clearly, and repeatedly—of their rights and options *and* of the expectations and obligations placed on judges, the judiciary’s commitment to a fair and transparent workplace is reinforced.

#### IV. LOOKING TO THE FUTURE

##### *A. Internal Efforts*

The judiciary is steadfast in its commitment to enduring improvements. The Office of Judicial Integrity and the network of Directors of Workplace

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<sup>141</sup> See *Programs and Resources for Judges*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-judges> [<https://perma.cc/BNE2-AGBT>]; WORKING GROUP REPORT, *supra* note 43, at 41.

<sup>142</sup> See 2019 STATUS REPORT, *supra* note 54, at 2; *Programs & Resources for Executives*, *supra* note 139.

<sup>143</sup> For example, workplace issues are addressed in online and in-person training for law clerks, meetings of chief judges (both district and appellate courts), yearly educational meetings with district and bankruptcy court judges, the national symposium for court of appeals judges, targeted training for pretrial and probation units, and individual district meetings with lawyers and judges. Other examples include the Ninth Circuit’s internal newsletter *9th to 5*, and law clerk training via the Interactive Orientation for Federal Law Clerks and Maintaining an Exemplary Workplace.

<sup>144</sup> This positive relationship between training and reporting should be unsurprising and has been observed in other environments. See Jamie Mansell, Dani M. Moffit, Anne C. Russ & Justin N. Thorpe, *Sexual Harassment Training and Reporting in Athletic Training Students*, 12 ATHLETIC TRAINING EDUC. J. 3, 7 (2017) (“[A]thletic training students who never received any training were 6 times less likely to know what to do in harassing situations.”).

Relations and EDR Coordinators continue to track and respond to workplace conduct trends, serve as resources for court employees, collaborate on best practices, and increase awareness of the judiciary's flexible reporting processes. Indeed, direct feedback on these resources has resulted in suggested changes, as recounted in this Essay. The National Working Group continues to meet, review relevant policies and procedures, identify areas for improvement, and aggressively recommend changes to existing structures while working closely with various other judicial committees.

The judiciary also is expanding the ways it collects feedback from employees, from post-training surveys regarding employees' awareness of available resources to anonymous comment boxes and both court-wide and unit-focused climate surveys. Several circuits have previously conducted either climate surveys or law clerk exit surveys which have provided valuable feedback for the development of workplace initiatives.<sup>145</sup> As Professor Litman and Shah note, and the EEOC recommends, workplace surveys are a means to uncover potential problems, including harassment.<sup>146</sup> Climate surveys and other feedback mechanisms "can alert organizations to the extent of the problem and provide[] them with an opportunity for early intervention."<sup>147</sup>

At the national level, all judiciary employees can provide information anonymously to the Office of Judicial Integrity through its online reporting mechanism, which allows employees to relay concerns without any attributable or identifying information. The Ninth Circuit implemented a similar tool for conveying anonymous information.<sup>148</sup> 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.

Several circuits have developed or are developing various types of law clerk and employee engagement groups, facilitating closer engagement and interaction between chambers and court units.<sup>149</sup> These opportunities provide useful assistance to employees and simultaneously serve as a source of feedback to Directors of Workplace Relations about current concerns and the unique needs of each group. For example, the Ninth Circuit launched the Law Clerk Resources Group, comprised of former law clerks, to help current law clerks navigate their clerkships and provide them the opportunity to

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<sup>145</sup> See 2019 STATUS REPORT, *supra* note 54, at 18; NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 6–10, 16.

<sup>146</sup> Litman & Shah, *supra* note 17, at 635; see EEOC REPORT, *supra* note 20, at 67.

<sup>147</sup> Buchanan et al., *supra* note 76, at 697.

<sup>148</sup> See NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 1, 9–10.

<sup>149</sup> See *infra* notes 150–152 and accompanying text.

discuss questions and concerns about their chambers experience with peers.<sup>150</sup> Similarly, the D.C. Circuit created a Law Clerk Advisory Group.<sup>151</sup> Expanding on these models, the First Circuit includes law clerks, probation and pretrial services employees, and Clerk's Office staff on its Workplace Conduct Committee.<sup>152</sup>

### *B. Partnerships*

The Office of Judicial Integrity and Directors of Workplace Relations also serve as conduits and liaisons for outside stakeholders, such as law schools, clerkship programs and associations, and other organizations that interact with the judiciary. Judiciary representatives are collaborating with organizations like the National Association of Law Placement and the Association of American Law Schools and are connecting with law school administrators.<sup>153</sup>

Law school faculty and administrators have a unique window into their students' and graduates' experiences. They can be valuable partners to the judiciary in identifying and addressing workplace misconduct during or after clerkships or other assignments.<sup>154</sup> In August 2021, the Director of the Administrative Office reached out to nearly 200 law schools to update them on the judiciary's efforts and to seek their assistance in "identify[ing] and correct[ing] any workplace conduct that falls short of [the judiciary's] high standards."<sup>155</sup> The letter urges law schools to contact the Office of Judicial Integrity or a Circuit Director of Workplace Relations if they "receive a report of or hear about potential workplace misconduct in the Federal

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<sup>150</sup> Jessica Mach, *Stakeholders Credit 9th Circuit's Harassment Policy Changes, But Say More Needs to Be Done*, DAILY J. (Mar. 11, 2020), <https://www.dailyjournal.com/articles/356634-stakeholders-credit-9th-circuit-s-harassment-policy-changes-but-say-more-needs-to-be-done> [<https://perma.cc/6ZPU-MQKY>].

<sup>151</sup> *Law Clerk Advisory Group*, U.S. CT. OF APPEALS D.C. CIR., <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Workplace+Conduct+-+Law+Clerk+Advisory+Group> [<https://perma.cc/4QYJ-EZSP>].

<sup>152</sup> See *First Circuit Workplace Conduct Committee Appoints Three New Members*, U.S. CT. OF APPEALS FOR THE FIRST CIR. (July 17, 2019), <https://www.ca1.uscourts.gov/news/first-circuit-workplace-conduct-committee-appoints-three-new-members> [<https://perma.cc/2HAC-4SFN>].

<sup>153</sup> For example, the judiciary has been in correspondence with these organizations and a representative participated in national meetings of both groups along with appearing at the American Academy of Appellate Lawyers. Judiciary representatives have also spoken at bar associations and civic groups. See, e.g., NINTH CIRCUIT COMMITTEE REPORT, *supra* note 45, at 10, 17.

<sup>154</sup> See NAT'L ASS'N OF L. PLACEMENT, *COURTING CLERKSHIPS: THE NALP JUDICIAL CLERKSHIP STUDY* § 3 (2000), <https://www.nalp.org/courtingclerkships?s=judicial%20clerkship%20study> [<https://perma.cc/XQK3-H75V>] (discussing findings regarding the role of law school faculty and administrators in judicial clerkship placement).

<sup>155</sup> Letter from Roslynn R. Mauskopf, Dir., Admin. Off. of the U.S. Cts., to law school clerkship directors (Aug. 5, 2021) (on file with author).

Judiciary.”<sup>156</sup> Confidentiality protections in place for this reporting should enhance follow-up by law schools and the judiciary.

### CONCLUSION

Recent news reports highlight that no industry is immune from workplace harassment.<sup>157</sup> As the EEOC and others have recognized, the institutional structures of some workplaces may increase the likelihood of misconduct while at the same time decreasing the likelihood of its detection. Professor Litman and Shah point out that the federal judiciary possesses several risk factors for harassment, and the surfacing of allegations against federal judges underscores the pressing need to address these institutional structures.<sup>158</sup>

In evaluating the work that needs to be done to combat workplace harassment, Professor Litman and Shah call on the legal profession, including the judiciary, to engage in a “sustained, public reflection about how our words, actions, attitudes, and institutional arrangements allow harassment to happen, and about the many different ways that we can prevent and address harassment.”<sup>159</sup> After more than three years of intensive efforts to change the workplace landscape with respect to harassment and bullying, this Essay reflects on the ways in which the federal judiciary has begun this difficult but necessary work and acknowledges that it will take ongoing vigilance and attentiveness. Leadership will continue reflection and reform with the goal to gain the workforce’s trust and confidence in the fairness of the policies and their implementation.

As one of the EEOC Report’s authors testified to Congress, “two essential components of a successful effort to shape workplace culture are leadership from the top and a focus on the unique needs of a particular

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<sup>156</sup> *Id.*

<sup>157</sup> See, e.g., Jesse McKinley, *Cuomo Faces New Claims of Sexual Harassment from Current Aide*, N.Y. TIMES (Apr. 7, 2021), <https://www.nytimes.com/2021/03/19/nyregion/alyssa-mcgrath-cuomo-harassment.html> [<https://perma.cc/K5MX-W2Z9>] (detailing recent allegations of sexual harassment against former New York state Governor Andrew Cuomo).

<sup>158</sup> Litman & Shah, *supra* note 17, at 620–25; see also Zapotosky, *supra* note 9 (detailing allegations of harassment against former judge Alex Kozinski); see also, e.g., Mihir Zaveri, *Federal Judge in Kansas Resigns After Reprimand for Sexual Harassment*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/judge-carlos-murguia-sexual-harassment.html> [<https://perma.cc/395J-Q927>] (same against former judge Carlos Murguia); Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html> [<https://perma.cc/2H5Q-4V52>] (same against former judge Stephen Reinhardt). The events recounted against these judges occurred before the judiciary undertook the extensive workplace initiatives outlined in this Essay.

<sup>159</sup> Litman & Shah, *supra* note 17, at 599.



workplace.”<sup>160</sup> The leadership has come directly from Chief Justice Roberts, chief circuit and district judges, and workplace managers. As efforts to date demonstrate, the federal judiciary appreciates the gravity of the issue and is dedicated to continued reform and innovation tailored to the judicial structure and environment. That effort should be given a fair chance to blossom and take root, while at the same time looking ahead to continued refinements and innovations. Although from 2020 to the present, the pandemic slowed certain court operations and modified in-person interactions, the judiciary’s workplace reforms continued unabated. The focus remains on preventing workplace harassment and providing employees with necessary advice, guidance, and procedures to address harassment and other abusive workplace conduct. This commitment to ensuring an exemplary workplace begins with Chief Justice Roberts and extends to all 30,000 plus people employed by the federal court system who deserve a respectful workplace.<sup>161</sup>

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<sup>160</sup> *Protecting Federal Judiciary Employees from Sexual Harassment Discrimination and Other Workplace Misconduct*, *supra* note 126, at 2 (statement of Chai R. Feldblum, Partner & Dir. of Workplace Culture Consulting, Morgan, Lewis & Bockius LLP).

<sup>161</sup> 2017 YEAR-END REPORT, *supra* note 15, at 11 (noting the federal judiciary’s commitment to ensuring “an exemplary workplace for every judge and every court employee”).

# **NINTH CIRCUIT EMPLOYMENT DISPUTE RESOLUTION POLICY**



**Judicial Council Approved: October 22, 2020**  
**Effective date: October 22, 2020**

# **NINTH CIRCUIT EMPLOYMENT DISPUTE RESOLUTION POLICY**

## **I. INTRODUCTION**

The Federal Judiciary is committed to a workplace of respect, civility, fairness, tolerance, and dignity, free of discrimination and harassment. These values are essential to the Judiciary, which holds its Judges and Employees to the highest standards. All Judges and Employees are expected to treat each other accordingly.

This Policy provides options for the reporting and resolution of allegations of wrongful conduct (discrimination, sexual, racial, or other discriminatory harassment, abusive conduct, and retaliation) in the workplace. Early action is the best way to maintain a safe work environment. All Judges, Employing Offices, and Employees have a responsibility to promote workplace civility, prevent harassment or abusive conduct, and to take appropriate action upon receipt of reliable information indicating a likelihood of wrongful conduct under this Policy. *See* Code of Conduct for Judicial Employees, Canon 3(C).

This Policy applies to all Judges, current and former Employees (including all law clerks; chambers employees; paid and unpaid interns, externs, and other volunteers; and probation and pretrial services employees), and applicants for employment who have been interviewed.<sup>1</sup> The following persons cannot seek relief under this Policy: Judges, applicants for judicial appointment, federal public defender employees, Criminal Justice Act panel attorneys and applicants, investigators and service providers, community defender employees, volunteer mediators, and any other non-Employees not specified above. *See* Appendix 1 for full definitions of Judges and Employees. This Policy covers conduct and actions that take place on and off work premises.

## **II. WRONGFUL CONDUCT**

**A.** This Policy prohibits wrongful conduct that occurs during the period of employment or the interview process (for an applicant).<sup>2</sup> Wrongful conduct includes:

- Discrimination;
- sexual, racial, and other discriminatory harassment;
- abusive conduct; and
- retaliation (including retaliation as described in the Whistleblower Protection Provision in [\*Guide to Judiciary Policy, Vol. 12 § 220.10.20\(c\)\*](#)).

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<sup>1</sup> Employees of courts within the Ninth Circuit, which have had an EDR Policy specific to their court approved by the Judicial Council of the Ninth Circuit on or after October 22, 2020, are subject to the applicable local court EDR Policy rather than this Ninth Circuit Policy.

<sup>2</sup> The rights and protections of Chapter 1 of the EEO Policy (Appendix 6) shall apply to Employees.

Wrongful conduct can be verbal, non-verbal, physical, or non-physical.

Wrongful conduct also includes conduct that would violate the following employment laws and policy, as applied to the Judiciary by Judicial Conference policy:

- Title VII, Civil Rights Act of 1964;
- Age Discrimination in Employment Act of 1967;
- Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973;
- Family and Medical Leave Act of 1993;
- Uniformed Services Employment and Reemployment Rights Act of 1994;
- Whistleblower Protection Provision ([Guide, Vol. 12 § 220.10.20\(c\)](#));
- Worker Adjustment and Retraining Notification Act;
- Occupational Safety and Health Act; and
- The Employee Polygraph Protection Act of 1988.

See [Guide, Vol. 12, Ch. 2](#).

- B. Discrimination** is an adverse employment action that materially affects the terms, conditions, or privileges of employment (such as hiring, firing, failing to promote, or a significant change in benefits) based on the following Protected Categories: race, color, sex, gender, gender identity, gender expression, marital status, pregnancy, parenthood, sexual orientation, religion, creed, ancestry, national origin, citizenship, genetic information, age (40 years and over),<sup>3</sup> disability, or service in the uniformed forces.
- C. Discriminatory harassment** occurs when a person covered by this Policy is subject to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working environment. Discriminatory harassment includes sexual harassment. Sexual harassment is a form of harassment based on sex or gender.

*Examples of conduct that may give rise to discriminatory harassment:* racial slurs; derogatory comments about a person's ethnicity, culture, or foreign accent; or jokes about a person's age, disability, or sexual orientation.

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<sup>3</sup> The age discrimination provision does not apply to hiring, retirement, or separation of probation and pretrial services officers under 5 U.S.C. chapters 83 and 84.

*Examples of conduct that may give rise to sexual harassment:* suggestive or obscene notes, emails, text messages, or other types of communications; sexually degrading comments; display of sexually suggestive objects or images; unwelcome or inappropriate touching or physical contact; unwelcome sexual advances or propositions; inappropriate remarks of a sexual nature or about physical appearance; or employment action affected by submission to, or rejection of, sexual advances.

- D. Abusive Conduct** is ordinarily a pattern of demonstrably egregious and hostile conduct *not* based on a Protected Category that unreasonably interferes with an Employee’s work and creates an abusive working environment. Abusive conduct is threatening, oppressive, or intimidating.

Abusive conduct does not include communications and actions conveyed in a respectful manner and reasonably related to performance management, including but not limited to: instruction, corrective criticism, and evaluation; performance improvement plans; duty assignments and changes to duty assignments; office organization; progressive discipline; and adverse action.

- E. Retaliation** is a materially adverse action taken against an Employee for reporting wrongful conduct; for assisting in the defense of rights protected by this Policy; or for opposing wrongful conduct. Retaliation against a person who reveals or reports wrongful conduct is itself wrongful conduct.

### **III. REPORTING WRONGFUL CONDUCT**

The Judiciary encourages early reporting and action on wrongful conduct. Employees who experience, observe, or learn of reliable evidence of sexual, racial, or other discriminatory harassment or abusive conduct are strongly encouraged to take appropriate action, including reporting it to a supervisor, human resources professional, Unit Executive, Employment Dispute Resolution (“EDR”) Coordinator,<sup>4</sup> Chief Judge, Chief Circuit Judge, the Office of Workplace Relations, or to the national Office of Judicial Integrity. *See* Code of Conduct for Judicial Employees, Canon 3(C). Employees are also encouraged to report wrongful conduct in the workplace by non-Employees. Court and chambers’ confidentiality requirements do not prevent any Employee—including law clerks—from revealing or reporting wrongful conduct by any person.

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<sup>4</sup> A staff member of the Office of Workplace Relations may function as an EDR Coordinator to provide all the Options for Resolution (*see* Appendix 1).

## IV. OPTIONS FOR RESOLUTION

The Judiciary's goal is to address wrongful conduct as soon as possible and to provide multiple, flexible options for doing so. An Employee is always free to address a conduct issue directly with the person who allegedly committed wrongful conduct or to contact a colleague, supervisor, Unit Executive, Judge, Chief Judge, or other individual to discuss or address the situation. This Policy provides the following additional options, and Employees may choose the option(s) that best fit their needs and comfort level.

**A. Policy Options.** This Policy provides three options to address wrongful conduct, as explained in detail below:

- 1. Informal Advice**
- 2. Assisted Resolution**
- 3. Formal Complaint**

**B. General Rights.** All options for resolution are intended to respect the privacy of all involved to the greatest extent possible, and to protect the fairness and thoroughness of the process by which allegations of wrongful conduct are initiated, investigated, and ultimately resolved.

- 1. Confidentiality.** All individuals involved in the processes under this Policy must protect the confidentiality of the allegations of wrongful conduct. Information will be shared only to the extent necessary and only with those whose involvement is necessary to address the situation. An assurance of confidentiality must yield when there is reliable information of wrongful conduct that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity of the Judiciary.

No person in the role of EDR Coordinator, the Office of Workplace Relations, or the Office of Judicial Integrity shall be compelled to disclose any conversations, testify, or provide information obtained through Informal Advice except as described in § IV.B.1.

Any persons or Party involved in mediation or settlement discussion under §§ IV.C.2. or IV.C.3.f.iii. of this Policy shall not disclose any information or records obtained during the mediation or settlement process except as necessary to consult with the Party or Parties involved. Records made of mediation discussions, including notes and documents provided in preparation for mediation, are strictly confidential and will not be filed with

the EDR Coordinator, Office of Workplace Relations, or Office of Judicial Integrity (*see* § V.B.).

Confidentiality obligations in the *Code of Conduct for Judicial Employees* concerning use or disclosure of confidential information received in the course of official duties do not prevent nor should they discourage Employees from reporting or disclosing wrongful conduct, including sexual, racial, or other forms of discriminatory harassment by a Judge, supervisor, or other person.

Supervisors, Unit Executives, and Judges must take appropriate action when they learn of reliable information of wrongful conduct, such as sexual, racial, or other discriminatory harassment, which may include informing the appropriate Chief Judge.

2. **Impartiality.** All investigations, hearings, and other processes under this Policy must be conducted in a fair and impartial manner. The EDR Coordinator, the Office of Workplace Relations, and the Presiding Judicial Officer must be impartial and may not act as an advocate for either Party. The EDR Coordinator, staff member of the Office of Workplace Relations, or Presiding Judicial Officer must recuse if they participated in, witnessed, or were otherwise involved with the conduct or employment action giving rise to the claim. Recusal of these individuals is also required if the matter creates an actual conflict or the appearance of a conflict.
3. **Right to representation.** Both the Employee and the Employing Office responsible for providing any remedy have the right to be represented by an attorney or other person of their choice at their own expense. Another Employee may assist the Employee or Employing Office if doing so will not constitute a conflict of interest or unduly interfere with the Employee's duties, as determined by the assisting Employee's appointing officer.
4. **Interim Relief.** An Employee, including a law clerk or other chambers employee, who pursues any of the options under this Policy may request transfer, an alternative work arrangement, or administrative leave if the Employee alleges egregious conduct by a supervisor, Unit Executive, or Judge that makes it untenable to continue working for that person. Any such request must be made to the Unit Executive or Chief Judge, as appropriate, to determine appropriate interim relief, if any, taking into consideration the impact on any Employing Office.

5. **Allegations Regarding a Judge.** An Employee alleging that a Judge has engaged in wrongful conduct may use any of the options for resolution as set forth in Section C. An Employee may also file a complaint under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

## C. Specific Options

1. **Informal Advice.** An Employee may contact an EDR Coordinator, the Office of Workplace Relations, or the national Office of Judicial Integrity for confidential advice and guidance (*see* § IV.B.1) about a range of topics including:

- the rights and protections afforded under this Policy, the Judicial Conduct and Disability Act, and any other processes;
- providing perspective on conduct described, including whether it violates the Policy;
- ways to respond to wrongful conduct as it is happening; and/or
- options for addressing the conduct, such as informal resolution, participating in Assisted Resolution, or pursuing a Formal Complaint under this Policy, the Judicial Conduct and Disability Act, or any other processes.

2. **Assisted Resolution.** Assisted Resolution is an interactive, flexible process that may include:

- discussing the matter with the person whose behavior is of concern;
- conducting a preliminary investigation including interviewing persons alleged to have violated rights under this Policy and witnesses to the conduct;
- engaging in voluntary mediation between the persons involved; and/or
- resolving the matter by agreement.

- a. To pursue this option, an Employee must contact an EDR Coordinator or the Office of Workplace Relations and complete a “Request for Assisted Resolution” (Appendix 2).<sup>5</sup> An Employee asserting any claim of abusive conduct

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<sup>5</sup> When an Employee completes a Request for Assisted Resolution form and chooses to use a local EDR Coordinator to facilitate resolution, the local EDR Coordinator must notify the Office of Workplace Relations of the request.



is strongly encouraged to use Assisted Resolution before filing a Formal Complaint but is not required to do so. Filing a Request for Assisted Resolution does not toll (extend) the time for filing a Formal Complaint under § IV.C.3 unless one of the Parties requests, and the Chief Judge or Presiding Judicial Officer grants, an extension of time for good cause, as permitted in § IV.C.3.a.

**b.** If the allegations concern the conduct of a Judge, the Chief Judge of the appropriate district, bankruptcy, or circuit Court must be notified and will be responsible for coordinating any Assisted Resolution and/or taking any other action required or appropriate under the circumstances. *See, e.g., Rules for Judicial-Conduct and Judicial-Disability Proceedings.*

**c.** If the allegations concern the conduct of an Employee, the EDR Coordinator or the Office of Workplace Relations will coordinate Assisted Resolution and must notify the appropriate Unit Executive(s). The Unit Executive is responsible for assessing the allegation(s) and taking appropriate steps to resolve the matter. If the allegations concern the conduct of a Unit Executive, the EDR Coordinator or the Office of Workplace Relations must notify the Chief Judge, who is responsible for assessing the allegation(s) and addressing the matter as appropriate.

**d.** The Unit Executive or Chief Judge responsible for assessing the allegations, as indicated in (b) and (c) above, may deny the Request for Assisted Resolution at any time if they were to conclude it is frivolous; it does not allege violations of the rights or protections in this Policy; the alleged conduct arises out of the same facts and circumstances, and was resolved by, a previous EDR Complaint or other claim process or procedure; or on other appropriate grounds.

**e.** If Assisted Resolution is successful in resolving the matter, the Parties will so acknowledge in writing.

**f.** If Assisted Resolution is not successful in resolving the matter, the EDR Coordinator or the Office of Workplace Relations will advise the Employee of the Employee's rights to file a Formal Complaint and/or pursue action under the Judicial Conduct and Disability Act, if applicable, or any other processes.

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The Office of Workplace Relations may serve as a resource for the EDR Coordinator to facilitate resolution at the EDR Coordinator's request.

When an Employee completes a Request for Assisted Resolution form and chooses to use the Office of Workplace Relations to facilitate the resolution, the Office of Workplace Relations may notify the local EDR Coordinator when appropriate or upon request of the Employee.

**3. Filing a Formal Complaint.** An Employee may file a Formal Complaint (“Complaint”) with any of the Court’s EDR Coordinators or the Office of Workplace Relations to address a claim of wrongful conduct.<sup>6</sup>

**a.** To file a Complaint, an Employee must submit a “Formal Complaint” (Appendix 3) to any of the Court’s EDR Coordinators or the Office of Workplace Relations within 180 days of the alleged wrongful conduct or within 180 days of the time the Employee becomes aware or reasonably should have become aware of such wrongful conduct. Use of the Informal Advice or Assisted Resolution options does not toll (extend) this 180-day deadline unless the Chief Judge of the Court or the Presiding Judicial Officer grants an extension of time for good cause.

**b.** An Employee asserting any claim of abusive conduct is strongly encouraged to use Assisted Resolution before filing a Formal Complaint but is not required to do so.

**c.** The Employee filing the Complaint is called the Complainant. The Party responding to the Complaint is the Employing Office that is responsible for providing any appropriate remedy and is called the Respondent. The Complaint is not filed against any specific individual(s) but against the Employing Office.

**d. Complaint Regarding a Judge.** An Employee alleging that a Judge has engaged in wrongful conduct may file a Complaint under this Policy. For Complaints against Judges, the Presiding Judicial Officer is the Chief Circuit Judge or a designee. If the Chief Circuit Judge is the subject of the Complaint, the Circuit Judge who is next in precedence to become Chief Circuit Judge pursuant to 28 U.S.C. § 45, shall designate an alternative Presiding Judicial Officer to oversee the hearing process. The EDR Coordinator must immediately provide a copy of the Complaint to the Chief Circuit Judge (or the next Circuit Judge in precedence to become Chief Circuit Judge, if the allegation is against the Chief Circuit Judge) , who will oversee the EDR Complaint process. If a District, Magistrate, or Bankruptcy Judge is the subject of the Complaint, the EDR Coordinator must also provide a copy of the Complaint to the Chief District Judge, and to the Chief Bankruptcy Judge if a Bankruptcy Judge is the subject of the Complaint (unless the Chief District Judge or Chief Bankruptcy Judge is the subject of the Complaint, in which case the Complaint would not be given to that Judge).

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<sup>6</sup> When an Employee files a Formal Complaint form with a local EDR Coordinator, the local EDR Coordinator must notify the Office of Workplace Relations of the Complaint. The Office of Workplace Relations may serve as a resource for the EDR Coordinator upon the EDR Coordinator’s request.

When an Employee files a Formal Complaint form with the Office of Workplace Relations, the Office of Workplace Relations may notify the local EDR Coordinator when appropriate or upon request of the Employee.

If a Judge becomes the subject of both a Complaint under this Policy and a complaint under the Judicial Conduct and Disability Act, the Chief Circuit Judge will determine the appropriate procedure for addressing both, which may include holding the EDR claim in abeyance and determining how best to find any common issues of fact, subject to all requirements of the Judicial Conduct and Disability Act, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and, as practicable, this EDR Policy. Regardless of whether there is a formal complaint under the Judicial Conduct and Disability Act, the Chief Circuit Judge should consider the need for any necessary or appropriate interim relief.

**e. Formal Complaint Procedures and Procedural Rights**

i. *Appointment of Presiding Judicial Officer.* Upon receipt of a Complaint, the EDR Coordinator will immediately send a copy of the Complaint to the Chief Judge of the Court, who will appoint a Presiding Judicial Officer. The Presiding Judicial Officer will be a Judge in the Court or, when appropriate, a Judge from another Court (with the consent of the respective Chief Judge of that Court).

ii. *Presiding Judicial Officer.* The Presiding Judicial Officer oversees the Complaint proceeding. The Presiding Judicial Officer will provide a copy of the Complaint to the head of the Employing Office against which the Complaint has been filed (Respondent), except when the Presiding Judicial Officer determines for good cause that the circumstances dictate otherwise. The Presiding Judicial Officer must provide the individual alleged to have violated rights under this Policy notice that a Complaint has been filed and the nature and substance of the Complaint allegations.

The Presiding Judicial Officer will provide for appropriate investigation and discovery, allow for settlement discussions,<sup>7</sup> and determine any written submissions to be provided to the Parties, determine if a hearing is needed, determine the time, date, and place of the hearing, issue a written decision, and, if warranted, order remedies.

iii. *Disqualification and Replacement.* Either Party may seek disqualification of the EDR Coordinator or the Presiding Judicial Officer by

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<sup>7</sup> The Employing Office may request in writing a stay, or the Presiding Judicial Officer may on the Presiding Judicial Officer's own initiative stay a Formal Complaint proceeding up to 60 days (unless extended for good cause), if the Employing Office asserts that there has been no prior opportunity to address the conduct alleged. The Presiding Judicial Officer will determine whether to grant the stay after providing the Complainant an opportunity to respond. A stay in the proceedings can provide the Employing Office an opportunity to assess the allegations and take appropriate action. If the matter is successfully resolved, the Parties may enter into an agreed written settlement approved by the Presiding Judicial Officer pursuant to § IV.C.3.f.iii. If the matter is not resolved during the stay, the stay of proceedings will be lifted, and the Formal Complaint will proceed under § IV.C.3.

written request to the Chief Judge, explaining why the individual should be disqualified.

If the Presiding Judicial Officer is disqualified, the Chief Judge will designate another Judge to serve as Presiding Judicial Officer. If the EDR Coordinator is disqualified, the Chief Judge will appoint one of the alternate EDR Coordinators or, if available, an EDR Coordinator from another Court (with the consent of the respective Chief Judge of that Court).

iv. *Response.* The Respondent may file a Response to the Complaint with the EDR Coordinator within **30 days** of receiving the Complaint. The EDR Coordinator must immediately send the Response to the Presiding Judicial Officer and to the Complainant.

v. *Investigation and Discovery.* The Presiding Judicial Officer will ensure that the allegations are impartially and fairly investigated, and may use outside trained investigators if warranted. The investigation may include interviews with persons alleged to have violated rights under this Policy and witnesses, review of relevant records, and collecting documents or other records. The Presiding Judicial Officer will provide for such discovery to the Complainant and Respondent as is necessary and appropriate. The Presiding Judicial Officer will also determine what evidence and written arguments, if any, are necessary for a fair and complete assessment of the allegations and response.

vi. *Case preparation.* The Complainant may use official time to prepare their case, so long as it does not unduly interfere with the performance of duties.

vii. *Extensions of time.* Any request for an extension of time must be in writing. The Presiding Judicial Officer may extend any of the deadlines set forth in this EDR Policy for good cause, except for the deadline to issue a written decision, which may only be extended by the Chief Judge.

viii. *Established Precedent.* In reaching a decision, the Presiding Judicial Officer should be guided by judicial and administrative decisions under relevant rules and statutes, as appropriate. The Federal Rules of Evidence and any federal procedural rules do not apply.

ix. *Notice of Written Decision.* The EDR Coordinator or Presiding Judicial Officer will immediately send a copy of the written decision to the Parties, the Chief Judge of the Court, and to any individual alleged to have

violated rights protected by this Policy. The EDR Coordinator will inform the Parties of appeal rights, procedures, and deadlines.

**f. Resolution of Complaint Without a Hearing.** After notifying the Parties and giving them an opportunity to respond, the Presiding Judicial Officer may resolve the matter without a hearing.

i. The Presiding Judicial Officer may dismiss a Complaint and issue a written decision at any time in the proceedings on the grounds that: it is untimely filed, is frivolous, fails to state a claim, or does not allege violations of the rights or protections in this Policy; the alleged conduct arises out of the same facts and circumstances, and was resolved by, a previous EDR Complaint or other claim process or procedure; or on other appropriate grounds.

ii. After completion of investigation and discovery, the Presiding Judicial Officer may, on the Presiding Judicial Officer's own initiative or at the request of either Party, issue a written decision if the Presiding Judicial Officer determines that no relevant facts are in dispute and that one of the Parties is entitled to a favorable decision on the undisputed facts.

iii. The Parties may enter into an agreed written settlement if approved in writing by the Presiding Judicial Officer and the Chief Judge.

**g. Resolution of Complaint With a Hearing.** If the Complaint is not resolved in its entirety by dismissal, Assisted Resolution, decision without a hearing, or settlement, the Presiding Judicial Officer will order a hearing on the merits of the Complaint.

i. *Hearing.* The hearing will be held no later than **60 days** after the filing of the Complaint unless the Presiding Judicial Officer extends the deadline for good cause. The Presiding Judicial Officer will determine the place and manner of the hearing.

ii. *Notice.* The Presiding Judicial Officer must provide reasonable notice of the hearing date, time, and place to the Complainant, the Respondent, and any individual(s) alleged to have violated the Complainant's rights.

iii. *Right to Present Evidence.* The Complainant and Respondent have the right to present witnesses and documentary evidence and to examine adverse witnesses, subject to the discretion of the Presiding Judicial Officer.

vi. *Record of Proceedings.* A verbatim record of the hearing must be made and will be the official record of the proceeding. This may be a digital recording or a transcript.

v. *Written Decision.* The Presiding Judicial Officer will make findings of fact and conclusions of law and issue a written decision no later than **60 days** after the conclusion of the hearing, unless an extension for good cause is granted by the Chief Judge.

**h. Remedies.** When the Presiding Judicial Officer finds that the Complainant has established by a preponderance of the evidence (more likely than not) that a substantive right protected by this Policy has been violated, the Presiding Judicial Officer may direct the Employing Office to provide remedies for the Complainant. The remedies are limited to providing relief to the Complainant, should be tailored as closely as possible to the specific violation(s) found, and take into consideration the impact on any Employing Office. The Chief Judge and Employing Office (Respondent) must take appropriate action to carry out the remedies ordered in the written decision, subject to any applicable policies or procedures.

i. *Allowable Remedies* may include:

- placement of the Complainant in a position previously denied;
- placement of the Complainant in a comparable alternative position;
- reinstatement to a position from which the Complainant was previously removed;
- prospective promotion of the Complainant;
- priority consideration of the Complainant for a future promotion or position;
- back pay and associated benefits, when the statutory criteria of the Back Pay Act are satisfied<sup>8</sup>;
- records modification and/or expungement;
- granting of family and medical leave;
- any reasonable accommodation(s); and
- any other appropriate remedy to address the wrongful conduct.<sup>9</sup>

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<sup>8</sup> *Back Pay Act.* Remedies under the Back Pay Act, including attorney's fees, may be ordered only when the statutory criteria of the Back Pay Act are satisfied, which include: (1) a finding of an unjustified or unwarranted personnel action; (2) by an appropriate authority; (3) which resulted in the withdrawal or reduction of all or part of the Employee's pay, allowances, or differentials. An order of back pay is subject to review and approval by the Director of the Administrative Office of the United States Courts. See 5 U.S.C. § 5596 (b)(1) and [Guide, Vol. 12, § 690](#).

<sup>9</sup> The issue in an EDR Complaint is whether the Employing Office is responsible for the alleged conduct; it is not an action against any individual. The Presiding Judicial Officer lacks authority to impose disciplinary or similar action

ii. *Unavailable Remedies.* Other than under the Back Pay Act, monetary damages are not available. The Presiding Judicial Officer may award attorney's fees only if the statutory requirements under the Back Pay Act are satisfied.

i. **Review of Decision (Appeal).** The Complainant and/or the Respondent may appeal the decision to the Judicial Council of the Ninth Circuit by submitting in writing a Petition for Review of Decision setting forth the grounds for appeal within **30 days** of the date of the decision under procedures established by the Judicial Council of the Ninth Circuit (Appendix 4). The EDR Coordinator will inform the Parties of the procedures for seeking review. The decision will be reviewed based on the record created by the Presiding Judicial Officer and will be affirmed if supported by substantial evidence and the proper application of legal principles.

## **V. COURT AND EMPLOYING OFFICE OBLIGATIONS**

To ensure that Employees are aware of the options provided by this Policy, and that the Policy is effectively implemented, Courts and Employing Offices must adhere to the following:

- A. Adopt and Implement EDR Policy.** All Courts must adopt and implement an EDR Policy based on this EDR Policy. Courts may join with others to adopt consolidated EDR Policies. Any modification of this EDR Policy (1) may expand, but should not diminish or curtail, any of the rights or remedies afforded Employees under this EDR Policy, and (2) must be approved by the Judicial Council of the Ninth Circuit. A copy of each EDR Policy and any subsequent modifications must be filed with the Administrative Office.
- B. Records.** At the conclusion of informal or formal proceedings under this Policy, all papers, files, and reports will be filed with the EDR Coordinator and the Office

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against an individual. When there has been a finding of wrongful conduct in an EDR proceeding, an appointing official, or official with delegated authority, should separately assess whether further action, in accordance with any applicable policies and procedures, is necessary to correct and prevent wrongful conduct and promote appropriate workplace behavior, such as:

- requiring counseling or training;
- ordering no contact with the Complainant;
- reassigning or transferring an Employee;
- reprimanding the Employee who engaged in wrongful conduct;
- issuing a suspension, probation, or demotion of the Employee who engaged in wrongful conduct; and/or
- terminating employment for the Employee who engaged in wrongful conduct.

of Workplace Relations. No papers, files or reports relating to an EDR matter will be filed in any Employee's personnel folder, except as necessary to implement an official personnel action.

Final decisions under this Policy will be made available to the public, appropriately redacted, in accordance with procedures established by the Judicial Council of the Ninth Circuit. The Presiding Judicial Officer should make a recommendation on whether a final decision should be public.

- C. EDR Coordinators.** The Chief Judge will designate both a primary EDR Coordinator and, if available, at least one alternate EDR Coordinator for the Court.<sup>10</sup> A Court may use an EDR Coordinator from another Court, or may use the Office of Workplace Relations as an alternate EDR Coordinator, if necessary, with the approval of the appropriate Chief Judge. An Employee may choose the EDR Coordinator with whom the Employee wishes to seek Informal Advice, request Assisted Resolution, or file a Complaint under this EDR Policy.

An EDR Coordinator must be an Employee who is not a Unit Executive. A Judge may not be an EDR Coordinator. All EDR Coordinators must be trained and certified as set forth in the EDR Interpretive Guide and Handbook.

- D. Advising Employees of their Rights.** Courts and Employing Offices must:

1. prominently post on their internal and external main homepages a direct link labeled "Your Employee Rights and How to Report Wrongful Conduct," to:
  - the entire EDR Policy with all Appendices and relevant contact information;
  - the Judicial Conduct and Disability Act, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and the Judicial Conduct and Disability Complaint form; and
  - contact information for all the Court's EDR Coordinators, the Office of Workplace Relations, and the national Office of Judicial Integrity (internal homepage only).

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<sup>10</sup> A team of EDR Coordinators or multiple EDR Coordinators would satisfy the requirement to designate a primary and alternate EDR Coordinator.



2. prominently display in the workplace:
  - the posters set forth in Appendix 5; and
  - an Anti-Discrimination and Harassment Notice that: (a) states that discrimination or harassment based on race, color, sex, gender, gender identity, gender expression, marital status, pregnancy, parenthood, sexual orientation, religion, creed, ancestry, national origin, citizenship, genetic information, age (40 years and over), disability, or service in the uniformed forces is prohibited; (b) explains that Employees can report, resolve, and seek remedies for discrimination, harassment, or other wrongful conduct under the EDR Policy by contacting any of the Court's EDR Coordinators and/or the Office of Workplace Relations, and/or the national Office of Judicial Integrity; (c) identifies the names and contact information of all Court EDR Coordinators, the Office of Workplace Relations, and the national Office of Judicial Integrity; and (d) states where the EDR Policy can be located on the Court's website.
3. ensure that each new Employee receives an electronic or paper copy of the EDR Policy and acknowledge in writing that the Employee has read the Policy; and
4. conduct training annually for all Judges and Employees, including chambers staff, to ensure that they are aware of the rights and obligations under the EDR Policy and the options available for reporting wrongful conduct and seeking relief.

**E. Reporting.** Courts and Employing Offices will provide annually, to the Administrative Office of the United States, data on: (1) the number and types of alleged violations for which Assisted Resolution was requested, and for each matter, whether it was resolved or was also the subject of a Complaint under this Policy or other complaint; (2) the number and type of alleged violations for which Complaints under this Policy were filed; (3) the resolution of each Complaint under this Policy (dismissed or settled prior to a decision, or decided with or without a hearing); and (4) the rights under this Policy that were found by decision to have been violated. Courts and Employing Offices should also provide any information that may be helpful in identifying the conditions that may have enabled wrongful conduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its recurrence.

**F. Appendices Attached:**

1. Definitions
2. Request for Assisted Resolution
3. Formal Complaint Form
4. Procedures for Review of EDR Presiding Judicial Officer Decision by the Executive Committee of the Judicial Council of the Ninth Circuit (Appeal)
5. Posters
6. Ninth Circuit Equal Employment Opportunity (EEO) Policy

This Policy supersedes all prior Equal Employment Opportunity and Employment Dispute Resolution Policies.

Effective date: October 22, 2020

## **DEFINITIONS**

### **APPENDIX 1**

**Office of Workplace Relations:** The Office of Workplace Relations serves the Ninth Circuit and includes the Director of Workplace Relations. The Office coordinates workplace conduct issues and the implementation of all Court EDR Policies within the circuit. The scope of duties generally may include: provide Informal Advice, coordinate Assisted Resolution, and assist with the Formal Complaint process under any EDR Policy within the circuit; assist in training the EDR Coordinators within the circuit; provide or arrange for training throughout the circuit on workplace conduct, discrimination, and sexual harassment; and collect and analyze statistical data and other information relevant to workplace conduct matters. A staff member of the Office of Workplace Relations may function as an EDR Coordinator and provide all Options for Resolution for Employees.

**Court:** The Court (Court of Appeals, District Courts, Bankruptcy Courts, Court of Federal Claims and Court of International Trade, or of any Court created by an Act of Congress in a territory that is invested with any jurisdiction of a District Court of the United States) in which the Employing Office that would be responsible for ordering redress, correction, or abatement of a violation of rights under this EDR Policy is located. In the case of disputes involving probation and pretrial services, “Court” refers to the appropriate District Court.

**EDR Coordinator:** A Court Employee or staff member of the Office of Workplace Relations, other than a Judge or Unit Executive, designated by the Chief Judge to coordinate all of the Options for Resolution provided for in this Policy. The EDR Coordinator provides confidential advice and guidance (*see* § IV.B.1.) if an Employee seeks Informal Advice; coordinates the Assisted Resolution process, including any necessary investigation; accepts Complaints under this Policy for filing; and assists the Presiding Judicial Officer in the Complaint proceeding, as directed. The EDR Coordinator maintains and preserves all Court files pertaining to matters initiated and processed under this EDR Policy. The EDR Coordinator assists the Court in meeting its obligations under this Policy to train and advise employees of their rights under this Policy, and to post the Policy as directed. Additional information on the EDR Coordinator’s responsibilities may be found in the EDR Interpretive Guide and Handbook.

**Employee:** All employees of a Court. This includes Unit Executives and their staffs; judicial assistants and other chambers employees; law clerks; and chief probation officers and chief pretrial services officers and their respective staffs; court reporters appointed by a Court; and paid and unpaid interns, externs, and other volunteer employees.

**Employing Office/Respondent:** The office of the Court that is responsible for providing any appropriate remedy. The Court is the Employing Office of Judges and chambers employees.

**Judge:** A judge appointed under Article III of the Constitution, a United States bankruptcy judge, a United States magistrate judge, a judge of the Court of Federal Claims, a judge of the Court of International Trade, or a judge of any Court created by an Act of Congress in a territory that is invested with any jurisdiction of a district court of the United States.

**Office of Judicial Integrity:** The office of the Administrative Office of the United States Courts staffed to provide advice and guidance to Employees nationwide about workplace conduct issues, including sexual, racial, and other discriminatory harassment, abusive conduct and other wrongful conduct. Contact information for the Office of Judicial Integrity can be found on JNet and on [uscourts.gov](http://uscourts.gov).

**Parties:** The Employing Office and the Employee who has filed a request for Assisted Resolution or a Formal Complaint.

**Protected Category:** Race, color, sex, gender, gender identity, gender expression, marital status, pregnancy, parenthood, sexual orientation, religion, creed, ancestry, national origin, citizenship, genetic information, age (40 years and over),<sup>11</sup> disability, or service in the uniformed forces.

**Unit Executive:** Circuit Executive, district court executive, clerk of court, chief probation officer, chief pretrial services officer, bankruptcy administrator, bankruptcy appellate panel clerk, senior staff attorney, chief preargument/conference attorney/circuit mediator, or circuit librarian.

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<sup>11</sup> The age discrimination provision does not apply to hiring, retirement, or separation of probation and pretrial services officers under 5 U.S.C. chapters 83 and 84.

**REQUEST FOR ASSISTED RESOLUTION  
APPENDIX 2**

**\*USE OF ASSISTED RESOLUTION DOES NOT EXTEND THE 180-DAY  
DEADLINE TO FILE A FORMAL COMPLAINT UNLESS THE DEADLINE IS  
EXTENDED UNDER THE EDR POLICY § IV.C.3.a.\***

Submitted under the Procedures of the Ninth Circuit Employment Dispute Resolution  
Policy

Court: \_\_\_\_\_

Full name of person submitting the form: \_\_\_\_\_

Your mailing address: \_\_\_\_\_

Your email address: \_\_\_\_\_

Your phone number(s): \_\_\_\_\_

Office in which you are employed or applied to: \_\_\_\_\_

Name and address of Employing Office from which you seek assistance (*if the matter involves a judge or chambers employee, the Employing Office is the Court*):

Your job title/job title applied for: \_\_\_\_\_

Date of interview (*for interviewed applicants only*): \_\_\_\_\_

Date(s) of alleged incident(s) for which you seek Assisted Resolution:

Summary of the actions or occurrences for which you seek Assisted Resolution (*attach additional pages as needed*):

Names and contact information of witnesses to the actions or occurrences for which you seek Assisted Resolution:

Describe the assistance or corrective action you seek:

Alleged Wrongful Conduct for which you seek Assisted Resolution (*check all that apply*):

☐ Discrimination based on (*check all that apply*):

- ☐ Race
- ☐ Color
- ☐ Sex
- ☐ Gender
- ☐ Gender identity
- ☐ Gender expression
- ☐ Marital status
- ☐ Pregnancy
- ☐ Parenthood
- ☐ Sexual orientation
- ☐ Religion
- ☐ Creed
- ☐ Ancestry
- ☐ National origin
- ☐ Citizenship
- ☐ Genetic information
- ☐ Age
- ☐ Disability
- ☐ Service in the uniformed forces

☐ Harassment based on (*check all that apply*):

- ☐ Race
- ☐ Color
- ☐ Sex
- ☐ Gender
- ☐ Gender identity
- ☐ Gender expression
- ☐ Marital status
- ☐ Pregnancy
- ☐ Parenthood
- ☐ Sexual orientation
- ☐ Religion
- ☐ Creed
- ☐ Ancestry
- ☐ National origin
- ☐ Citizenship
- ☐ Genetic information
- ☐ Age
- ☐ Disability
- ☐ Service in the uniformed forces

- ☐ Abusive Conduct
- ☐ Retaliation
- ☐ Whistleblower Protection
- ☐ Family and Medical Leave

- ☐ Uniform Services Employment and Reemployment Rights
- ☐ Worker Adjustment and Retraining

- ☐ Occupational Safety and Health
- ☐ Polygraph Protection
- ☐ Other (describe)

Do you have an attorney or other person who represents you?

☐ Yes

Please provide name, mailing address, email address, and phone number(s):

☐ No

**I acknowledge** that this Request will be kept confidential to the extent possible, but information may be shared to the extent necessary and with those whose involvement is necessary to resolve this matter, as explained in the EDR Policy (*see* EDR Policy § IV.B.1).

Your signature \_\_\_\_\_

Date submitted \_\_\_\_\_

Request for Assisted Resolution reviewed by EDR Coordinator/Director of Workplace Relations on \_\_\_\_\_

EDR Coordinator/Director of Workplace Relations name \_\_\_\_\_

EDR Coordinator/Director of Workplace Relations signature \_\_\_\_\_

Local Court Claim ID (Court Initials–AR–YY–Sequential Number): \_\_\_\_\_

**FORMAL COMPLAINT FORM  
APPENDIX 3**

Submitted under the Procedures of the Ninth Circuit Employment Dispute Resolution  
Policy

Court: \_\_\_\_\_

Full name of person submitting the form (Complainant): \_\_\_\_\_

Your mailing address: \_\_\_\_\_

Your email address: \_\_\_\_\_

Your phone number(s): \_\_\_\_\_

Office in which you are employed or applied to: \_\_\_\_\_

Name and address of Employing Office from which you seek a remedy (*if the matter involves a judge or chambers employee, the Employing Office is the Court*):

Your job title/job title applied for: \_\_\_\_\_

Date of interview (*for interviewed applicants only*): \_\_\_\_\_

Date(s) of alleged incident(s) for which you seek a remedy:

Summary of the actions or occurrences giving rise to the Complaint (*attach additional pages as needed*):

Describe the remedy or corrective action you seek (*attach additional pages as needed*):

Identify, and provide contact information for, any persons who were involved in this matter, who were witnesses to the actions or occurrences, or who can provide relevant information concerning the Complaint (*attach additional pages as needed*):



Identify the Wrongful Conduct that you believe occurred (*check all that apply*):

☐ Discrimination based on (*check all that apply*):

- ☐ Race
- ☐ Color
- ☐ Sex
- ☐ Gender
- ☐ Gender identity
- ☐ Gender expression
- ☐ Marital status
- ☐ Pregnancy
- ☐ Parenthood
- ☐ Sexual orientation
- ☐ Religion
- ☐ Creed
- ☐ Ancestry
- ☐ National origin
- ☐ Citizenship
- ☐ Genetic information
- ☐ Age
- ☐ Disability
- ☐ Service in the uniformed forces

☐ Harassment based on (*check all that apply*):

- ☐ Race
- ☐ Color
- ☐ Sex
- ☐ Gender
- ☐ Gender identity
- ☐ Gender expression
- ☐ Marital status
- ☐ Pregnancy
- ☐ Parenthood
- ☐ Sexual orientation
- ☐ Religion
- ☐ Creed
- ☐ Ancestry
- ☐ National origin
- ☐ Citizenship
- ☐ Genetic information
- ☐ Age
- ☐ Disability
- ☐ Service in the uniformed forces

☐ Abusive Conduct

☐ Retaliation

☐ Whistleblower  
Protection

☐ Family and Medical  
Leave

☐ Uniform Services  
Employment and  
Reemployment  
Rights

☐ Worker Adjustment  
and Retraining

☐ Occupational Safety  
and Health

☐ Polygraph Protection

☐ Other (describe)

Date on which Assisted Resolution was requested: \_\_\_\_\_

Date on which Assisted Resolution concluded: \_\_\_\_\_

Do you have an attorney who represents you?

☐ Yes

Please provide name, mailing address, email address, and phone number(s):

☐ No

☐ I have attached copy(ies) of any documents that relate to my Complaint (such as emails, notices of discipline or termination, job application, etc.)

**I acknowledge** that this Complaint will be kept confidential to the extent possible, but information may be shared to the extent necessary and with those whose involvement is necessary to resolve this matter, as explained in the EDR Policy (*see* EDR Policy § IV.B.1).

**I affirm** that the information provided in this Complaint is true and correct to the best of my knowledge:

Complainant signature \_\_\_\_\_

Date submitted \_\_\_\_\_

Complaint reviewed by EDR Coordinator/Director of Workplace Relations on \_\_\_\_\_

EDR Coordinator/Director of Workplace Relations name \_\_\_\_\_

EDR Coordinator/Director of Workplace Relations signature \_\_\_\_\_

Local Court Claim ID (Court Initials–FC–YY–Sequential Number): \_\_\_\_\_

**PROCEDURES FOR REVIEW OF EDR PRESIDING JUDICIAL OFFICER  
DECISION BY THE EXECUTIVE COMMITTEE OF THE JUDICIAL COUNCIL  
OF THE NINTH CIRCUIT (APPEAL)  
APPENDIX 4**

**I. Scope of the Rules**

These rules govern procedures for petitioning for review a decision, or summary dismissal of a Ninth Circuit Employment Dispute Resolution Policy Complaint rendered by a Presiding Judicial Officer (*see* § IV.C.3.e.ii). Such review is conducted by the Executive Committee of the Judicial Council of the Ninth Circuit (“Executive Committee”).

**II. Filing Petition for Review**

**A. Filing the Petition for Review.** A Party aggrieved by the final decision of the Presiding Judicial Officer or by summary dismissal of a Complaint, may petition for review of that decision or summary dismissal by filing a Petition for Review (“Petition”) to which is attached a copy of the decision of the Presiding Judicial Officer (or copy of the summary dismissal).

**B. Form of Petition and Supporting Arguments.** The Petition shall be in accordance with Form 1, which follows these procedures. Included in the Petition or as an attachment to the Petition shall be a statement, not to exceed 10 pages in length (8 ½ x 11 white paper, double-spaced, singled-sided) setting forth the basis for the Petition and all arguments and information supporting the petition. The Petition must be filed with the Executive Committee in a timely manner as set forth in Section III below.

**C. Serving the Petition for Review.** The petitioning party must serve the Petition on the Executive Committee by having it delivered to the Office of Workplace Relations at the following address:

Office of Workplace Relations  
P.O. Box 193939  
San Francisco, CA 94119

Parcel Delivery  
Office of Workplace Relations  
95 Seventh Street  
San Francisco, CA 94103

The Petition may also be emailed to the Office of Workplace Relations at [workplacedirector@ce9.uscourts.gov](mailto:workplacedirector@ce9.uscourts.gov).

Simultaneously, a copy of the Petition (and all attachments thereto) must be served on the opposing party, and proof of such service shall be included with the Petition filed with the Executive Committee.

### **III. Filing Deadlines**

- A. Time for Filing a Petition for Review.** A Petition for Review must be submitted to the Executive Committee no later than 30 days following the date of the final decision of the Presiding Judicial Officer or following the date of a summary dismissal of the Complaint.
- B. Requests for Extension of Time.** The Executive Committee may extend the time to file a Petition for Review and for any other filing specified in these procedures, provided the request is received no later than the required filing date, and provided the petitioner shows good cause or excusable neglect.
- C. Determining Time Periods.** The word “days” in all filing deadlines in these procedures shall mean calendar days, except that if the deadline date occurs on a Saturday, Sunday, or holiday, the deadline shall be extended to the next following Monday or court business day respectively.

### **IV. Consideration by the Executive Committee**

- A. General.** All reviews will be conducted by the members of the Executive Committee, and shall be based on the decision of the Presiding Judicial Officer or the summary dismissal of a Complaint and any documents submitted by the Parties in response to the directive of the Executive Committee as outlined below.
- B. Scope of the Record and Documents to be Considered.** Within 20 days following receipt of the Petition for Review, the Executive Committee shall notify the Parties concerning what, if any, additional information, i.e., record (e.g., hearing transcript), documents and/or briefs, may be submitted for its consideration. Unless notified by the Executive Committee of its request for additional information, neither party is to submit further information.
- C. Oral Argument.** Oral argument will normally not be permitted but may be ordered by the Executive Committee. Either party may request such argument in writing filed within 7 days following filing of the Petition as part of the petition (in the case of the

party filing the Petition) or (in the case of the Respondent) in a letter submitted no later than 7 days from receipt of the Petition, setting forth the specific reasons why such argument is necessary, and why adequate argument cannot be made in writing form. If granted, oral argument, may, at the sole discretion of the Executive Committee, be conducted via teleconference using video and/or audio technology.

**D. Standard of Review.** The final decision or summary dismissal of the Presiding Judicial Officer shall be affirmed if supported by substantial evidence.

**E. Summary Disposition.** If at any time prior to the final submission of the case for review, the Executive Committee determines that the basis(es) of the request for review are so insubstantial as to not justify further proceedings, the Court may issue an appropriate dispositive order.

**F. Form of Final Review.** The Executive Committee shall issue its decision in writing.

**Attachment:** Sample Petition for Review to the Executive Committee of the Judicial Council of the Ninth Circuit from Presiding Judicial Officer's Decision  
[see next page for Form 1]

Name of Petitioning Party or Counsel

Address

Telephone #

Fax #

Email

Name of Court in Which Presiding Judicial Officer's Final Decision Was Issued

A.B., Petitioner

v.

C.D., Respondent

Petition for Review of Decision in (or  
Summary Dismissal of Employment  
Dispute Resolution Policy Complaint

Notice is hereby given that (name of Party petitioning for review),  
(Petitioner) in the above named case, hereby Petition for Review to the Executive  
Committee of the Judicial Council of the Ninth Circuit from the final decision (or  
summary dismissal of the Complaint) by Judge (name of Presiding Judicial  
Officer) entered in this matter action on the \_\_\_\_\_ day of \_\_\_\_\_, (20\_\_).

Attached to this Petition is a copy of the Presiding Judicial Officer's Final  
Decision (or summary dismissal of the Complaint).

The basis(es) of this Petition for Review is (reason why review is  
requested—this basis(es) may be included as an attachment).

Submitted on this \_\_\_\_ day of \_\_\_\_\_, (20\_\_).

(s) \_\_\_\_\_  
(Representing name of Party)

Approved by the Ninth Circuit Judicial Council on \_\_\_\_\_.

**POSTERS**  
**APPENDIX 5**

# How to Address Wrongful Conduct in the Workplace

## INFORMAL ADVICE

To request advice about a workplace concern, contact your Employment Dispute Resolution (EDR) coordinator, Circuit Director of Workplace Relations, or the Office of Judicial Integrity. They can provide you with advice and guidance on how to address the issue including:

- Your rights under the EDR Policy
- Advice on handling discriminatory, harassing, or abusive conduct
- Options for addressing the conduct

## ASSISTED RESOLUTION

Contact an EDR Coordinator or Circuit Director of Workplace Relations to request Assisted Resolution. This interactive, flexible process may include:

- Discussions with the source of the conduct
- Preliminary investigation, including interviewing witnesses
- Resolving the matter by agreement

## FORMAL COMPLAINT

Contact an EDR coordinator to file a formal complaint.

The Complaint must be filed within **180 days** of the alleged violation or the discovery of the violation.

This formal process includes:

- Appointment of Presiding Judicial Officer
- An investigation and/or hearing if appropriate
- Written decision
- Appeal rights

### Confidentiality

All options for resolution are intended to respect privacy of all involved to the greatest extent possible, and to protect the fairness and thoroughness of the process by which allegations of wrongful conduct are initiated, investigated, and ultimately resolved.

### Contact Information:

Office of Workplace Relations  
(415) 355-8914

[workplacedirector@ce9.uscourts.gov](mailto:workplacedirector@ce9.uscourts.gov)

National Office of Judicial Integrity  
Michael Henry, Judicial Integrity  
Officer 202-502-1603

[AO\\_OJI@ao.uscourts.gov](mailto:AO_OJI@ao.uscourts.gov)





# Your Rights

## In a Federal Judiciary Workplace

Employees of the Federal Judiciary are protected by the employment rights listed below, as described in *Guide to Judiciary Policy*, Vol. 12, Ch. 2.

Employees have options for resolution, including Informal Advice, Assisted Resolution, and filing a Formal Complaint. Formal Complaints must be filed within 180 days of when the Employee knew or should have known of the alleged violation. More information, including a list of court EDR Coordinators, can be found on JNet.

Employees may confidentially report workplace discrimination, harassment, abusive behavior, or retaliation to an EDR Coordinator, Office of Workplace Relations, or the Judicial Integrity Officer, Jill B. Langley, at 202-502-1604.

### Protection from Unlawful Discrimination

Prohibits discrimination in personnel actions based on race, color, sex, gender, gender identity, gender expression, marital status, pregnancy, parenthood, sexual orientation, religion, creed, ancestry, national origin, citizenship, genetic information, age (40+), disability, service in the uniformed forces.

### Protection from Harassment

Prohibits sexual harassment, discriminatory harassment, and abusive conduct.

### Protection for Exercising Workplace Rights

Prohibits intimidation, retaliation, or discrimination against employees who exercise their employment rights or report or oppose wrongful conduct, including **whistleblower protection**.

### Family and Medical Leave

Provides rights and protections for employees needing leave for specified family and medical reasons.

### Protection for Veterans and Members of the Uniformed Services

Protects employees performing service in the uniformed services from discrimination and provides certain benefits and reemployment rights.

### Notification of Office Closings and Mass Layoffs

Under certain circumstances, requires that employees be notified of an office closing or of a mass layoff at least 60 days in advance of the event.

### Hazard-Free Workspaces

Requires employing offices to comply with occupational safety and health standards, and provide workplaces free of recognized hazards.

### Polygraph Testing Prohibition

Restricts the use and the results of polygraph testing.

*These rights are fully explained in Guide to Judiciary Policy, Vol. 12, Ch. 2.*

# The Employment Dispute Resolution Formal Complaint Process

## File a Complaint

File a complaint with an EDR coordinator within **180 days** of the conduct (or discovery of the conduct).



## Gather Information

The Presiding Judicial Officer decides what investigation and discovery are needed and if written arguments are needed.



## Hearing

The Presiding Judicial Officer determines if a hearing is needed.



## DECISION



## Appeal



Parties have the right to appeal to the circuit judicial council within 30 days of a decision.

## RIGHTS

- An impartial investigation and/or hearing, if appropriate.
- Both parties may use a representative or attorney (at own expense).
- Both parties may present witnesses and examine adverse witnesses.
- A prompt written decision by a Presiding Judicial Officer.

# **NINTH CIRCUIT EQUAL EMPLOYMENT OPPORTUNITY (EEO) POLICY**

## **APPENDIX 6**

### **I. Statement of Policy**

Each Court and court unit will promote equal employment opportunity to all persons or classes of persons regardless of their race, sex, gender, gender identity, gender expression, marital status, pregnancy, sexual orientation, religion, creed, ancestry, national origin, citizenship, genetic information, age,<sup>12</sup> disability, or service in the uniformed forces, in addition to any other status or characteristic protected under applicable federal law. All facets of employment such as recruitment, hiring, work assignments, compensation, benefits, education, disciplinary actions, terminations, training, promotion, advancement, and supervision are included in the EEO Policy. Each Unit Executive will promote a Court or office environment free of discrimination and harassment. Along with Employees (as defined in the EDR Policy), applicants for employment and former employees are covered by this EEO Policy. All Complaints under this EEO Policy shall be covered by the procedures in § IV.C.3. of the Ninth Circuit Employment Dispute Resolution Policy.

Unit Executives must ensure that appropriate vacancies (with the exception of chambers law clerk and judicial assistant vacancies) are publicly announced to attract candidates who represent the make-up of persons available in the relevant job market and that all hiring and other employment decisions are based solely on job-related factors. Job postings may be published solely to internal staff in certain circumstances, such as budgetary constraints; career ladder promotions; reassignments; and accretion of duties. Reasonable efforts should be made to see that the skills, abilities, and potential of each Employee are identified and developed, and that all Employees are given equal opportunities for promotions by being offered, when the work of the Court permits, and within the limits of available resources, cross-training, reassignments, special assignments, and outside job-related training.

### **II. Annual Report**

Unit Executives must submit an annual report to the Chief Circuit Judge. The report will describe any significant achievements in providing equal employment opportunities, identify areas where improvements are needed, and explain factors inhibiting achievement of equal employment opportunity objectives. The report will be the same report as that submitted annually to the Administrative Office of the United States Courts.

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<sup>12</sup> The age discrimination provision does not apply to hiring, retirement, or separation of probation and pretrial services officers under 5 U.S.C. chapters 83 and 84.

### **III. Objectives**

When the Unit Executive deems it necessary or desirable, the Unit Executive will develop annual objectives that reflect improvements needed in recruitment, hiring, promotions, and advancement, and will prepare a specific plan (report) explaining how those objectives will be achieved.

### **IV. Distribution and Public Notice**

Copies of this EEO Policy shall be made available to all Employees and furnished, upon request, to applicants for positions of employment.

**NINTH CIRCUIT AD HOC COMMITTEE ON WORKPLACE  
ENVIRONMENT REPORT**  
**June 18, 2019**

*“The Ninth Circuit takes seriously its commitment to a respectful workplace. Over the past eighteen months, we have worked hard to put in place revised policies and procedures to make that commitment a reality and we will continue our innovations to foster a culture of respect.”*

*Chief Judge Sidney R. Thomas*

**INTRODUCTION**

In December 2017, Chief Circuit Judge Sidney R. Thomas of the United States Court of Appeals for the Ninth Circuit appointed the Ad Hoc Committee on Workplace Environment (“the Committee”) to review and revise policies and procedures to promote and safeguard a healthy working environment throughout the Ninth Circuit. Following extensive outreach and consultation with judges, employees, law clerks, and employment experts, the Committee reaffirmed the Ninth Circuit’s core values for a successful and welcoming workplace. The Ninth Circuit is committed to a workplace that treats everyone with respect, recognizes everyone’s dignity, and fosters inclusion of differences and diverse viewpoints. The Ninth Circuit also emphasizes the importance of removing barriers to reporting workplace concerns and the strict prohibition against retaliation for reporting misconduct.

Recognizing the importance of consultation and collaboration, the Committee engaged in an extensive outreach effort to obtain feedback to guide its work. This effort included developing and sending a questionnaire to thousands of current and former employees and law clerks; conducting, through Ninth Circuit mediators, small focus group sessions with law clerks and employees in multiple cities; conducting town halls with employees; having confidential conversations with individuals upon request; and making a Committee email address publicly available for additional comments. The Committee expanded its outreach effort to include law school deans, a national group of concerned law clerks, and others from around the country. This broad scope of input assisted the Committee in developing plans to improve the experience of employees, law clerks, externs,

interns, and volunteers. The Committee also cooperated extensively with the Federal Judiciary Workplace Conduct Working Group.

The Committee took the data and feedback and proposed immediate policy changes responsive to workplace concerns. These recommendations led to significant changes to the policies, procedures, practices, and resources available to all employees in every court unit in the Ninth Circuit:

- ***Revised Ninth Circuit Employment Dispute Resolution Policy (“EDR Policy”).*** The Committee received feedback that the previous EDR Policy was confusing, contained unwieldy processes, and imposed restrictive reporting timelines. The Committee revised and rewrote the EDR Policy in plain language, redefined sequential EDR steps into independent options, offered an option for informal advice, created a flowchart to assist in understanding the process, and extended the time to report misconduct from 30 days to 180 days.
- ***Established Director of Workplace Relations.*** The most requested recommendation from current and former employees was for a clearly identifiable and independent person of high stature to whom they could report misconduct and discuss other workplace concerns. The Committee created the Director of Workplace Relations position—the first of its kind in the federal judiciary. In January 2019, Yohance C. Edwards joined the Ninth Circuit as the Director of Workplace Relations. The Director of Workplace Relations oversees workplace misconduct issues, such as harassment and bullying; offers confidential consultations with employees at an early stage; assists in guiding employees through the EDR process; serves as a resource to and works in collaboration with local EDR Coordinators on EDR-related matters; and oversees general workplace environment issues.
- ***Simplified Confidentiality Policy.*** The Committee learned that some employees and clerks viewed the existing confidentiality policy as restricting their reporting of workplace harassment and other misconduct. To remove any ambiguity for those facing these issues, the Committee quickly revised and simplified the confidentiality policy to clarify that, although court matters remain confidential, misconduct issues are not

subject to the confidentiality policy. The Judicial Council of the Ninth Circuit promptly approved the new Ninth Circuit confidentiality policy.

- ***Expanded Law Clerk Orientation and Other Resources.*** The Court of Appeals has long had an orientation for new law clerks. Beginning in September 2018, law clerks participated in an expanded orientation that included improved training on workplace policies, reporting procedures, and resources available to law clerks. Training sessions also focused on implicit bias and interpersonal communication skills. To further its effort, the Committee created a Chambers Checklist for in-chambers law clerk orientation and an anonymous exit survey process for all law clerks. An online law clerk portal was established to provide easy access to policies, reporting procedures, and other information important to law clerks. The Committee recently established a Law Clerk Resources Group, comprised of former clerks throughout the Ninth Circuit, to serve as a sounding board and source of information for current clerks. The Court of Appeals Clerk of the Court and Director of Workplace Relations also conducted mid-year updates for current employees and law clerks to emphasize the availability of confidential reporting and other resources within the Office of Workplace Relations.
- ***Conducted Employee Climate Survey and Implemented Exit Questionnaire.*** The Committee recognizes that a key source for information and ideas to improve the Ninth Circuit workplace came from those within the Ninth Circuit. At the outset of its work, the Committee conducted a climate survey of over 6,000 of its current and former employees and law clerks through a questionnaire, focus groups, and individual feedback. To increase opportunities for feedback and provide an ongoing mechanism to monitor the workplace environment throughout the Ninth Circuit, all employees will be asked to participate in periodic climate surveys, and all law clerks will be asked to complete an anonymous exit questionnaire, with the responses going to the Director of Workplace Relations.
- ***Expanded Training and Education.*** Training and education are key to the successful implementation of these new policies and practices. Moving forward, everyone throughout the Ninth Circuit—judges, court unit

executives, employees, and law clerks—will have additional workplace training opportunities. A number of training sessions have already taken place, including those for judges. The Director of Workplace Relations has already met with countless chief judges, judges, court unit executives, and employees throughout the Circuit and is developing additional training opportunities.

## OVERVIEW

This Report provides a summary of the work and findings of the Ninth Circuit Ad Hoc Committee on Workplace Environment to date. The Committee continues to monitor the new policies and address initiatives to improve the judicial workplace. The Report also includes an Appendix, which contains documents of interest and key revised policies, procedures, and best practices endorsed by the Committee, including: (1) the revised EDR Policy, adopted by the Judicial Council of the Ninth Circuit on December 27, 2018; (2) the revised Confidentiality Policy; (3) a Calendar of Events and Presentations, which includes past and upcoming events that relate to workplace topics; and (4) press releases and announcements of the Ninth Circuit's work.

The Report is organized into five sections:

- ***Section I: Background.*** This section discusses the formation of the Ninth Circuit Ad Hoc Committee on Workplace Environment.
- ***Section II: Outreach and Research.*** This section describes the outreach effort the Committee undertook to obtain feedback from current and former employees. The section also discusses research that guided the Committee's work, including the 2016 Report by the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace.
- ***Section III: Implementation.*** This section highlights the implementation of the Committee's recommendations, including the revised EDR Policy and the creation of the Director of Workplace Relations position.



- ***Section IV: Training.*** This section discusses the plan to implement training sessions on new policies and procedures as well as workplace topics.
- ***Section V: Past and Future Activities.*** This section outlines broader outreach efforts the Committee has taken within and outside of the Ninth Circuit.

## **I. Background**

In December 2017, Chief Circuit Judge Sidney R. Thomas appointed the Ad Hoc Workplace Environment Committee. The Committee was created in response to revelations about workplace misconduct within the Ninth Circuit and was tasked with addressing any deficiencies in the Circuit’s policies, procedures, and culture. Chief Judge Thomas named Circuit Judge M. Margaret McKeown as chair of the Committee, with membership consisting of Chief District Judge Virginia A. Phillips of the Central District of California; Senior District Judge Charles R. Breyer of the Northern District of California; Magistrate Judge Candy W. Dale of the District of Idaho; and employment and mediation specialist Abby Silverman. Court of Appeals Clerk of Court Molly Dwyer, Circuit Executive Elizabeth A. “Libby” Smith, and Deputy Circuit Executive Marc Theriault have served on the Committee as staff, along with Shannon Coit, a Ninth Circuit law clerk, and Megan Larkin, a former Ninth Circuit law clerk. Since January 2019, Director of Workplace Relations Yohance C. Edwards and Workplace Relations Specialist Stella Huynh have worked closely with, but independently of, the Committee.

Chief Judge Thomas selected each Committee member for their interest and experience in workplace environment issues. Along with being appointed by United States Supreme Court Chief Justice John G. Roberts, Jr. to serve on the Federal Judiciary Workplace Conduct Working Group, Judge McKeown formerly chaired the national Judicial Conference of the United States Code of Conduct Committee, which is the ethics committee for federal judges. Judge McKeown also served on various committees and panels related to workplace and gender discrimination, including the Ninth Circuit Gender Bias Task Force; served as president of the Federal Judges Association; and consulted with federal judges and courts throughout the nation about judicial ethics. Judge Breyer is a member of the Multidistrict Litigation Panel, and formerly served as the district judge

representative to the Executive Committee of the Judicial Conference of the United States and as a member of the U.S. Sentencing Commission. Judge Dale currently serves on the United States Judicial Conference as the magistrate judge observer. Prior to joining the bench, Judge Dale practiced employment law, which included counseling and training employers and representing employers in court and in administrative proceedings for over twenty years. Chief District Judge Phillips leads the largest federal court in the Ninth Circuit and serves on the Judicial Council of the Ninth Circuit. Ms. Silverman, one of the nation's top employment and alternative dispute resolution practitioners, serves as a mediator and arbitrator in employment law disputes.

## **II. Outreach and Research**

Shortly after its formation, the Committee implemented a comprehensive outreach effort to obtain feedback from a wide array of sources. The aim of this outreach was to better understand the needs of those working in the Ninth Circuit and help identify any deficiencies with the current policies and procedures. The information gathered through this effort helped guide the Committee's work. Members of Law Clerks for Workplace Accountability also attended several of the Committee meetings and provided extensive written comments. The feedback from the outreach efforts proved invaluable to the Committee in recommending changes to improve the Ninth Circuit's workplace environment. The Committee is confident that the willingness of so many current and former Ninth Circuit personnel to participate in these outreach efforts and to share their experiences and ideas is evidence of a widespread commitment to the development of best practices and an investment in the creation of a positive workplace environment for everyone.

### **A. Circuit-Wide Questionnaire**

The Ninth Circuit Workplace Environment Questionnaire ("Questionnaire") consisted of short questions seeking views, suggestions, and advice on workplace policies and procedures, trainings, and programs. The Questionnaire offered the opportunity for narrative comments and specifically sought feedback from employees about categories of individuals whom they would feel comfortable turning to for confidential advice or guidance on a workplace issue. The purpose

of the Questionnaire was to hear all voices and perspectives on the best ways the Ninth Circuit could provide employees with a healthy and productive workplace.

The Committee sent the Questionnaire to approximately 6,000 current and former employees and law clerks (appellate, district, and bankruptcy courts) and to former law clerks from the federal courts outside the Ninth Circuit. Participation was voluntary and anonymous. The Committee received nearly 3,000 responses. The responses came from employees in a variety of roles, including chambers staff (appellate, district, and bankruptcy courts); clerk's office staff (appellate, district, and bankruptcy courts); other circuit and court unit staff; and pretrial services and probation office staff.

The overwhelming majority of respondents expressed positive or neutral experiences while working in the Ninth Circuit. However, there were responses that identified specific negative experiences, defined as witnessing or experiencing conduct that, if reported, could lead to an EDR complaint or investigation. Respondents also identified other areas—outside of complaint-level behavior—that they felt needed improvement to enhance the workplace environment.

One of the most cited issues was a reluctance to report workplace concerns. Some respondents attributed this reluctance to the fear of retaliation and workplace power dynamics, as well as a concern about how reporting would affect their careers. Respondents recommended creating a confidential avenue to report workplace issues outside of the direct chain of command. Respondents expressed other concerns relating to reporting, such as whether details of their complaint would be kept private, reported misconduct would be adequately investigated, and reporting would lead to a satisfactory resolution. Additionally, some respondents commented on the lack of information on how to report workplace misconduct.

Other responses focused on a perceived lack of information and communication about workplace relations and work expectations. The respondents recommended policy and structural changes to highlight resources and improve communication in this arena. In addition, respondents recommended that information regarding the policies be readily accessible, such as posting on websites.

Respondents identified specific training and education that would help improve the judiciary's workplace environment. Respondents recommended developing and implementing trainings on harassment, bullying, implicit bias, leadership, and management techniques. Respondents indicated that the trainings should be mandatory, regular, and interactive for all Ninth Circuit employees, including judges.

Finally, respondents suggested fostering a healthy and more collegial workplace environment. Recommendations included more interaction across units and chambers to reduce feelings of isolation. Respondents also suggested training on work-life balance, identifying and addressing employee fatigue, and using positive reinforcements to boost morale and productivity for a more positive work environment.

## **B. Focus Groups**

Ninth Circuit mediators held eighteen voluntary focus group events for current and former law clerks and current court staff. The Committee and the mediators sought to create an environment where all participants could speak freely and confidentially. The mediators compiled the comments and suggestions from each group so that this information was kept anonymous and confidential.

The focus group participants identified similar recommendations and issues as the Questionnaire respondents. First, they expressed reluctance to report negative experiences and provided similar recommendations to establish a clearly identifiable and independent person to handle workplace matters.

Next, the participants suggested establishing workplace standards and norms so employees could easily identify whether a task or experience exceeded workplace expectations and norms. Some law clerks expressed reluctance to report workplace concerns because they were unsure whether their experiences fell outside normal bounds of their role. Court staff expressed a similar need for increased transparency and communication from leadership about policies and procedures, including supervisors who expressed concerns that, at times, lines of authority were unclear.

Third, the focus groups recommended establishing, improving, and communicating workplace policies and trainings at a higher level, especially as related to anti-bullying and sexual harassment, personnel management, and implicit bias. The participants particularly suggested these training sessions for judges, senior management, and supervisors.

Additionally, more broadly, the focus group participants expressed the need for changes to the overall judicial culture. There were participants who expressed concern that judges have not taken any action to prevent or stop abuse in the workplace. The participants identified various ways to change court culture: judges taking more responsibility to stop and prevent inappropriate behavior; modifying the Code of Judicial Ethics to include an affirmative obligation for judges to report misconduct; imposing discipline for judges who do not change their inappropriate behavior; and redefining the confidentiality policy to clarify and define expectations and limitations of confidentiality. Female law clerks further suggested improving policies that would make it easier for them to have children and balance childcare during their clerkship. Court staff suggested cross-trainings and creating a way to ensure staff can contribute to court policies, practices, and events. The participants also identified the issue of feeling isolated in the workplace and suggested ways to encourage community, such as holding workplace events to boost morale and show appreciation for employees.

Other focus group recommendations included reforming the law clerk hiring process, improving law clerk orientation, conducting exit interviews, and considering consultation with outside professionals. Focus group participants suggested having multiple avenues of confidential reporting and a system to review judges, such as a hotline or email reporting system, commenting that having multiple reporting methods would increase the likelihood of employees reporting workplace issues. Participants also suggested improving law clerk orientation to “set the proper tone,” providing resources on how workplace issues would be handled, and distributing workplace policies and procedures.

### **C. Confidential Conversations**

The Committee also provided individuals with the opportunity to speak confidentially with a Committee member or senior circuit executive. The Committee designated an email address to request a phone call or to provide

additional written comments. Though these conversations are kept confidential, they provided helpful and anecdotal information that served as an additional resource in the Committee's deliberations.

#### **D. Law School Outreach**

The Committee engaged numerous law schools to work toward the joint goal of addressing workplace misconduct and generally improving the law clerk and extern experience in the Ninth Circuit. This outreach included phone calls with law school deans and letters sent to schools soliciting their input. Over thirty law school deans responded with suggestions for what both the law schools and the courts could do to improve the workplace environment for law clerks and externs. In its recommendations and implementation, the Committee considered these suggestions, which included increased communication between the law schools and the judiciary, improved training at law schools and in the judiciary, and clearer policies.

Committee members also participated in panel discussions on this topic and engaged with related groups. In January 2019, the Chair of the Committee was one of the coordinators of a panel at the Association of American Law Schools annual meeting to discuss how law schools, courts, and the private sector can work together to reduce workplace misconduct for law students and assist students with addressing such issues. The Committee Chair also participated in a panel at the National Association of Law Placement. In addition, the Committee considered and implemented a number of suggestions from Law Clerks for Workplace Accountability and the Yale Law School Judicial Workplace Conduct Working Group. The Committee plans to continue its conversations with law schools on these issues, including additional follow-up in the coming months.

#### **E. 2016 EEOC Report**

The Committee researched best practices in workplace relations both in the private and university settings. Most significantly, the foundational report of the 2016 Equal Employment Opportunity Commission Select Task Force on the Study of Sexual Harassment in the Workplace ("EEOC Report") guided the Committee's work. The EEOC Report found that 43% of the complaints filed by federal

employees in fiscal year 2015 alleged harassment.<sup>1</sup> Additionally, the EEOC Report identified that across various studies, between 25-85% of women report that they have experienced sexual harassment in the workplace (depending on how such harassment is defined).<sup>2</sup> It also found that “significant power disparities” is a prime risk factor for harassment.<sup>3</sup> The studies cited in the EEOC Report identify significant reporting of workplace harassment based on sex, gender identity, sexual orientation, race and ethnicity, national origin, religion, disability, age, and/or genetic information.<sup>4</sup> The data shows the prevalence of workplace harassment and emphasizes the importance of revising and improving policies and procedures to prevent such harassment in the workplace.<sup>5</sup>

The EEOC Report provided recommendations to prevent harassment in the workplace. These suggestions included ways to ensure that the organizational culture—particularly, the leadership—is committed to and values a respectful workplace.<sup>6</sup> For example, the EEOC Report recommended having systems in place to ensure accountability for *all* employees at *all* levels.<sup>7</sup>

The EEOC Report also advocated for comprehensive anti-harassment policies and procedures, written in clear, plain language, that are communicated regularly to employees.<sup>8</sup> The EEOC Report suggested organizations, even those with policies consistent with the EEOC’s recommendations, take a “fresh and critical look at their current processes and consider whether a ‘reboot’ is necessary or valuable.”<sup>9</sup> These policies should also include clear definitions of misconduct, explain reporting processes, and give assurances to employees that the employer will take proper, timely actions and protect confidentiality to the extent possible.<sup>10</sup> Policies should further establish reporting procedures that offer multiple avenues and points-of-contact; prompt, thorough, and impartial investigations; and

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<sup>1</sup> CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 6 (2016).

<sup>2</sup> *Id.* at 8.

<sup>3</sup> *Id.* at 28.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 37-38.

<sup>6</sup> *Id.* 31-37.

<sup>7</sup> *Id.* at 34-37.

<sup>8</sup> *Id.* at 38.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

protections against retaliation.<sup>11</sup> Lastly, the EEOC Report recommends employers offer training to employees about what is considered harassment and what is considered unacceptable conduct in the workplace.<sup>12</sup>

The recommendations in the EEOC Report informed the Committee's recommendations.

### **III. Implementation**

Since May 2018, following the Ninth Circuit Judicial Council provisional approval of its recommendations, the Committee's work has focused on implementing these initiatives. The recommendations are consistent with those of the national Federal Judiciary Workplace Conduct Working Group and the EEOC Report, and are as follows.

#### **A. Revised Employment Dispute Resolution Policies**

The Committee revised the Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace ("EDR Policy"). The Judicial Council of the Ninth Circuit formally approved the revised EDR Policy on December 27, 2018, and it went into effect on January 1, 2019.

##### *Revised Ninth Circuit EDR Policy*

The process for revising the EDR Policy relied heavily on feedback from employees, judges, and employment experts. The much improved EDR Policy is written in plain language and provides important employee protections while maintaining proven, effective means of resolving employment disputes, such as mediation and other forms of informal dispute resolution.

The revised EDR Policy redefines the EDR process to include several, distinct options of the EDR process: (i) Informal Advice; (ii) Assisted Resolution of workplace issues; or (iii) the Formal Complaint of workplace issues. The newly-created Informal Advice option gives the employee the option to speak with a wide range of individuals to obtain guidance on addressing workplace issues. If

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<sup>11</sup> *Id.* at 38, 80.

<sup>12</sup> *Id.* at 46.



an employee wants to have a confidential conversation, the Director of Workplace Relations is available to assist the employee. The Assisted Resolution option is an interactive and flexible approach to informal resolution of workplace issues. It may include voluntary mediation or discussions with the parties to the conflict. The Formal Complaint option is the complaint and hearing procedure for resolving workplace disputes. A key change in this formal EDR procedure is that the time to file a complaint has been extended from 30 days to 180 days. The options for resolution are no longer sequential stages. Employees may choose the option that best fits their needs and comfort level.

The degree of privacy and confidentiality for each EDR option is now clearly laid out. Relevant forms contain checkboxes to confirm the complainant's understanding of the degree of privacy of each option. The Committee also created a flowchart to provide a quick reference to each option's level of confidentiality.

Though redefining the three EDR options was the most significant change to the EDR Policy, there were several other notable revisions. The Committee added a prefatory statement to affirm the Ninth Circuit's commitment to assuring a workplace where everyone is treated with respect, recognizing everyone's dignity, and fostering tolerance for differences and diverse viewpoints. The statement also emphasizes the importance of removing barriers to reporting workplace concerns and the strict prohibition against retaliation for reporting concerns.

The Covered Conduct section states more clearly and comprehensively employees' equal employment and anti-discrimination rights. Gender identity and gender expression were added to the covered rights. Because feedback frequently reflected concerns about bullying and abusive conduct, the Covered Conduct was expanded to include bullying. Bullying may involve repeated abusive conduct that is threatening, oppressive, or intimidating, or otherwise interferes with an individual's ability to do one's job. Additionally, the definitions of harassment and retaliation were refined. The revised EDR Policy now applies to conduct and actions that take place on and off premises if the conduct had or has adverse effects on the functioning and standing of the judiciary.

To further the goal of reducing barriers to reporting, employees now have the option to report to their local EDR Coordinator, their chief judge, or the

Director of Workplace Relations. An employee is no longer required to undergo a counseling period and engage in mediation. Complainants may, at their option, proceed directly to an EDR complaint, although seeking informal advice or voluntary assisted resolution is encouraged. Reporting is also encouraged for those who observe, but do not directly experience, workplace misconduct. Finally, the revised EDR Policy includes assurances throughout that the complainant and witnesses are protected from retaliation and that retaliation against a person who makes a report, whether as a target or bystander, is prohibited.

### *Local Courts and Federal Public Defender EDR Policies*

All units in the Ninth Circuit were required to either adopt the Ninth Circuit EDR Policy or receive Judicial Council approval for any modifications adopted in a local policy. While some units chose to adopt the revised Ninth Circuit EDR Policy in its entirety, many district and bankruptcy courts and the Ninth Circuit Federal Public Defenders submitted proposed local modifications. The Committee worked with the chief district judges and the Federal Public Defenders to review modified policies. The Judicial Council approved the submitted modifications, and the policies went into effect on January 1, 2019. The Director of Workplace Relations will oversee the implementation of EDR policies throughout the Circuit.

### **B. Director of Workplace Relations**

The Ninth Circuit established the first of its kind Director of Workplace Relations position to oversee workplace environment and training and to provide an avenue for employees to confidentially report, address, and resolve workplace issues. This position was specifically designed in response to information and recommendations received from the Questionnaire, focus groups, and other consultation with employees. The position functions with a high degree of independence and discretion and provides expert guidance on workplace issues (including harassment and bullying) and oversight of EDR-related matters. The Federal Judiciary Workplace Conduct Working Group has endorsed the Director of Workplace Relations position as a national model for other courts to adopt.

In January 2019, Yohance C. Edwards was named as the first Director of Workplace Relations and oversees the Office of Workplace Relations. Prior to his appointment, Mr. Edwards was the Associate Director and Deputy Title IX Officer

of the Office for the Prevention of Harassment and Discrimination at the University of California, Berkeley. At U.C. Berkeley, he oversaw the process for resolving complaints of discrimination and harassment based on race, color, national origin, age, gender, sex, sexual orientation, and gender identity, including allegations of sexual harassment. He also conducted training on the university's harassment and nondiscrimination policies and procedures and helped coordinate campus compliance with Title IX of the Education Amendments of 1972. Prior to his time at U.C. Berkeley, Mr. Edwards was an attorney at the U.S. Department of Education Office for Civil Rights. In that role, he was responsible for enforcing federal civil rights laws that prohibit discrimination at educational institutions receiving federal funding from the U.S. Department of Education. Mr. Edwards previously served as a staff attorney in the Ninth Circuit Court of Appeals, an associate at the law firm Munger, Tolles & Olson, and a law clerk to Judge McKeown. He received his J.D. from New York University School of Law, graduating magna cum laude and Order of the Coif, and his B.A. from Brown University.

The Director of Workplace Relations provides employees throughout the Ninth Circuit a resource outside of their direct line of supervision, where they can have confidential conversations about workplace issues. The Director of Workplace Relations also is available to assist employees and judges with all phases of the EDR process. Rather than replacing the role of EDR Coordinators throughout the Ninth Circuit, the Director of Workplace Relations will complement and work alongside EDR Coordinators in units that have a local point of contact for employment dispute issues.

Additionally, the Director of Workplace Relations will oversee the development and implementation of training sessions that will be offered to all the court units throughout the Ninth Circuit. These training sessions will be for judges, court unit executives, supervisors, and judiciary personnel. Training topics will include workplace issues and policies and procedures and are currently in development.

### **C. Revised Confidentiality Policy**

The Committee significantly revised the Confidentiality Policy. Feedback highlighted that the existing confidentiality policy was interpreted by some as

prohibiting the reporting of workplace harassment and other misconduct. The revised model Confidentiality Policy, which is now a single paragraph and written in plain language, clarifies that reporting misconduct is an exception to any and all chambers confidentiality requirements.

#### **D. Improved Law Clerk Orientation and Other Resources**

The Committee also revised the law clerk orientation programs. Beginning September 2018, the Court of Appeals law clerk orientation was expanded to include training on discrimination and harassment policies and employee dispute procedures. The September 2018 orientation also included a session on implicit bias and improving communication within and outside of chambers.

The Committee created a suggested Chambers Checklist for in-chambers law clerk orientation. This checklist includes addressing internal chambers policies and the new workplace resources available to law clerks. A law clerk portal was established on the Court of Appeals intranet to provide easy access to policies, procedures, and other information important to law clerks.

The Committee also recently formed the Law Clerk Resources Group. This group is comprised of former law clerks from throughout the Ninth Circuit, with several members who served as clerks in state courts as well as in various district and circuit courts. The group will serve as a resource for law clerks to discuss issues relating to clerkship and workplace issues. The Committee also plans to use the Law Clerk Resource Group as a diverse source of input as it continues to review, revise, and implement policies relating to workplace conduct.

#### **E. Employee Climate Survey and Law Clerk Exit Questionnaire**

The Committee has developed and will implement an employee climate survey and a law clerk exit questionnaire to gather more feedback on the experience of current employees and to monitor workplace environment issues. The climate survey will allow the Committee and Director of Workplace Relations to re-examine policies and practices on an ongoing basis to improve and foster a more productive and healthier workplace. Recognizing the unique circumstances of term law clerks, the anonymous exit questionnaire for departing law clerks will allow law clerks to confidentially provide feedback about their experiences.

#### **IV. Training**

A key aspect to the successful implementation of these new policies and practices is the training and education of law clerks, employees, managers, and judges. The 2019 Ninth Circuit Judges Symposium included a dedicated session on the Committee's work, the newly revised Judicial Code of Conduct, and the Judicial Conduct and Disability procedures, which mandate reporting of misconduct. The 2019 Ninth Circuit Orientation for New Judges included sessions on these topics as well. The upcoming 2019 Ninth Circuit Judicial Conference will also include a similar discussion and training. The next phase, which has already begun, includes training existing employees, managers, court unit executives, and judges on the rights and responsibilities in the conduct codes, the revised EDR Policy, and workplace matters.

Additionally, the Director of Workplace Relations is developing enhanced training for EDR Coordinators, who play a pivotal role in the EDR process at the local level. The development of additional EDR Coordinator training is consistent with the recommendation from the Federal Judiciary Workplace Conduct Working Group. The Ninth Circuit understands the importance of training and education to the successful implementation of the new policies and will be focusing on those efforts moving forward through the leadership of the Director of Workplace Relations.

#### **V. Past and Future Activities**

Committee members and staff have attended events throughout the Ninth Circuit to present updates to judges and court staff. These events have included the 2018 Ninth Circuit Judicial Conference, 2018 Court of Appeals Law Clerk Orientation, 2019 Ninth Circuit Judges Symposium, 2019 Ninth Circuit Orientation for New Judges, dedicated mid-year updates to court staff and law clerks, and meetings of judges, court clerks, federal public defenders, and probation and pretrial services officers. Additionally, Committee staff have also presented at events outside of the Ninth Circuit, including to the American Bar Association, the American Academy of Appellate Lawyers, the Association of Law Schools, and the National Association for Law Placement.

A “Calendar of Events and Presentations” detailing the past and future work of the Committee is included in the Appendix of this Report.

## **CONCLUSION**

This Report summarizes the Ninth Circuit’s work over the past eighteen months to improve the workplace environment. The foundation for the Ninth Circuit’s work is the extensive outreach effort and the tremendous amount of analysis and dialogue that the Ad Hoc Committee on Workplace Environment has engaged in concerning these very important issues. The feedback has guided the Ninth Circuit to implement several significant changes to the workplace environment of the Ninth Circuit, including a revised EDR Policy, revised confidentiality policy, newly-created Director of Workplace Relations position, revised orientation for law clerks, and new Employee Exit Questionnaire.

While revising policies and providing more resources will enact short-term change for the better, the Committee recognizes the implementation of positive training and the long-term commitment to all these initiatives are crucial to promoting and safeguarding a healthy workplace culture. The Committee, the judges, and the Director of Workplace relations will continue to listen and expect that the people of the Ninth Circuit will continue to participate in the creation and maintenance of the culture to which we aspire. Ensuring a healthy and productive workplace for all employees is, and will continue to be, the highest priority in the Ninth Circuit.

**Appendix 1: Ninth Circuit Employment Dispute Resolution Policy and  
Commitment to a Fair and Respectful Workplace**

# **Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace**



**Judicial Council Approved: December 27, 2018**  
**Effective date: January 1, 2019**



# **Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace**

## **I. INTRODUCTION**

The Ninth Circuit is committed to a workplace that fosters respect, fairness, dignity, and tolerance. The Ninth Circuit’s Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace (“the EDR Policy” or “the Policy”), is designed to assure that these values are a part of the culture of the Ninth Circuit as a workplace. The goal is to eliminate misconduct, including discriminatory, harassing, demeaning, and bullying behavior.

The Policy describes types of conduct that are prohibited in the workplace, and then sets out options for addressing or resolving such conduct. The Policy outlines the Ninth Circuit’s mechanisms for (i) informal advice; (ii) assisted resolution of workplace issues; and (iii) formal resolution of workplace complaints.<sup>1</sup>

The Policy also seeks to encourage the reporting of workplace misconduct and reduce barriers to reporting, which include fear of retaliation, concern about reputational harm, and the belief that an issue will not be resolved even if it is reported. The Ninth Circuit recognizes the courage that is needed to report misconduct, and continues to encourage early reporting as the best way to address and prevent systemic, harmful conduct. The Policy prohibits retaliation against anyone who reports misconduct, whether the person experiences the misconduct directly or is a bystander. The Policy seeks to provide safe and accessible ways of reporting misconduct.

## **II. SCOPE OF COVERAGE**

This Policy applies to all courts and court units within the Ninth Circuit, including District Courts, Bankruptcy Courts and Clerks of the District and Bankruptcy Courts, as well as United States Probation and Pretrial Services Offices and Federal Public Defenders. For ease of reference, all judges, judicial officers, court unit heads, and their staffs (including law clerks, externs, interns, and volunteers) are referred to as “Employees” in the Policy. This Policy covers conduct and actions that take place both on and off work premises.

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<sup>1</sup> This Policy has been approved by the Ninth Circuit Judicial Council and supersedes all previous versions of the circuit Employment Dispute Resolution plan.

Any modification of this Policy by a court or court unit must be consistent with the rights and procedures in this Policy and must be approved by the Judicial Council of the Ninth Circuit.

### **III. COVERED CONDUCT<sup>2</sup>**

#### **A. Equal Employment and Anti-Discrimination Rights**

Employees are prohibited from engaging in discrimination, harassment, bullying, and retaliation, which are actions or behaviors that are unwelcomed, illegal, unfair, demeaning, or offensive. Discrimination and harassment are actions or behaviors directed against or toward an Employee, or group of Employees, based upon the Employee's race, sex or gender (including pregnancy, gender identity, gender expression, marital status, and parenthood), color, creed, national origin, citizenship, ancestry, age (at least 40 years of age at the time of the claimed discrimination), disability, religion, sexual orientation, genetic information, or past, current, or prospective service in the uniformed forces, in addition to any other status or characteristic protected under applicable federal law. Conduct need not be illegal to be Covered Conduct under this Policy. The rights and protections of Chapter 1 of the EEO Plan (Appendix 2) shall apply to Employees.

#### **B. Family and Medical Leave Rights**

Title II of the Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381-6387, applies to Employees in the manner prescribed in Volume 12, Chapter 9, Section 920.45.20 of the *Guide to Judiciary Policy*.

#### **C. Employment and Reemployment Rights of Members of the Uniformed Services**

An employing office shall not discriminate against an eligible Employee or deny an eligible Employee reemployment rights or benefits under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335.

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<sup>2</sup> This Policy also applies to additional workplace rights that are incorporated in Appendices 1 and 2.

## **D. Explanation of Types of Misconduct: Discrimination, Harassment, Bullying, and Retaliation**

**Discrimination:** Discrimination comes in many forms. It generally arises as an adverse employment-related action, such as a demotion or an unfair evaluation, or action that negatively affects an Employee's workplace environment, which is sometimes referred to as a "hostile workplace environment."

Harassment (including sexual harassment), bullying, and retaliation can all be forms of discrimination. Each is described below. The categories listed in this section are illustrative, not exhaustive. Nothing in this Policy should be interpreted as a limitation on what the Ninth Circuit considers to be discrimination or harassment. Further, conduct need not be directed toward a specific individual or group of individuals to be considered discrimination or harassment.

**Harassment:** Harassment, which may be a form of discrimination, is unwelcome conduct that is based on any of the categories of Covered Conduct. Harassment can include physical, verbal, non-verbal, or psychological behavior that interferes with work performance or creates a hostile or offensive work environment. Examples of harassment include offensive jokes, remarks, slurs or name-calling; viewing or display of inappropriate images, pictures, videos or cartoons; or disparaging comments.

Sexual harassment is a form of harassment based on sex or gender. Like harassment, sexual harassment can include physical, verbal, or non-verbal behavior. Examples of sexual harassment include offensive remarks about an individual's sex or gender; unwelcome sexual advances; requests for sexual favors; repeated sexual advances or jokes; inappropriate touching or physical contact; displaying sexually suggestive posters, cartoons, or drawings; leering; making sexual gestures; or any other conduct of a sexual nature, when any of the following occur:

- Submission to the advance, request, or conduct is made either explicitly or implicitly a term or condition of employment;
- Submission to or rejection of the advance, request, or conduct is used as a basis for employment decisions; or

- Such advance, request, or conduct has the purpose or effect of substantially or unreasonably interfering with an Employee's work performance by creating an intimidating, hostile, or offensive work environment.

**Bullying:** Bullying includes repeated mistreatment involving abusive conduct that is threatening, oppressive, or intimidating, and interferes with an individual's ability to do one's job. It can be physical, verbal, non-verbal, or psychological and can involve work assignments and social ostracism as well as demeaning treatment and comments. Bullying is not consistent with a workplace that aims to treat all individuals fairly and with respect.

**Retaliation:** An Employee who asserts rights or participates in the filing or processing of any report or claim under this Policy has the right to be free from retaliation, coercion, or interference. Retaliatory behavior can include, but is not limited to, unwarranted reprimands; unfair downgrading of personnel evaluations; transfers to less desirable positions; verbal, physical, or psychological abuse; and altered or less convenient work schedules.

#### **IV. DIRECTOR OF WORKPLACE RELATIONS**

The Director of Workplace Relations will serve as the primary contact for Employees who experience or witness workplace misconduct and wish to discuss or report such misconduct. The duties of the Director of Workplace Relations include (i) providing information to Employees regarding the rights and protections under this Policy; (ii) providing guidance to Employees seeking options for resolution of workplace issues covered under this Policy; (iii) coordinating EDR proceedings; (iv) coordinating training for judges and Employees; (v) recording and resolution of complaints under this Policy; (vi) compiling periodic reports regarding implementation of this Policy; and (vii) collecting and analyzing data related to this Policy. The Director of Workplace Relations will act as a neutral point of contact to ensure a safe, fair, and discreet reporting environment.

In addition to the circuit Director of Workplace Relations, each court or court unit may designate an EDR Coordinator to assist with the resolution of workplace concerns. The duties of an EDR Coordinator may include (i) providing information to Employees regarding the rights and protections afforded under this Policy; (ii) facilitating training opportunities for Employees within the court or court unit; (iii) engaging in Assisted Resolution to

Employees; (iv) compiling court unit reports of misconduct allegations; and (v) other duties as assigned by the court or court unit, so long as they do not conflict with the duties of the Director of Workplace Relations.

## **V. COMMITMENT TO REPORT WORKPLACE MISCONDUCT**

Employees share the responsibility for keeping the workplace free of discrimination, harassment, bullying, retaliation, and other misconduct. To implement this Policy effectively, it is imperative that Employees report instances of misconduct immediately. Employees may reach out to a supervisor, a local EDR Coordinator, the Director of Workplace Relations, or any other resource for assistance. However, at their option, Employees may report directly to the Director of Workplace Relations. Any Employee (including supervisors and local EDR Coordinators) who receives a report or inquiry about misconduct should advise the Director of Workplace Relations.

## **VI. OPTIONS FOR RESOLUTION**

Employees who experience or witness discrimination, harassment, bullying, retaliation, or any other Covered Conduct have several options. These options include (i) requesting informal advice, (ii) seeking assisted resolution, or (iii) filing a formal complaint.

These options are not mutually exclusive. However, not all options can guarantee strict confidentiality, so Employees should choose the avenues that best fit their needs and comfort level. For a strictly confidential conversation, Employees are encouraged to contact the Director of Workplace Relations with any questions or simply to discuss ways in which to proceed. Nothing in this Policy prevents an Employee from addressing the situation directly with the person whose behavior is of concern if they are comfortable doing so, or from contacting a colleague, supervisor, chief judge, judge, local EDR Coordinator, or other individual to discuss or address the situation.

### **A. Informal Advice**

An Employee may contact the Director of Workplace Relations to request advice about a workplace concern. The purpose of this option is to provide an outlet for confidential advice and guidance on how an Employee can address workplace issues. An Employee may request anonymity, confidentiality, or that no action be taken following the inquiry. The Director of Workplace Relations

will adhere to the Employee's request unless the conduct is physically threatening or so pervasive as to present unsafe working conditions for the Employee or other Employees.

The advice could cover a range of topics, including:

- providing information regarding the rights and protections afforded under this Policy;
- providing perspective on the conduct described, including whether it violates this Policy;
- coaching on handling discriminatory or harassing conduct as it is happening;
- immediate options for further reporting the conduct or lodging a complaint; and
- possible options and procedures to consider given the circumstances.

In addition to contacting the Director of Workplace Relations for informal advice, an Employee may also contact the Judiciary Workplace Conduct Counselor, an employee of the Administrative Office of the U.S. Courts who staffs the federal judiciary workplace hotline, the Ninth Circuit Employee Assistance Program (EAP) for personal counseling, or, for ethics advice, a member of the Codes of Conduct Committee. Like the Director of Workplace Relations, these individuals are professionals who have been trained in the court's policies and practices and are outside the Employee's chain of command.

## **B. Assisted Resolution**

In addition to, or in lieu of, seeking Informal Advice, an Employee can seek Assisted Resolution of workplace issues.

Assisted Resolution is an interactive, flexible process that may include:

- interviewing witnesses to the conduct;
- discussion with the source of the conduct;
- conducting a preliminary investigation report
- crafting a resolution of the situation; and
- voluntary mediation between the parties.

Because this option may lead to a preliminary investigation that may include discussing the issue with the source of the conduct, confidentiality and

anonymity are not guaranteed. However, information about the complaint will be shared only on a “need to know” basis to ensure fairness to all parties and to minimize disruption to the workplace environment.

To pursue this option, an Employee should contact the Director of Workplace Relations and/or the local EDR Coordinator, who will assist the Employee in completing a “Request for Assisted Resolution under EDR Policy” (Appendix 3). The Request for Assisted Resolution form includes (1) a summary of the incident or decision giving rise to the dispute; (2) a list of any witnesses to the conduct; and (3) the desired outcome of reporting the conduct.

The Director of Workplace Relations will coordinate options for resolution with the local chief judge or court unit executive, depending on whether the source of the conduct is a judge or an Employee. At all stages of the process, the Director of Workplace Relations will ensure that no conflict of interest exists with the decision maker for the employing office.

If Assisted Resolution is successful in resolving the Employee’s concerns, a written Acknowledgement of Resolution will be signed by the parties and retained by the Director of Workplace Relations. If Assisted Resolution is not successful in resolving the matter, the Director of Workplace Relations will advise the Employee of rights under this Policy, including the option to file a formal complaint.

### **C. Formal Complaint and Hearing**

An Employee may also initiate a formal dispute resolution process. This option involves the filing of a formal complaint, which leads to an investigation and possibly a hearing. Appendix 4 is a summary of the timeline for a formal complaint.

**Filing Complaint:** To initiate this process, an Employee must file a “Complaint under the EDR Policy” (Appendix 5) with the Director of Workplace Relations or local EDR Coordinator within 180 calendar days of the alleged misconduct. Once this process is initiated, the Employee becomes known as the “Complainant,” and the Employing Office becomes known as the “Respondent.”

After a Complaint has been filed, a Hearing Officer will be assigned to the matter. For Complaints against Employees, including supervisors or court unit executives, the Hearing Officer will be the chief judge of the court of the employing office or a designee. For Complaints against judges, the Hearing

Officer is the chief circuit judge or a designee.<sup>3</sup> If the chief circuit judge is the subject of the Complaint, the circuit Judicial Council shall designate an alternative Hearing Officer to oversee the hearing process.

**Investigation:** The Hearing Officer or a designee will investigate the allegations in the Complaint thoroughly, promptly, and confidentially to the extent that is reasonable under the circumstances. Because the investigation may include interviews of known witnesses, confidentiality and anonymity cannot be guaranteed.

**Hearing:** Once the investigation is complete, the Hearing Officer will determine whether there are material factual issues or remedies for resolution. If the Hearing Officer determines that there are no remaining issues for resolution, the Hearing Officer will resolve the Complaint via a written decision. Otherwise, the Hearing Officer will proceed with a hearing decision.

The Hearing Officer will determine the time, place, and manner of conducting the hearing.

The following provisions shall apply to hearing procedures:

- The hearing shall take place no later than 60 calendar days after the filing of the Complaint. No later than 30 calendar days before the hearing date, written notice of the hearing shall be given to the Complainant, the Respondent, and the head of the office from which relief is being sought.

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<sup>3</sup> With respect to misconduct by a judge, the Employee may also file a Judicial Misconduct Complaint under the Judiciary Conduct & Disability Act (“the Act”). 28 U.S.C. §§ 351-364.

If a judge becomes the subject of both an EDR Complaint and a judicial misconduct complaint under the Judiciary Conduct and Disability Act, the Judicial Council of the Ninth Circuit or its designee, which may include the chief judge of the circuit, will craft a procedure for determining any common issues of fact and processing both complaints, subject to all requirements of the Act, the Rules for Judicial-Conduct and Judicial Disability Proceedings, and, as practicable, this EDR Policy. In doing so, the council or its designee, who may include the chief judge of the circuit, may determine that all or part of the EDR claim must be abated until action is taken on the judicial misconduct complaint.



- The scope of the hearing shall generally be limited to a review and discussion of the documents and other written evidence submitted, rather than a full evidentiary hearing or trial. However, at the discretion of the Hearing Officer, witnesses may be presented.
- At the hearing, the Complainant and the employing office are permitted to be represented by counsel.
- A verbatim record of the hearing must be kept and shall be the sole official record of the proceeding.
- In reaching a decision, the Hearing Officer shall be guided by judicial and administrative decisions under relevant rules and statutes.
- Remedies may be provided in accordance with this Policy where the hearing officer finds that the Complainant has established by a preponderance of the evidence that a substantive right protected by this Policy has been violated.
- The final written decision of the Hearing Officer must be issued no later than 30 calendar days after the conclusion of the hearing.
- All parties, and any aggrieved individual, shall be provided with a copy of the written decision.

The Hearing Officer may extend for good cause any of the deadlines in this Policy. All extensions of time granted will be made in writing and become part of the record.

A Complainant or Respondent may appeal the Hearing Officer's final decision within 30 calendar days of the date of the decision. Appeals must be made in writing to the Executive Committee of the Judicial Council of the Ninth Circuit. The Executive Committee's decision is final.

**Remedies:**<sup>4</sup> Any remedies imposed by the Hearing Officer should be tailored as closely as possible to the specific violation involved. For Covered Conduct under this Policy, remedies may include, but are not limited to:

- required counseling or training for the Respondent;
- an oral or written reprimand to the Respondent;
- loss of salary or benefits for the Respondent;
- suspension, probation, demotion, or termination for the Respondent;
- an apology;
- placement of a Complainant in a position previously denied;
- placement of a Complainant in a comparable alternative position;
- reinstatement to a position from which the Complainant was previously removed;
- prospective promotion of a Complainant;
- priority consideration of a Complainant for a future promotion or position;
- back pay and associated benefits, including attorney's fees, where the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied;
- records modification and/or expungement;
- "equitable" relief, such as temporary stays of adverse actions;
- granting of family and medical leave; and
- accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours, or other appropriate means.

Remedies that are not legally available include:

- payment of attorney's fees (except as authorized under the Back Pay Act);
- compensatory damages;
- punitive damages; and
- overtime pay.

**Record-keeping:** The Director of Workplace Relations shall retain all notes, reports, files, and other documents created or submitted in connection with this Policy. Records necessary for statistical or reporting purposes shall be

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<sup>4</sup> Consistent with the Constitution of the United States and the Judicial Conduct & Disability Act, certain remedies are unavailable where a judge is the Respondent.

stripped of any personally identifiable information. Records created in connection with this Policy, shall not be: (1) filed in any Employee's personnel folder, except as necessary to implement an official personnel action, or (2) made available to the public or to other Ninth Circuit personnel. However, the Hearing Officer may determine that all or portions of the decision be made available to the public.

## **VII. ANNUAL REPORT**

The Director of Workplace Relations will prepare an annual report for the fiscal year for the Judicial Council, indicating:

1. The number and type of alleged violations for which Informal Advice was provided.
2. The number and type of alleged violations for which Assisted Resolution was requested.
3. The number and type of Complaints filed.
4. The number and type of hearings conducted.
5. The number and type of final decisions rendered reflecting the number for which some relief was granted.
6. With respect to all the data supplied in items 1 through 5 above, the allegations or Complaints shall be reported according to the section of this Policy that is involved and the type(s) of discrimination alleged.

### **Appendices Attached:**

1. Additional Workplace Protections
2. Ninth Circuit Equal Employment Opportunity Plan
3. Request for Assisted Resolution under EDR Policy
4. Timeline for EDR Complaint Process
5. Complaint under EDR Policy
6. Petition for Review Procedures and Sample Form

Judicial Council approved: December 27, 2018

Effective date: January 1, 2019

**Additional Workplace Protections**

**I. WORKER ADJUSTMENT AND RETRAINING  
NOTIFICATION RIGHTS**

No “employing office closing” or “mass layoff” (as defined below) may occur until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to employees who will be affected. This provision shall not apply to an employing office closing or mass layoff that results from the absence of appropriated funds.

**Definitions**

- A. The term “employing office closing” means the permanent or temporary shutdown of a single site of employment if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.
- B. The term “mass layoff” means a reduction in force which:
  - 1. is not the result of an employing office closing; and
  - 2. results in an employment loss at the single site of employment during any 30-day period for
    - a. (i) at least 33 percent of the employees (excluding any part-time employees); and
    - (ii) at least 50 employees (excluding any part-time employees), or
    - b. at least 500 employees (excluding any part-time employees).

*See 29 U.S.C. § 2101.*

**II. OCCUPATIONAL SAFETY AND HEALTH PROTECTIONS**

Each employing office shall implement a program to provide to its employees a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. Claims that seek a remedy that is exclusively within the jurisdiction of the General Services Administration (“GSA”) or the United States Postal Service

(“USPS”) to provide are not cognizable under this Plan; such requests should be filed directly with GSA or the USPS as appropriate.

### **III. POLYGRAPH TESTS**

Unless required for access to classified information, or otherwise required by law, no employee may be required to take a polygraph test.

### **IV. WHISTLEBLOWER PROTECTION**

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or threaten to take an adverse employment action with respect to any employee (excluding applicants for employment) because of any disclosure of information by the latter employee to -

- A. the appropriate federal law enforcement authority, or
- B. a supervisor or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts, which that employee reasonably and in good faith believes evidences a violation of any law, rule, or regulation, or other conduct that constitutes gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety, provided that such disclosure of information -

- 1. is not specifically prohibited by law,
- 2. does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in the *Guide to Judiciary Policy*, Vol. 20, Ch. 8), and
- 3. does not reveal information that would endanger the security of any federal judicial officer.

**Definition** - For purposes of this section, an “adverse employment action” means a termination, demotion, transfer, or reassignment; loss of pay, benefits, or awards; or any other employment action that is materially adverse to the employee’s job status, compensation, terms, or responsibilities, or the employee’s working conditions.

## NINTH CIRCUIT EQUAL EMPLOYMENT OPPORTUNITY PLAN<sup>1</sup>

### I. Statement of Policy

Each court and court unit will promote equal employment opportunity to all persons or classes of persons regardless of their race, sex or gender (including pregnancy, gender identity, and gender expression), color, creed, national origin, citizenship, ancestry, age (at least 40 years of age at the time of the claimed discrimination<sup>2</sup>), disability, religion, sexual orientation, genetic information, or past, current or prospective service in the uniformed forces, in addition to any other status or characteristic protected under applicable federal law. All facets of employment such as recruitment, hiring, work assignments, compensation, benefits, education, disciplinary actions, terminations, training, promotion, advancement, and supervision are included in the Plan. Each court unit executive will promote a court or office environment free of discrimination and harassment. Along with employees (as defined in the EDR Policy), applicants for employment and former employees are covered by this Plan. All Complaints under this plan shall be covered by the procedures in Section VI of the Ninth Circuit EDR Policy.

Court unit executives must ensure that appropriate vacancies (with the exception of chambers law clerk and judicial assistant vacancies) are publicly announced to attract candidates who represent the make-up of persons available in the relevant labor market and that all hiring and other employment decisions are based solely on job-related factors. Job postings may be published solely to internal staff in certain circumstances, such as budgetary constraints; career ladder promotions; reassignments; and accretion of duties.

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<sup>1</sup> This plan was originally adopted in December 1997 and approved and amended in June 1998, November 2000, and June 2014 by the Judicial Council of the Ninth Circuit. This plan supersedes the Court of Appeals and the Circuit Executive's former EEO Plan.

<sup>2</sup> Special provision for probation and pretrial services officers – The age discrimination provision shall not apply to the initial hiring or mandatory separation of probation and pretrial services officers and officer assistants. *See* Report of the Proceedings of the Judicial Conference of the United States (March 1991), pp. 16-17. Additionally, probation and pretrial services officers must meet all fitness for duty standards, and compliance with such standards does not, in and of itself, constitute discrimination on the basis of disability.

Reasonable efforts should be made to see that the skills, abilities, and potential of each employee are identified and developed, and that all employees are given equal opportunities for promotions by being offered, when the work of the court permits, and within the limits of available resources, cross-training, reassignments, special assignments, and outside job-related training.

## **II. Annual Report**

Court unit executives must submit an annual report to the chief circuit judge. The report will describe any significant achievements in providing equal employment opportunities, identify areas where improvements are needed, and explain factors inhibiting achievement of equal employment opportunity objectives. The report will be the same report as that submitted annually to the Administrative Office of the United States Courts.

## **III. Objectives**

When the court unit executive deems it necessary or desirable, he or she will develop annual objectives that reflect improvements needed in recruitment, hiring, promotions, and advancement, and will prepare a specific plan (report) explaining how those objectives will be achieved.

## **IV. Distribution and Public Notice**

Copies of this plan shall be made available to all employees and furnished, upon request, to applicants for positions of employment.

Judicial Council approved: December 27, 2018

Effective date: January 1, 2019

## Appendix 3

### REQUEST FOR ASSISTED RESOLUTION UNDER EDR POLICY

Submitted under the Procedures of the Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace

Prior to completing this form, please refer to the EDR Policy.

1. Full name of person requesting Assisted Resolution: \_\_\_\_\_
2. Mailing Address: \_\_\_\_\_  
Email Address: \_\_\_\_\_
3. Home Phone: (\_\_\_\_\_)\_\_\_\_\_ Work Phone: (\_\_\_\_\_)\_\_\_\_\_
4. If you are an employee with the Court of Appeals or Circuit Executive's Office, state the following:  
Court Unit in which employed: \_\_\_\_\_  
Job Title \_\_\_\_\_
5. Name and address of the office from which you seek resolution of your dispute:  
\_\_\_\_\_  
\_\_\_\_\_
6. Identify the Section(s) of the EDR Policy under which your Request for Assisted Resolution is being filed.
  - ☐ Section III.A - Equal Employment Opportunity & Anti-Discrimination Rights
    - ☐ Race
    - ☐ Color
    - ☐ Sex or Gender (may include: pregnancy, gender identity, gender expression, marital status, parenthood, sexual harassment, biological sex)
    - ☐ Bullying
    - ☐ Religion or creed
    - ☐ National Origin, citizenship, or ancestry
    - ☐ Age
    - ☐ Disability
    - ☐ Sexual Orientation
    - ☐ Genetic information



- ☐ Section III.B - Family and Medical Leave Rights
- ☐ Section III.C - Employment and Reemployment Rights of Members of the Uniformed Services
- ☐ Section III.D - Retaliation
- ☐ Appx. 1, Section I - Worker Adjustment and Retraining Notification Rights
- ☐ Appx. 1, Section II - Occupational Safety and Health Protections
- ☐ Appx. 1, Section III - Polygraph Tests
- ☐ Appx. 1, Section IV - Whistleblower Protection Provision

7. Date(s) of alleged incident or decision giving rise to this dispute: \_\_\_\_\_

8. Please summarize the actions or occurrences giving rise to this dispute. (If insufficient space, use the reverse side or an attachment):

\_\_\_\_\_

\_\_\_\_\_

9. Please list any witnesses to the actions or occurrences giving rise to this dispute:

10. What corrective action do you seek in this matter?

\_\_\_\_\_

11. I acknowledge that this Request will be kept confidential to the extent possible and that the Director of Workplace Relations or EDR Coordinator may share confidential information on a need to know basis to attempt resolution of this matter as provided in the EDR Policy.

☐ Yes      ☐ No

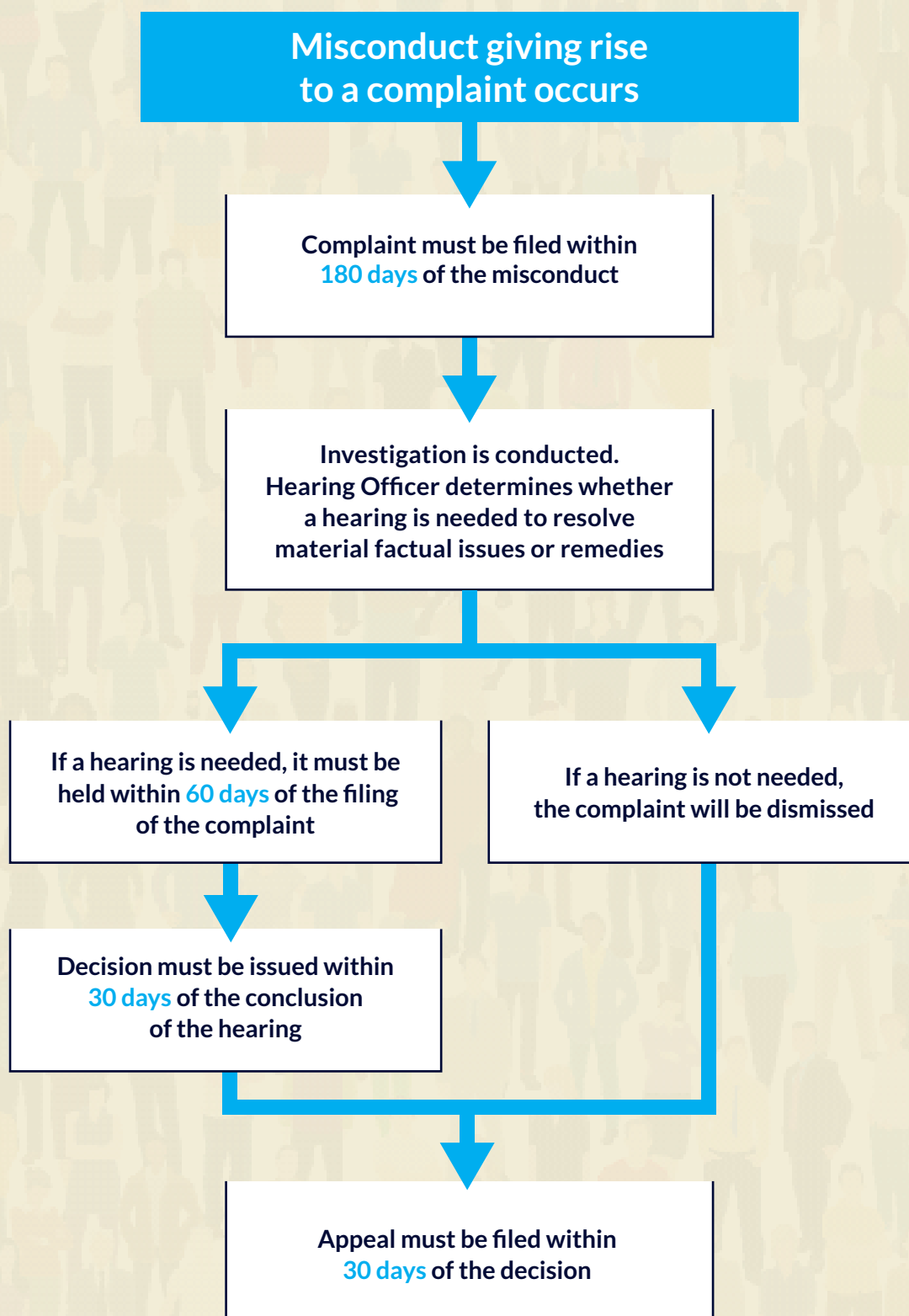
This Request for Assisted Resolution is submitted by: \_\_\_\_\_

\_\_\_\_\_      \_\_\_\_\_

Signature      Date

Director of Workplace Relations Signature: \_\_\_\_\_ Date of Receipt: \_\_\_\_\_

## Timeline for EDR Complaint Process



## COMPLAINT UNDER EDR POLICY

Submitted under the Procedures of the Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace

Prior to completing this form, please refer to the EDR Policy.

1. Full name of person filing complaint: \_\_\_\_\_
2. Mailing Address: \_\_\_\_\_  
Email Address: \_\_\_\_\_
3. Home Phone: (\_\_\_\_\_) \_\_\_\_\_ Work Phone: (\_\_\_\_\_) \_\_\_\_\_
4. If you are an employee with the Court of Appeals or Circuit Executive's Office, state the following:  
Court Unit in which employed: \_\_\_\_\_  
Job Title \_\_\_\_\_
5. Name and address of the Employing Office against whom this complaint is filed: (all complaints must be filed against an "Employing Office," and, except in the case of a judge, not an individual):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
6. Identify the Section(s) of the EDR Policy under which your complaint is being filed.
  - ☐ Section III.A - Equal Employment Opportunity & Anti-Discrimination Rights
    - ☐ Race
    - ☐ Color
    - ☐ Sex or Gender (may include: pregnancy, gender identity, gender expression, marital status, parenthood, sexual harassment, biological sex)
    - ☐ Bullying
    - ☐ Religion or creed
    - ☐ National Origin, citizenship, or ancestry
    - ☐ Age
    - ☐ Disability
    - ☐ Sexual Orientation
    - ☐ Genetic information

- ☐ Section III.B - Family and Medical Leave Rights
- ☐ Section III.C - Employment and Reemployment Rights of Members of the Uniformed Services
- ☐ Section III.D - Retaliation
- ☐ Appx. 1, Section I - Worker Adjustment and Retraining Notification Rights
- ☐ Appx. 1, Section II - Occupational Safety and Health Protections
- ☐ Appx. 1, Section III - Polygraph Tests
- ☐ Appx. 1, Section IV - Whistleblower Protection Provision

7. Date(s) of alleged violation: \_\_\_\_\_

8. Date on which Informal Advice was requested, if any: \_\_\_\_\_

Date on which Informal Advice was completed: \_\_\_\_\_

Date on which Assisted Resolution was requested, if any: \_\_\_\_\_

Date on which Assisted Resolution was concluded: \_\_\_\_\_

9. Name of person who served as Director of Workplace Relations on this matter: \_\_\_\_\_

10. Name of all other Circuit personnel who worked with you on this matter: \_\_\_\_\_

11. Please summarize the actions or occurrences giving rise to your complaint. Explain in what way you believe your rights under the EDR Policy were violated. Identify all persons who participated in this matter or who can provide relevant information concerning your complaint, including persons who witnessed the actions or occurrences giving rise to your complaint. (If there is insufficient space below, you may attach additional pages.)

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**[Please attach a copy of any documents that relate to your complaint, such as an application form, resume, letters, notices of discipline, or termination, etc.]**

12. What corrective action do you seek from your complaint? \_\_\_\_\_

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13. Do you have an attorney or any other person who represents you in this matter?

☐ Yes

☐ No

If yes, please provide the following information concerning that person:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Work Phone: (\_\_\_\_\_) \_\_\_\_\_ Fax (\_\_\_\_\_) \_\_\_\_\_

Email: \_\_\_\_\_

14. I acknowledge that this Complaint will be kept confidential to the extent possible and that the Director of Workplace Relations or EDR Coordinator may share confidential information on a need to know basis to attempt resolution of this matter as provided in the EDR Policy.

☐ Yes

☐ No

I affirm that the information provided in this complaint is true and correct to the best of my knowledge.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**PROCEDURES FOR REVIEW OF EDR HEARING OFFICER  
DECISION BY THE EXECUTIVE COMMITTEE OF THE JUDICIAL  
COUNCIL OF THE NINTH CIRCUIT**

**I. Scope of the Rules**

These rules govern procedures for petitioning for review of a decision, or summary dismissal, of a Ninth Circuit Employment Dispute Resolution Policy and Commitment to a Fair and Respectful Workplace (“the EDR Policy”) complaint rendered by a “Hearing Officer” (see the EDR Policy, Section VI.C). Such review is conducted by the Executive Committee of the Judicial Council of the Ninth Circuit (“Executive Committee”).

**II. Filing of Petition for Review**

- A. *Filing the Petition for Review* -- A party aggrieved by a final decision of the Hearing Officer or by summary dismissal of a complaint, may petition for review of that decision or summary dismissal by filing a petition for review to which is attached a copy of the decision of the Hearing Officer (or a copy of the summary dismissal).
- B. *Form of Petition and Supporting Arguments* -- The petition shall be in accordance with Form 1, which follows these procedures. Included in the petition or as an attachment to the petition shall be a statement, not to exceed 10 pages in length (8 ½ x 11 white paper, double-spaced, single-sided) setting forth the basis for the petition and all arguments and information supporting the petition. The petition must be filed with the Executive Committee in a timely manner as set forth in Section III below.

- C. *Serving the Petition for Review* -- The petitioning party must serve the petition on the Executive Committee by having it delivered to the Circuit Executive at the following address:

Office of the Circuit Executive  
Assistant Circuit Executive - EDR Policy  
P.O. Box 193939  
San Francisco, CA 94119

Parcel Delivery:  
95 Seventh Street  
San Francisco, CA 94103  
Fax (415) 355-8901

Simultaneously, a copy of the petition (and all attachments thereto) must be served on the opposing party, and proof of such service shall be included with the petition filed with the Executive Committee.

### **III. Filing Deadlines**

- A. *Time for Filing a Petition for Review* -- A petition for review must be submitted to the Executive Committee no later than 30 days following the date of the final decision of the Hearing Officer or following the date of a summary dismissal of the complaint.
- B. *Requests for Extension of Time* -- The Executive Committee may extend the time to file a petition for review and for any other filing specified in these procedures, provided the request is received no later than the required filing date, and provided the petitioner shows good cause or excusable neglect.
- C. *Determining Time Periods* -- The word “days” in all filing deadlines in these procedures shall mean calendar days, except that if the deadline date occurs on a Saturday, Sunday or holiday, the deadline shall be extended to the next following Monday or court business day respectively.

### **IV. Consideration by the Executive Committee**

- A. *General* -- All reviews will be conducted by the members of the Executive Committee, and shall be based on the decision of the Hearing Officer or the summary dismissal of a complaint and any documents submitted by the parties in response to the directive of the Executive Committee as outlined below.
- B. *Scope of Record and Documents to be Considered* -- Within 20 days following receipt of the petition for review, the Executive Committee shall notify the parties concerning what, if any, additional information, i.e., record (e.g., hearing transcript), documents and/or briefs, may be submitted for its consideration. Unless notified by the Executive Committee of its request for additional information, neither party is to submit further information.
- C. *Oral Argument* -- Oral argument will normally not be permitted, but may be ordered by the Executive Committee. Either party may request such argument in writing filed within 7 days following filing of the petition as part of the petition (in the case of the party filing the petition) or (in the case of the Respondent) in a letter submitted no later than 7 days from receipt of the petition, setting forth the specific reasons why such argument is necessary, and why adequate argument cannot be made in written form. If granted, oral argument, may, at the sole discretion of the Executive Committee, be conducted via teleconference using video and/or audio technology.
- D. *Standard of Review* -- The decision or summary dismissal of the Hearing Officer shall be affirmed if supported by substantial evidence.
- E. *Summary Disposition* -- If at any time prior to the final submission of the case for review, the Executive Committee determines that the basis(es) of the request

for review are so insubstantial as not to justify further proceedings, the court may issue an appropriate dispositive order.

- F. *Form of Final Review* -- The Executive Committee shall issue its decision in writing.

Attachment: **Sample Petition for Review to the Executive Committee of the Judicial Council of the Ninth Circuit from Hearing Officer's Decision.**  
[see next page for form]



Name of Petitioning Party or Counsel  
Address  
Telephone #  
Fax #

Name of Court in Which Hearing Officer's Decision Was Issued

A.B., Petitioner	)	Petition for Review of Decision in
	)	(or Summary Dismissal of) Employment
	)	Dispute Resolution Policy Complaint
v.		
	)	
	)	
C.D., Respondent	)	

Notice is hereby given that (name the party petitioning for review), (petitioners) in the above named case, hereby petition for review to the Executive Committee of the Judicial Council for the Ninth Circuit from the decision (or summary dismissal of the complaint) by Judge (name of Hearing Officer) entered in this matter action on the \_\_\_\_\_ day of \_\_\_\_\_, (20\_\_).

Attached to this petition is a copy of the Hearing Officer's Decision (or summary dismissal of the complaint).

The basis(es) of this petition for review is (reason why review is requested -- this basis(es) may be included as an attachment).

Submitted this \_\_\_\_\_ day of \_\_\_\_\_, (20\_\_).

(s) \_\_\_\_\_  
(Representing name of party)

Approved by the Ninth Circuit Judicial Council on \_\_\_\_\_.

## **Appendix 2: Revised Confidentiality Policy**

## **Confidentiality Policy**

Confidential information is information, however communicated, received in the course of judicial duties that is not public and is not authorized to be made public. Employees are prohibited from using or disclosing confidential information. Former judicial employees should observe the same restrictions on disclosure of confidential information that apply to current employees. This restriction does not apply to (nor should it discourage) reporting misconduct, including sexual or other forms of harassment.

**Appendix 3: Workplace Committee/Workplace Relations  
Calendar of Events and Presentations**

**Workplace Committee/Workplace Relations**  
**Calendar of Events and Presentations 2018-2019**

*Updated June 17, 2019*

<b>Date</b>	<b>Event/Presentation</b>
January 25, 2018	Workplace Committee Meeting
February 6, 2018	Focus Group Event
February 7, 2018	Focus Group Event
February 7, 2018	Focus Group Event
February 13, 2018	Focus Group Event
February 14, 2018	Focus Group Event
February 14, 2018	Focus Group Event
February 15, 2018	Focus Group Event
February 26, 2018	Workplace Questionnaire Released
February 27–28, 2018	Ninth Circuit Clerks Conference Presentation
March 12, 2018	Workplace Committee Meeting
March 27, 2018	Focus Group Event
March 29, 2018	Focus Group Event
April 3, 2018	Focus Group Event
April 4, 2018	Focus Group Event
April 15–18, 2018	Circuit Judges Symposium Presentation
April 24, 2018	Presentation for Federal Judicial Center
April 24, 2018	Workplace Committee Meeting
April 25, 2018	Focus Group Event
May 14, 2018	Workplace Committee Meeting
May 17, 2018	Judicial Council Meeting Presentation
May 23-25, 2018	Magistrate Judges Executive Board Presentation
June 5, 2018	Focus Group Event
June 11, 2018	Focus Group Event

**Workplace Committee/Workplace Relations**  
**Calendar of Events and Presentations 2018-2019**

*Updated June 17, 2019*

<b>Date</b>	<b>Event/Presentation</b>
June 19, 2018	Update/Meeting with District Court
June 20, 2018	Workplace Committee Meeting
June 29, 2018	Revised EDR Policy Approved by Judicial Council
July 22–26, 2018	Ninth Circuit Judicial Conference Presentation
August 2–6, 2018	ABA Annual Meeting Presentation
August 27–28, 2018	Conference of Chief District Judges and District Court Clerks Presentation
September 23–25, 2018	Conference of Chief Bankruptcy Judges Presentation
September 26–27, 2018	Law Clerk Orientation—Workplace presentation and training
October 4–5, 2018	Magistrate Judges Executive Board Presentation
October 6–7, 2018	American Academy Appellate Lawyers Annual Meeting Presentation
November 14, 2018	Conference of Chief Judges Annual Conference Presentation
December 11, 2018	Workplace Committee Meeting
December 27, 2019	Ninth Circuit and District EDR Policies Approved by Judicial Council
January 5, 2019	Association of American Law Schools Annual Meeting Presentation
January 7, 2019	Yohance Edwards joins the Ninth Circuit as Director of Workplace Relations
February 6-7, 2019	Conference of Chief District Judges
February 25, 2019	Ninth Circuit Clerks Meeting
February 26, 2019	Ninth Circuit Workplace Committee Panel

**Workplace Committee/Workplace Relations**  
**Calendar of Events and Presentations 2018-2019**

*Updated June 17, 2019*

<b>Date</b>	<b>Event/Presentation</b>
February 27-28, 2019	Federal Defender Conference
March 6, 2019	Ninth Circuit Chief and Deputy Chief Probation Officers Meeting
March 15, 2019	Workplace Committee Meeting
March 18-19, 2019	Conference of Chief Bankruptcy Judges
March 26, 2019	Court of Appeals Court Meeting
April 9-12, 2019	National Association for Law Placement Annual Education Conference
April 28-May 1, 2019	Circuit Judges Symposium
May 14-16, 2019	Federal Defender Supervisory Training
May 29, 2019	Judicial Council Meeting Presentation
May 29-31, 2019	Magistrate Judges Executive Board Presentation
May 30-31, 2019	Ninth Circuit New Judges Orientation
July 21–25, 2019	Ninth Circuit Judicial Conference Presentation
September 16-20, 2019	Pacific Judicial Council Biennial Conference Presentation
September 24–25, 2019	Law Clerk Orientation
October 10-11, 2019	Association of Bankruptcy Judicial Assistants
October 22-23, 2019	Ninth Circuit Chief Deputy Conference

## **Appendix 4: News Releases**





Public Information Office  
**United States Courts for the Ninth Circuit**  
Office of the Circuit Executive · 95 7<sup>th</sup> Street, San Francisco, CA 94103 · (415) 355-8800 · (415) 355-8901 Fax

**NEWS RELEASE**

January 12, 2018

Contact: David Madden, (415) 355-8000

## **Ninth Circuit Committee to Review Workplace Environment Policies**

SAN FRANCISCO – Chief Judge Sidney R. Thomas of the United States Court of Appeals for the Ninth Circuit today announced the members of a special ad hoc committee on workplace environment, which he created on December 17, 2018. Chief Judge Thomas said that the committee will coordinate its work with the Federal Judiciary Workplace Conduct Working Group established by Chief Justice Roberts. “We do have many effective procedures in place to avoid problems in the workplace. But we need to re-examine them, develop better means of communication, and assure our law clerks and staff of a healthy and productive workplace,” Chief Judge Thomas said.

Ninth Circuit Judge M. Margaret McKeown will lead the special committee, which also includes Chief District Judge Virginia A. Phillips of the U.S. District Court for the Central District of California, Senior District Judge Charles R. Breyer of the U.S. District Court for the Northern District of California, Magistrate Judge Candy W. Dale of the U.S. District Court for the District of Idaho, and San Diego attorney Abby Silverman, one of the nation’s top employment and alternative dispute resolution practitioners.

Judge McKeown chaired the national United State Judicial Conference Code of Conduct Committee and is frequently consulted by federal judges and court staff throughout the nation on judicial ethics. She was also appointed by Chief Justice Roberts to serve on the Federal Judiciary Workplace Conduct Working Group. In the past, she has served on various committees and panels related to workplace and gender discrimination, including the Ninth Circuit Gender Bias Task Force. She also served as President of the Federal Judges Association.

Judge Breyer formerly served as the district judge representative to the Executive Committee of the United States Judicial Conference, while Judge Dale currently serves on the Judicial Conference as the magistrate judge observer. Chief Judge Phillips leads the largest federal court in the Ninth Circuit, while Ms. Silverman serves as a mediator and an arbitrator in employment law disputes.

Ninth Circuit Clerk of Court Molly C. Dwyer, Circuit Executive Elizabeth L. Smith and Deputy Circuit Executive Marc Theriault will support the committee in liaison roles.

Every court unit within the Ninth Circuit, including the Court of Appeals, has established an Equal Employment Opportunity plan and an Employee Dispute Resolution plan with whistleblower protection. The Ninth Circuit also has implemented an Adverse Action Plan for situations specifically involving a demotion or denial of a promotions, and a Grievance Procedure, when the issue involves application of a policy or procedure related to employment.

Misconduct complaints against federal judges, whether by court employees or others, are governed by rules promulgated by the Judicial Conference of the United States pursuant to federal law. The rules guide proceedings under the Judicial Conduct and Disability Act (the Act), 28 U.S.C. §§ 351–364, to determine whether a covered judge has “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.” The Ninth Circuit Court of Appeals has also established informal procedures to identify and solve potential problems relating to judicial conduct and disability.

The new ad hoc committee will review the policies in place, propose revisions where necessary, and identify means of maintaining a healthy workplace environment. The committee will also employ focus groups of staff, law clerks, and other interested parties to ensure that all potential workplace issues will be identified and effectively addressed.

The Ninth Circuit Court of Appeals, the nation’s largest and busiest appellate court, hears appeals of cases decided by federal trial courts and certain Executive Branch administrative agencies in nine western states and two Pacific Island jurisdictions.

# # #



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Office of the Circuit Executive · 95 7<sup>th</sup> Street, San Francisco, CA 94103 · (415) 355-8800 · (415) 355-8901 Fax

**NEWS RELEASE**

February 28, 2018

Contact: David Madden, (415) 355-8000

## **Ninth Circuit Committee Begins Workplace Environment Review**

SAN FRANCISCO – A special Ninth Circuit committee is actively consulting with current and former law clerks and employees as it seeks to address issues related to the prevention of workplace harassment and fostering of a positive working environment in the federal courts.

Appointed in December by Ninth Circuit Chief Judge Sidney R. Thomas, the Workplace Environment Committee was tasked with reviewing policies and procedures and proposing revisions where necessary to maintain a healthy working environment.

The Committee is chaired by Circuit Judge M. Margaret McKeown of San Diego and includes Chief District Judge Virginia A. Phillips of the Central District of California in Los Angeles; District Judge Charles R. Breyer of the Northern District of California in San Francisco; Magistrate Judge Candy W. Dale of the District of Idaho in Boise, Idaho; and employment and mediation specialist Abby Silverman, also of San Diego.

In a recent report to the Judicial Council of the Ninth Circuit, Judge McKeown said the Committee has conducted focus groups with current law clerks. It has plans for focus groups for former law clerks and current employees, and has reached out to law school deans for advice. The Committee also is redrafting various law clerk and employee policies and is consulting other organizations on best practices.

Judge McKeown later commented, "The Committee is dedicating substantial time and resources to this endeavor and we anticipate making recommendations for changes in policies and for circuit-wide training."

On February 26, 2018, the Committee sent a confidential questionnaire to about 6,000 current employees and current and former law clerks. The questionnaire seeks suggestions on circuit policies, training, and programs to address harassment prevention and improve the workplace environment. Comments may be submitted anonymously. Former Ninth Circuit clerks or employees who did not receive the questionnaire but want to participate, should contact the Committee at: [ninth\\_circuit\\_workplace\\_policies\\_committee@ce9.uscourts.gov](mailto:ninth_circuit_workplace_policies_committee@ce9.uscourts.gov).

The Committee is also coordinating with the federal judiciary's Workplace Conduct Working Group, which was appointed by Chief Justice Roberts.

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**NEWS RELEASE**

May 21, 2018

Contact: David Madden, (415) 355-8000

## **Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations**

SAN FRANCISCO – The Judicial Council of the Ninth Circuit has adopted recommendations to revise policies and procedures that ensure a healthy workplace environment for all employees, including law clerks, working in the federal courts of the western states and the Pacific islands. The council action was announced today by Chief Judge Sidney R. Thomas of the United States Court of Appeals for the Ninth Circuit.

“In an effort to promote and safeguard a healthy working environment, our goal is to make our policies and procedures more accessible, more understandable and more effective,” Chief Judge Thomas said.

The recommendations, which were put forth by a special ad hoc committee appointed by the chief judge last December, include:

- Establishing a new position, the director of workplace relations, responsible for overseeing workplace issues in the Ninth Circuit courts generally. The director will be available to assist all courts and court units in the circuit and will oversee discrimination and sexual harassment training.
- Reducing barriers to reporting workplace misconduct.
- Providing multiple avenues for employees to seek informal advice on workplace issues, including through the director of workplace relations, the circuit’s Employee Assistance Plan, and other available circuit-wide resources.
- Providing the option for assisted resolution of workplace disputes, including through coordinated dispute resolution and voluntary mediation.
- Revising the model Employment Dispute Resolution policy to make the process accessible and easy to understand. Employees also would have up to 180 days to bring a complaint

under the policy, rather than the current 30-day window. Following additional input and revisions, the policy will be effective in October 2018.

- Revising the confidentiality policy to make clear that the confidentiality restriction does not prevent or discourage employees from reporting misconduct, including sexual or other forms of harassment.
- Developing ongoing workplace training programs for judges and court employees.

“These recommendations are the result of a broad outreach effort over several months to both current and former law clerks and other court employees,” noted Circuit Judge M. Margaret McKeown, who chairs the special committee. “There was an intensive effort to gather information and hear from court employees about workplace issues.”

Also serving on the committee are Chief District Judge Virginia A. Phillips of the U.S. District Court for the Central District of California, Senior District Judge Charles R. Breyer of the U.S. District Court for the Northern District of California, Magistrate Judge Candy W. Dale of the U.S. District Court for the District of Idaho, and San Diego attorney Abby Silverman, one of the nation’s top employment and alternative dispute resolution practitioners.

The outreach included a questionnaire sent to almost 6,000 current and former employees. The response was overwhelming and employees expressed their appreciation for being queried, Judge McKeown said. Responses are still being reviewed but have already netted a number of suggestions that are being incorporated into circuit initiatives. Other outreach included focus groups conducted by Ninth Circuit mediators for current and former law clerks in Los Angeles, San Francisco, Seattle, and Washington, DC. Additional focus groups for staff are in progress. The committee also sent letters to law school deans soliciting ideas for cooperation between the law schools and the courts with respect to law clerks and externs.

The committee also is focusing on workplace education, including training on sexual harassment and bullying, for judges, law clerks, and court employees; revising law clerk orientation programs; creating a special internet portal for law clerks; and developing an employee exit questionnaire.

In addition to leading the Ninth Circuit effort, Judge McKeown also serves on the Federal Judiciary Workplace Conduct Working Group established at the direction of Chief Justice John G. Roberts. The national group also is focused on improving workplace policies and procedures and has sought input from former and current law clerks and judiciary employees.

The federal courts of the Ninth Circuit include the Ninth Circuit Court of Appeals and the district courts and bankruptcy courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands.

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**NEWS RELEASE**

November 13, 2018

Contact: David Madden, (415) 355-8800

## **Ninth Circuit Announces Appointment of First Director of Workplace Relations**

SAN FRANCISCO – Chief Judge Sidney R. Thomas of the United States Court of Appeals for the Ninth Circuit announced today the appointment of attorney Yohance Claude Edwards as the Ninth Circuit’s first director of workplace relations.

In his new position, the first of its kind in the federal judiciary, Mr. Edwards will help lead the Ninth Circuit’s ongoing effort to address issues related to preventing and resolving workplace harassment, and to fostering a positive working environment in the federal courts of the western states.

“The Ninth Circuit is committed to ensuring a healthy and productive workplace. We are extremely pleased to have Mr. Edwards fill a critical leadership role in this effort,” Chief Judge Thomas said.

Mr. Edwards currently serves as the associate director and deputy Title IX officer in the Office for the Prevention of Harassment and Discrimination at the University of California, Berkeley. The office is responsible for ensuring the university provides an environment for faculty, staff and students that is free from discrimination and harassment. Mr. Edwards oversees the process of resolving complaints of discrimination and harassment based on race, color, national origin, gender, age, sexual orientation and gender identity, including allegations of sexual harassment.

Scheduled to assume his new duties on January 7, 2019, Mr. Edwards will work within the Office of the Circuit Executive, which provides services and support to the Ninth Circuit Court of Appeals along with the federal trial and bankruptcy courts and associated court units within the 15 judicial districts that make up the Ninth Circuit. He will be available to assist all judges and court staff and will oversee the development and implementation of discrimination and sexual harassment training.

The hiring of a director of workplace relations was foremost among the recommendations put forth earlier this year by the Workplace Environment Committee, an ad hoc panel appointed by

– more –

Chief Judge Thomas to review policies and procedures aimed at maintaining a healthy working environment. The committee based its proposals on input received from more than 4,000 current and former law clerks and other court staff who responded to a wide-ranging workplace questionnaire.

“We are answering one of the most frequent concerns expressed by employees,” noted Ninth Circuit Judge M. Margaret McKeown, who chairs the committee. “They felt it very important to have a trained, professional contact to whom they can turn for information and advice about a range of workplace issues.”

Mr. Edwards joined the UC Berkeley administration in 2016. In addition to managing a staff of six complaint resolution officers and a data coordinator, he meets frequently with diverse campus stakeholders to advise them on discrimination and harassment issues and processes. He has conducted numerous trainings on the university’s harassment and nondiscrimination policies and procedures. He also helps coordinate campus compliance with Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational programs and activities.

Prior to UC Berkeley, Mr. Edwards served as an attorney in the U.S. Department of Education’s Office for Civil Rights in San Francisco from 2012 to 2016. He was responsible for enforcing federal civil rights laws that prohibit discrimination at educational institutions receiving funds from the U.S. Department of Education. He also led technical assistance trainings for educators and organizations on Title IX, Title IV, and Section 504.

Mr. Edwards served as a staff attorney in the Ninth Circuit Court of Appeals from 2011 to 2012. He began his law career in 2004 as an associate in the San Francisco office of Munger, Tolles & Olson from 2004 to 2010. While with the firm, he worked as a volunteer attorney in the San Francisco District Attorney’s Office.

“I am thrilled to return to the Ninth Circuit in this new role. I look forward to working with judges and staff throughout the circuit on these important workplace issues.” Mr. Edwards said.

Mr. Edwards received his B.A. in 1996 from Brown University, where he served as a minority peer counselor to first-year students and played for four years on the school’s NCAA Division I soccer team. He received his J.D. in 2003 from New York University School of Law, graduating magna cum laude and Order of the Coif. He served as an associate editor of the New York University Law Review and co-chaired the law review’s Diversity Committee. After law school, he served as a law clerk to Judge McKeown from 2003 to 2004.

A resident of El Cerrito, California, Mr. Edwards is active in community service. He currently serves on the Board of Trustees of Prospect Sierra School in El Cerrito, is an advisory trustee of enGender, a non-profit group supporting gender diverse youth, and is a former board member of BUILD Oakland, an entrepreneurship and college preparatory program for young people.

In addition to the hiring of Mr. Edwards, the Ninth Circuit’s comprehensive response to workplace harassment issues has included revised Employment Dispute Resolution and

Confidentiality policies and a series of educational presentations to judges and court staff. The overall goal is to provide multiple avenues for employees to seek informal advice on workplace issues and to assist in the resolution of workplace disputes, including through coordinated dispute resolution and voluntary mediation.

The U.S. Courts for the Ninth Circuit consists of the Ninth Circuit Court of Appeals, and the federal trial and bankruptcy courts and related court units in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands.

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**NEWS RELEASE**

March 6, 2019

Contact: David Madden, (415) 355-8800

## **New Office of Workplace Relations Established to Assist Federal Courts Within the Ninth Circuit**

SAN FRANCISCO – The Ninth Circuit’s new Office of Workplace Relations, which is responsible for preventing and resolving workplace harassment and fostering a positive working environment in the federal courts, is now fully operational with a director and support staff stationed at the circuit headquarters in San Francisco.

Yohance C. Edwards, Esq., hired in January to serve as director of workplace relations, and a workplace relations specialist, Stella Huynh, recently settled into offices in the James R. Browning United States Courthouse, home to the U.S. Court of Appeals for the Ninth Circuit and the regional administrative hub for the federal courts in the western states and Pacific islands.

Mr. Edwards is available to directly assist all judges and court staff in the circuit. He also oversees development of discrimination and sexual harassment training programs for federal trial and bankruptcy courts in the 15 judicial districts within the circuit. His near-term goals include new webpages to provide workplace-related information to the public and judiciary employees.

Materials recently posted online include a significantly revised Employment Dispute Resolution Policy, which sets out processes and practices for resolving workplace matters. The EDR Policy has been adopted by the Ninth Circuit Court of Appeals. All other courts in the circuit, and the Federal Public Defender offices, have either adopted the Ninth Circuit’s revised EDR Policy in its entirety, or have adopted revised local court policies that are substantially similar to the Ninth Circuit’s revised EDR Policy. All revised EDR Policies went into effect on January 1, 2019.

Mr. Edwards also has initiated a survey of EDR coordinators in all courts of the circuit to identify their needs and issues.

“All of us here in the Ninth Circuit are committed to maintaining a healthy and productive workplace. We are very pleased with the progress made to date,” said Ninth Circuit Chief Judge Sidney R. Thomas.

– more –

Mr. Edwards was formerly the associate director and deputy Title IX officer in the Office for the Prevention of Harassment and Discrimination at the University of California, Berkeley. Ms. Huynh is a recent law school graduate who previously worked in the Ninth Circuit's public information unit.

The hiring of a director of workplace relations was foremost among the recommendations put forth last year by the Workplace Environment Committee, an ad hoc panel appointed by Chief Judge Thomas to review policies and procedures aimed at maintaining a healthy working environment. The committee based its proposals on input received from more than 3,000 current and former law clerks and other court staff who responded to a wide-ranging workplace questionnaire.

More information about Office of Workplace Relations activities is available at <https://www.ca9.uscourts.gov/workplace>.

The U.S. Courts for the Ninth Circuit consists of the Ninth Circuit Court of Appeals, and the federal trial and bankruptcy courts and related court units in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands.

###

**STATUS REPORT FROM THE FEDERAL JUDICIARY  
WORKPLACE CONDUCT WORKING GROUP  
TO THE  
JUDICIAL CONFERENCE OF THE UNITED STATES**

**SEPTEMBER 17, 2019**



# **STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES SEPTEMBER 17, 2019**

## **INTRODUCTION**

This status report summarizes progress made on recommendations in the [Federal Judiciary Workplace Conduct Working Group Report](#) (Report), submitted to the Judicial Conference of the United States on June 1, 2018. At the direction of Chief Justice John G. Roberts, Jr., the Federal Judiciary Workplace Conduct Working Group (Working Group) was established in January 2018 to evaluate the Judiciary's standards of conduct and procedures for investigating and correcting inappropriate workplace conduct. The Working Group made more than thirty detailed recommendations to improve the Judiciary's policies and procedures and achieve the Chief Justice's goal of creating an exemplary workplace for every federal judicial employee and judge.

The Working Group's recommendations cover three general categories:

- Revisions to the Codes of Conduct for United States Judges (Codes of Conduct or Code) to state clear and consistent standards describing inappropriate workplace behavior.
- Improvements to the Judiciary's procedures for identifying and correcting misconduct and providing more informal and flexible ways to report and resolve workplace conduct issues, including revising the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules) and the Model Employment Dispute Resolution (EDR) Plan, and creating a national Office of Judicial Integrity (OJI) and circuit directors of workplace relations as independent

resources for employees to report and receive advice about workplace misconduct; and

- Enhancements to the Judiciary’s educational and training programs to raise awareness of workplace conduct issues, prevent discrimination and harassment, and promote civility throughout the Judicial Branch.

Prior to the submission of the Report, the Judiciary took several actions that did not require Judicial Conference action. Those included:

- Revising the confidentiality provisions in the law clerk handbook to clarify that nothing in those provisions prevents revealing workplace misconduct, including harassment, and removing the Model Confidentiality Statement from JNet, the courts’ intranet website;
- Establishing a comment mailbox on the [uscourts.gov](https://uscourts.gov) public website for current and former law clerks and other employees to send comments and suggestions to the Working Group;
- Meeting with the authors of the 2016 report from the Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace;
- Meeting with a group of law clerks, and a cross-section of Judiciary employees to hear their workplace experiences;
- Adding instructive in-person programs on Judiciary workforce policies and procedures and workplace sexual harassment to the curricula at Federal Judicial Center programs for chief district and chief bankruptcy judges; and

- Providing a session on sexual harassment during ethics training for newly appointed judges.

Since the receipt of the Working Group's Report in June 2018, the Judicial Conference of the United States, the Administrative Office of the U.S. Courts (AO), the Courts, and the Federal Judicial Center have acted on nearly all of the Working Group's recommendations. These actions include the following:

- The Judicial Conference approved revisions to the Codes of Conduct for United States Judges and Codes of Conduct for Judicial Employees, as well as the JC&D Rules in March 2019 to state expressly 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.
- AO Director James C. Duff appointed Jill Langley to head the newly-created OJI and that office began actively providing confidential advice and guidance since her January 2019 appointment.
- Many federal circuits and courts established workplace conduct committees and created directors of workplace relations (or similar positions) to provide circuit-wide guidance and oversight of workplace conduct matters.
- The Federal Judicial Center (FJC) has provided nation-wide training on preventing harassment, workplace civility, and diversity and inclusion.
- Most recently, on September 17, 2019, the Judicial Conference approved a significantly revised and simplified Model EDR Plan that clearly states that harassment, discrimination, abusive conduct, and retaliation are prohibited; provides several options for employees to report and seek redress for wrongful

conduct; and ensures that Judiciary employees know the many resources available to them.

This report addresses these improvements in more detail below. The Working Group has been encouraged by the initiatives at the national and local levels to assure professionalism, civility, and accountability in the workplace. The Working Group remains in place to monitor the progress and success of these initiatives and the ongoing work on the remaining recommendations.

## **I. AMENDMENTS TO THE CODES OF CONDUCT**

The Judicial Conference took action in response to several recommendations in the Working Group's Report. This action includes the overall recommendation that the Judiciary "revise its codes and other published guidance in key respects to state clear and consistent standards, delineate responsibilities, and promote appropriate workplace behavior." Report at 21. The Judicial Conference Committee on the Codes of Conduct's (Codes Committee) proposed revisions to the Codes of Conduct were published for written comment in September 2018. In October 2018, the Codes Committee held a public hearing to consider comments on the proposed amendments. After further consideration of all comments, the Codes Committee developed final recommendations, which the Judicial Conference approved in March 2019. The [revisions to the Codes](#) addressed the following Working Group recommendations.

### ***A. Promoting Appropriate Workplace Behavior and Prohibiting Workplace Harassment***

In its Report, the Working Group suggested clarifying in the Codes of Conduct that a judge has an affirmative duty to promote civility not only in the courtroom but throughout the courthouse. This includes the duty to promote appropriate behavior in the workplace, especially in chambers. The Working Group further recommended that the Code explicitly affirm that a



judge must not engage in or tolerate any workplace misconduct, including harassment, abusive behavior, or retaliation for reporting such conduct.

In response to these recommendations, the Judicial Conference amended the Codes of Conduct at Canon 2A (Commentary), the introduction to Canon 3, Canon 3B(4), and Canon 3B(4) (Commentary). These amendments make clear that a judge should promote and practice civility—by being patient, dignified, respectful, and courteous—in dealings with court personnel, including chambers staff. The amendments also prohibit judges from taking part in, or allowing, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct.

***B. Prohibiting Impermissible Harassment, Bias, or Prejudice***

The Working Group recommended Code amendments to clarify that harassment, bias, or prejudice based on race, color, religion, national origin, sex, age, disability, or other bases (including sexual orientation or gender identity) is impermissible. In response, the Judicial Conference added Commentary to Canon 3B(4) that “harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others.”

***C. Requiring Appropriate Action Concerning Misconduct***

The Report recommended clarifying a judge’s existing obligation under the Code to “take appropriate action” against misconduct extends to the inappropriate treatment of court employees, including those in chambers. The Report advised that “appropriate action” should reasonably address the misconduct, prevent harm to those affected by it, and promote public confidence in the integrity and impartiality of the Judiciary.

The Code amendments that are responsive to these recommendations are in Canon 3B(6) and Canon 3B(6) Commentary. As noted in the Commentary, “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.”

#### ***D. Clarifying Confidentiality and Reporting***

The Report stressed that confidentiality obligations must be clear so both judges and judicial employees understand these obligations never prevent any employee—including a law clerk—from revealing abuse or misconduct by any person. In response, the Codes Committee recommended, and the Judicial Conference approved, an amendment to the Code of Conduct for Judicial Employees at Canon 3D(3) to clarify that the “general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.”

#### ***E. Coordinating Amendments with Other Codes of Conduct***

The Working Group recommended making similar changes to the codes of conduct that apply to all judicial employees (including the Code of Conduct for Judicial Employees and the Code of Conduct for Federal Public Defender Employees). In response, the Judicial Conference adopted amendments to the Code of Conduct for Judicial Employees at Canon 3C and 3D. These amendments include a duty to promote appropriate workplace conduct, prohibit workplace harassment, take appropriate action to report and disclose misconduct, and prohibit retaliation for

reporting or disclosing misconduct. The Codes Committee expects to recommend similar revisions to the Code of Conduct for Federal Public Defender Employees later this year.

The Working Group also asked the Codes Committee to consider whether there was a continuing need to use the existing model confidentiality statement to inform employees about their confidentiality obligations. The Working Group viewed the statement—and the Codes Committee agreed—as an impediment to reporting workplace misconduct. The confidentiality statement was rescinded in February 2018. The Codes Committee further decided that developing a new confidentiality statement may not be necessary, as working groups at the circuit level have issued a variety of proposals to improve understanding of employee confidentiality issues. The Codes Committee intends to develop ethics education programs on this topic, including assisting judges and court executives to educate judicial employees about their confidentiality obligations.

#### ***F. Improving Educational and Guidance Materials***

The Report included a recommendation to review and revise all written ethics guidance concerning workplace conduct. The recommendation aims to ensure that the Judiciary provides a consistent and accessible message that it will not tolerate harassment or other inappropriate conduct. The Report further recommended developing ethics education programs, in cooperation with the FJC, on these topics. The Codes Committee has begun to review and revise existing written educational materials that inform judges and judicial employees of their ethical obligations related to workplace conduct and is working with the FJC to develop new ethics education programs for judges and court employees on these topics.

## **II. AMENDMENTS TO THE PROCEDURES AND NEW INITIATIVES FOR IDENTIFYING AND CORRECTING WORKPLACE MISCONDUCT**

### ***A. Rules for Judicial-Conduct & Judicial-Disability Proceedings (JC&D Rules)***

In response to the Working Group’s recommendations, the Committee on Judicial Conduct and Disability (JC&D Committee) proposed amendments to the JC&D Rules. The JC&D Committee released final draft proposed amendments to the JC&D Rules on September 13, 2018, for a sixty-day public comment period that ended on November 13, 2018. The JC&D Committee, in coordination with the Codes Committee, held a public hearing on October 30, 2018, to hear testimony and comments concerning the proposed amendments to the JC&D Rules, as well as the Codes of Conduct. The JC&D Committee prepared a final set of proposed amendments, which the Judicial Conference approved at its March 2019 session. The [amendments](#) address the following Working Group recommendations.

#### ***1. Requiring Judges to Report or Disclose Misconduct***

Most significantly, the Working Group recommended that the JC&D Committee “provide additional guidance . . . on a judge’s obligations to report or disclose misconduct and to safeguard complainants from retaliation” and that the Committee “reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct.” Report at 31. In response, the JC&D Committee recommended, and the Judicial Conference adopted, an expansion of the JC&D Rules’ misconduct definition to include retaliation for reporting or disclosing judicial misconduct or disability. *See* Rule 4(a)(4) (“Retaliation”). The Judicial Conference also added a new provision that includes a judge’s failure to bring “reliable information reasonably likely to constitute judicial misconduct” to the attention of the relevant chief district judge or chief circuit judge within the definition of cognizable misconduct. *See*

Rule 4(a)(6) (“Failure to Report or Disclose”) & Commentary; *see also* Rule 23 (“Confidentiality”) Commentary.

## ***2. Expressly Prohibiting Workplace Harassment***

In its Report, the Working Group suggested that the JC&D “Rules or commentary include express reference to workplace harassment within the definition of misconduct,” and include changes “clear[ly proscribing] harassment based on sexual orientation or gender identity.” Report at 30. The Judicial Conference responded by revising the JC&D Rules and related Commentary to include abusive or harassing behavior (including unwanted, offensive, or abusive sexual conduct; hostile work environment; and discrimination based on race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, and disability) within the definition of misconduct. *See* Rule 4(a)(2) (“Abusive or Harassing Behavior”); Rule 4(a)(3) (“Discrimination.”)

## ***3. Exempting Reports of Misconduct from Confidentiality Rules***

The Working Group proposed that “the Committee on Judicial Conduct and Disability make clear . . . that confidentiality obligations should never be an obstacle to reporting judicial misconduct or disability” in order to ensure that complainants “understand that the obligations of confidentiality that judicial employees must observe in the course of judicial business do not shield a judge from a complaint under the JC&D Act.” Report at 30-31. In response, 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. *See* Rule 23(c) (“Disclosure of Misconduct and Disability”). *See also* Rule 4 (“Misconduct and Disability Definitions”) Commentary; Rule 6 (“Filing of Complaint”) Commentary.

#### ***4. Clarifying Eligibility to File a JC&D Complaint***

The Working Group recommended that the “Rules or associated commentary state with greater clarity that traditional judicial rules respecting ‘standing’— viz., the requirement that the complainant himself or herself must claim redressable injury from the alleged misconduct—do not apply to the JC&D Act complaint process.” Report at 29–30. In response, the Judicial Conference revised the JC&D Rules and related Commentary to note that traditional standing requirements do not apply, and that individuals and organizations may file a complaint even if they have not been directly injured or aggrieved. *See* Rule 3(c)(1) (“Complaint”) & Commentary.

#### ***5. Improving Transparency***

The Working Group recommended that “the Judiciary as a whole consider possible mechanisms for improving the transparency of the JC&D Act process.” Report at 31. The Judicial Conference approved various changes to the JC&D Rules, including: expanding the provision regarding confidentiality to allow judicial councils and the JC&D Committee (and not just circuit chief judges) to disclose the existence of proceedings in specific circumstances, *see* Rule 23(b)(1)) (“General Rule” on “Confidentiality in the Complaint Process”); expanding the provision regarding disclosure of information about the consideration of a complaint where a complainant or other person has publicly released information regarding the existence of a complaint proceeding, *see* Rule 23(b)(8) (“Disclosure in Special Circumstances”) & Commentary; permitting the disclosure of a subject judge’s name in additional circumstances where a complaint is concluded based on voluntary corrective action, *see* Rule 24 (“Public Availability of Decisions”) Commentary; and including language that the Judiciary will seek ways to make decisions available to the public through searchable electronic indices, *id.*

## ***6. Authorizing Systemic Evaluations***

As the Working Group notes, the Judiciary has an “institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition.” Report at 39. The Judicial Conference added language to the JC&D Rules that the Judicial Conference and judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote “the expeditious conduct of court business.” 28 U.S.C. § 331. This includes making “all necessary and appropriate orders for the effective administration of justice within [each] circuit,” *id.* at § 332(d)(1), including consideration of what precautionary or curative steps could be undertaken to prevent the recurrence of misconduct. *See* Rule 11 (“Chief Judge’s Review”) Commentary.

### ***B. Amendments to the Model Employment Dispute Resolution (“EDR”) Plan***

The Working Group recommended revisions to the Model EDR Plan to provide clear, uniform definitions of “wrongful conduct,” such as harassment and discrimination; offer informal avenues for employees to report wrongful conduct; allow employees more time to file a formal claim; cover all paid and unpaid Judiciary employees; increase awareness of EDR rights and options to address workplace misconduct; and ensure the appropriate chief judge is notified of potential misconduct by a judge.

The Judicial Conference approved two of the Working Group’s recommendations in September 2018: increasing the time to file a formal EDR Complaint from 30 to 180 days and extending EDR coverage to all paid and unpaid interns and externs. As it always has, the Model EDR Plan applies to all Article III and other judicial officers of the federal courts; all current and

former Judiciary employees, including all chambers staff; federal public defenders and their staffs; and all applicants for employment who have been interviewed.

The Director of the AO established a Model EDR Plan Working Group (EDR Group), made up of federal judges and Judiciary officials with expertise in employment dispute resolution. The EDR Group drafted a revised Model EDR Plan to incorporate the Working Group's recommendations and ensure consistency with the amendments to the Codes of Conduct and the JC&D Rules. The proposed revision was circulated for Judiciary-wide comment. The Judicial Resources Committee of the Judicial Conference and its Diversity Subcommittee then considered the revised Model EDR Plan and recommended its adoption, which the Judicial Conference adopted at its September 2019 session. Some of the significant changes to the Model EDR Plan are highlighted below.

***1. Providing Clear and Consistent Definitions of Wrongful Conduct***

The Working Group recommended revising all of the Judiciary's guidance documents, including the Model EDR Plan, in parallel fashion with the Codes of Conduct to provide consistent standards of workplace conduct. In response, the revised Model EDR Plan now states the Judiciary's core values, including a commitment to a workplace of respect, civility, fairness, tolerance, and dignity, free of discrimination and harassment. Consistent with changes to the Codes of Conduct and the JC&D Rules, the Model EDR Plan encourages reports of wrongful conduct and makes clear that confidentiality requirements do not prohibit anyone, including law clerks, from reporting any type of workplace misconduct. Furthermore, consistent with the revised Codes of Conduct and JC&D Rules, the revised Model EDR Plan includes a clear policy statement of prohibited "wrongful conduct" in the workplace, using explanatory examples,



namely: discrimination; sexual, racial or other discriminatory harassment; abusive conduct; retaliation; and violations of specific employment laws.

The Model EDR Plan has always protected against discrimination and harassment based on race, color, national origin, sex, gender, pregnancy, religion, and age (40 years and over), but the Working Group recommended expanding the Model EDR Plan's definition of sex discrimination to match established legal definitions and the language used within the Codes of Conduct and other Judiciary policy statements. The revised Model EDR Plan includes gender identity and sexual orientation as a "protected category" consistent with similar action taken by the Judicial Conference in March 2019 in amending the Codes of Conduct and the JC&D Rules.

## ***2. Prohibiting Abusive Conduct***

The Working Group suggested that the revised Model EDR Plan state that harassment, without regard to motivation, is wrongful conduct. The revised Model EDR Plan adds "abusive conduct" as a form of wrongful conduct, defined as "a pattern of demonstrably egregious and hostile conduct *not* based on a protected category that unreasonably interferes with an employee's work and creates an abusive working environment." This definition is consistent with language defining abusive behavior in the JC&D Rules. The definition excludes communications and actions reasonably related to performance management.

## ***3. Providing Flexible and Informal Options for Resolution***

The Working Group recommended that the Model EDR Plan provide an avenue for employees to report wrongful conduct without filing a formal EDR complaint. The revised Model EDR Plan provides new flexible and more informal ways for reporting and resolving allegations of wrongful conduct, called "Options for Resolution:" (1) informal advice; (2) assisted resolution; or (3) formal complaint. Based on the Working Group's recommendation,

the revised Model EDR Plan allows an employee, including a law clerk or other chambers employee, to request interim relief during the pendency of any Option for Resolution, including transfer or an alternative work arrangement.

Informal advice is just that: an employee can contact an EDR Coordinator, circuit director of workplace relations, or the national OJI for informal, confidential advice and guidance about workplace misconduct. Assisted resolution simply means an employee can ask for help with a workplace conduct issue. Assistance under this option includes facilitated discussions, voluntary mediation, a preliminary investigation, or any other steps that may yield an effective resolution of the issues.

The formal EDR complaint option is substantially the same: it allows an employee to use a structured claims process overseen by a presiding judicial officer assigned by the chief judge. It provides for a fair and impartial investigation, a hearing before the presiding judicial officer to resolve material factual disputes, a written decision, and a right to have that decision reviewed by the circuit judicial council. The new Model EDR Plan sets out mandatory recusal standards for those involved in the EDR process to avoid conflicts of interest.

#### ***4. Increasing Awareness of EDR Rights and Options for Resolution***

The Working Group found that employees lacked awareness of the rights and options available to them under the Model EDR Plan. In response, the new Model EDR Plan is written in “plain English”; includes easy-to-follow infographics describing EDR rights and options; and requires courts to post the EDR Plans and infographics prominently on their websites, along with contact information for the court’s EDR Coordinators and the national OJI. The Model EDR Plan now also requires courts to conduct EDR and workplace conduct training annually for all judges and employees, including chambers staff.

Based on a Working Group recommendation, the revised Model EDR Plan requires that all EDR coordinators be trained and certified on the Model EDR Plan's rights, processes, and Options for Resolution. The EDR Group is currently developing materials to assist in training and to answer frequently asked questions about EDR.

#### ***5. Providing Notice of Wrongful Conduct Allegations Against Judges***

The Model EDR Plan has always permitted employees, including chambers employees, to report judicial misconduct in the workplace. Implementing the Working Group recommendation, the revised Model EDR Plan now requires notice to the appropriate chief district or circuit judge when an EDR-level allegation is made against a judge in their district or circuit. In such a case, the appropriate chief district or chief circuit judge is responsible for coordinating an Assisted Resolution request or overseeing a formal EDR Complaint. As it has in the past, the Model EDR Plan states that if a judge is the subject of both a formal complaint under the Model EDR Plan and a complaint under the Judicial Conduct and Disability Act, the chief circuit judge will determine the appropriate procedure for addressing both.

#### ***C. Creation of Office of Judicial Integrity***

The Working Group recommended that the Judiciary offer employees a broad range of options and methods to report harassment and seek guidance about workplace conduct concerns, with multiple points-of-contact at both the local and national level. As part of that goal, it recommended the AO establish a national OJI to provide confidential assistance regarding workplace conduct to all Judiciary employees.

### ***1. Providing Independent, Confidential Advice on Workplace Conduct***

The Director of the AO created the OJI, which began operations in January 2019. The OJI serves as an independent resource where current and former Judiciary employees can seek—by phone or confidential email—counseling, guidance, and intervention regarding sexual and other harassment, abusive conduct, discrimination, and other workplace misconduct. The OJI ensures employees are aware of all the informal and formal options available to them to report and address workplace harassment or other wrongful conduct. The OJI provides a safe and confidential avenue for employees who, for whatever reason, choose not to report misconduct to, or discuss their workplace concerns with, their local court office.

Employees can make confidential, even anonymous, reports of harassment or other wrongful conduct on an email form located on the OJI's JNet website, linked prominently on a Workplace Conduct Quick Link on the front page of the JNet. Former employees and members of the public can submit similar confidential reports on the OJI's public site on [www.uscourts.gov](http://www.uscourts.gov). The OJI's JNet website provides links to other workplace resources, such as court EDR Plans and EDR Coordinators, the Codes of Conduct and JC&D Rules, the Working Group's June 2018 Report, and the FJC's workplace conduct training programs and offerings.

The OJI also provides guidance and advice to judges, unit executives, managers, and EDR Coordinators about workplace conduct matters. It provides advice on best practices for conducting a fair, thorough, and impartial workplace investigation, and, at the request of a court Chief Judge, can assist with a workplace investigation. It ensures managers are aware of other workplace conduct resources at the AO, including the AO's Court Human Resources Division,

the Office of the General Counsel, and the FJC's workplace conduct in-person and web-based training programs.

The OJI is headed by the first appointed Judicial Integrity Officer, Jill Langley, formerly the Tenth Circuit's Director of Workplace Relations. Prior to her appointment, Ms. Langley was an attorney with the Tenth Circuit for twenty-three years and spent thirteen years focusing on EDR, during which time she developed an EDR training program that she presented nation-wide. Before joining the court, Ms. Langley was in private practice with a law firm in Phoenix, Arizona. She graduated cum laude from the Sandra Day O'Connor College of Law at Arizona State University, where she was an editor of the law review, and received her undergraduate degree from the University of Arizona.

## ***2. Outreach to Future, Current, and Former Judicial Employees and Law Clerks***

The OJI provides an avenue for law schools to report any information they learn from students about judicial workplace misconduct. Law schools and law students who worked in chambers can report a judicial workplace misconduct issue directly to the OJI. If the law school or student would prefer to remain anonymous, they can submit a confidential report via the OJI's public website. After receiving any such report, the OJI will notify the appropriate Chief Judge of the reported information.

The Judicial Integrity Officer travels extensively to circuit and court conferences to increase awareness of the OJI and its workplace conduct resources and of workplace conduct issues generally. In 2019, the Judicial Integrity Officer has been invited by courts in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh and District of Columbia circuits to participate in, or provide, training on the role of the OJI, workplace conduct, and the Model EDR Plan. The conferences have included judge conferences, court manager conferences, new law

clerk orientations, workplace conduct workshops, and training programs for Human Resource Professionals and EDR Coordinators. As courts adopt their EDR Plans based on the new Model EDR Plan, the OJI will be available to provide training next year to educate employees about their rights and options under the Model EDR Plan and make them aware of the many ways—informal and formal—they can get help with a workplace conduct concern.

### ***3. Analyzing Issues and Trends***

The OJI maintains a confidential database of all contacts with the OJI, including the nature of the allegations, to inform the Judiciary and this Working Group about the frequency and the nature of the reported workplace conduct issues and any notable trends. In addition, the OJI works with the Court Human Resources Division, which currently administers a national exit survey of all former Judiciary employees, to identify workplace conduct issues or trends revealed in the exit surveys.

The AO is in the process of clarifying the data that courts will be required to report under the new Model EDR Plan and creating easier and more accurate ways for courts to provide that information. This data collection will include a requirement that courts annually report sexual harassment claims.

### ***D. Circuit and Court Initiatives***

Following the recommendation of the Working Group, many circuits have now hired trusted individuals, often called Directors of Workplace Relations, to provide confidential guidance and resolution of workplace conduct issues to Judiciary employees within the circuit. The Directors of Workplace Relations offer workplace conduct training; give guidance to employees and managers about conduct issues; provide informal workplace conduct advice, train and assist court EDR Coordinators; and assist with workplace conduct investigations, mediation,

and dispute resolution. It is anticipated that the OJI and Circuit Directors of Workplace Relations will meet at least annually to develop best practices, identify effective training programs, improve methods and processes for employees to report misconduct, and identify workplace conduct trends. Many circuits have also created workplace conduct committees, either in addition or as an alternative to, a circuit director of workplace relations.

Many circuits and individual courts have conducted confidential climate surveys, developed their own workplace conduct training programs, and offered workplace conduct workshops and seminars. Courts in every circuit have provided training and education to staff and employees about workplace conduct, particularly the ways that employees can report issues and how managers can address and correct issues. The Seventh Circuit and the Ninth Circuit, which amended their EDR Plans in advance of the new Model EDR Plan, provided circuit-wide training to EDR Coordinators, including training on mediation skills and conducting a workplace investigation.

### **III. TRAINING AND EDUCATION**

The Working Group made three recommendations to the FJC regarding training. First, the FJC should ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation programs, with refresher training at regular intervals. Second, the FJC should develop an advanced training program aimed at developing a culture of workplace civility. Finally, the FJC, in coordination with the AO and individual courts, should continuously evaluate the effectiveness of workplace conduct educational programs.

The FJC has delivered “workplace standards” training at the initial orientations of new federal judges (phases I and II of the orientations for new district, bankruptcy, and magistrate judges). The FJC also regularly offers periodic refresher training consisting of sessions at

national and circuit judicial workshops. An orientation video covering workplace conduct issues for new law clerks was produced in time for summer 2018 term law clerks entering into their duties. That video is currently being updated to reflect changes recommended and implemented following the Working Group report, and to include the formation of the OJI and the amendments to the Codes of Conduct and JC&D Rules. The FJC anticipates creating EDR training programs after the Judicial Conference approves the revised Model EDR Plan.

With respect to an initial orientation for all new Judiciary employees, an FJC webcast last fall in the series “Court Web” reached roughly 2,400 participants and consisted largely of scenario-based discussions of acceptable workplace conduct. It is likely that an online approach, whether via podcast, webcast, or a similar mechanism, which allows the recipients to absorb the content at a time their choosing, offers the best chance of reaching the entirety of the target audience.

The FJC believes the most effective educational approach is to use scenarios, some of which are adapted from actual reports received, that enable candid discussions among groups of judges, court unit executives, and managers and supervisors. The formal ethics presentations at new judge orientations (typically consisting of a judge representative from the Codes Committee and a representative from the AO’s Office of the General Counsel) have been expanded to include greater focus on the ethical obligations of judges in responding to workplace misconduct allegations. The perceptions formed at orientations for new judges as to what is and is not acceptable within the Judiciary’s culture, guided by mentor judge observations, are critical. Discussions at national workshops of district, bankruptcy, and magistrate judges, circuit judicial workshops, chief district and bankruptcy judge workshops, and the new chief judge (circuit,



district, and bankruptcy) leadership seminar program have all proven useful in capturing important workplace conduct insights.

The FJC's lineup of in-person programs for unit and deputy unit executives, experienced supervisors, and new supervisors all address various issues affecting workplace conduct. The Conference for Court Unit Executives, a national-level gathering, addressed various aspects of workplace conduct both in plenary and elective sessions. At the court staff level, the primary educational method of learning more about these issues is a variety of in-district training seminars (e.g., Preventing Workplace Harassment, Dealing with Difficult Situations; Meet: Breaking New Ground – Respect and Inclusion in the Workplace) delivered by court trainers. In the year ahead, the FJC intends to add another program, Civility in the Workplace, to those seminars.

### **CONCLUSION**

The Judicial Branch has demonstrated commitment from courts nationwide to creating and ensuring exemplary workplaces. Managers are offering workplace training and workshops, judges are actively involved in workplace concerns, and employees are coming forward, both locally and to the OJI, to discuss and resolve any concerns they may have. Our Working Group will continue to monitor and assess workplace conduct matters throughout the Judiciary, to assist with continued implementation of the workplace initiatives already in place, and to recommend additional changes whenever we see needs for improvement.

**REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT  
WORKING GROUP  
TO  
THE JUDICIAL CONFERENCE OF THE UNITED STATES  
JUNE 1, 2018**

**INTRODUCTION**

On December 20, 2017, Chief Justice John G. Roberts, Jr., asked the Director of the Administrative Office of the United States Courts to establish a working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect all court employees from inappropriate conduct in the workplace.<sup>1</sup> The Chief Justice highlighted this issue in his 2017 *Year-End Report on the Federal Judiciary*, noting that the Judicial Branch cannot assume that it is immune from the problems of sexual harassment that have arisen elsewhere in the public and private sectors. He directed the working group to consider whether changes are needed to: the Judiciary's codes of conduct; its guidance to employees on issues of confidentiality and reporting of instances of misconduct; its educational programs; and its rules for investigating and processing misconduct complaints.<sup>2</sup> The ultimate goal of this undertaking is "to ensure an exemplary workplace for every judge and every court employee."<sup>3</sup>

On January 12, 2018, the Director announced the formation of the Federal Judiciary Workplace Conduct Working Group (Working Group).<sup>4</sup> The Working Group, chaired by the Director, consists of eight experienced judges and court administrators from diverse units within

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<sup>1</sup> See Appendix 1: Memorandum from James C. Duff, Director of the Administrative Office, to all Judiciary Employees (Dec. 20, 2017).

<sup>2</sup> See Appendix 2: Chief Justice John G. Roberts, Jr., United States Supreme Court, *Year-End Report on the Federal Judiciary* at 11 (2017).

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

<sup>4</sup> See Appendix 3: Press Release, Federal Judiciary Workplace Conduct Working Group Formed (Jan. 12, 2018).

the Judiciary. The members include representatives from the Administrative Office, the Federal Judicial Center (FJC), and six different courts from five different circuits.<sup>5</sup> The Director has enlisted the Administrative Office's General Counsel and her staff to provide additional subject-matter expertise, counsel, and support. The Working Group has collaborated continuously since its inception by telephone and electronic means, and it has convened monthly in-person meetings at the Administrative Office in Washington, D.C., on February 7, 2018; March 1, 2018; April 6, 2018; and May 21, 2018.

The Working Group took its charter from the Chief Justice's goal of ensuring an exemplary workplace for every judge and every court employee. As the branch of government whose core purpose is equal justice under law, the Judiciary must hold itself to the highest standards of conduct and civility to maintain the public trust. The Working Group developed its findings and recommendations not only to address harassment, but to pursue the overarching goal of an inclusive and respectful workplace.

The Working Group proceeded from the premise that in many respects the Judiciary shares common features with other public and private workplaces. The Working Group therefore analyzed existing literature on workplace misconduct in those sectors. The Working Group found particularly helpful a June 2016 study by a Select Task Force of the United States Equal Employment Opportunity Commission (EEOC).<sup>6</sup> The EEOC Study analyzes the prevalence of harassment, employee responses, risk factors, and steps that can be taken to prevent and remedy inappropriate conduct.<sup>7</sup> Its summary of recommendations provides

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<sup>5</sup> *Id.*

<sup>6</sup> U.S. Equal Emp. Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, (2016), (*EEOC Study*).

<sup>7</sup> *Id.*

invaluable general guidance on developing harassment prevention policies, providing education and compliance training, and promoting workplace civility.<sup>8</sup>

The Working Group included in its review the entire federal Judiciary, including judges, court unit executives, managers, supervisors and others serving in supervisory roles, as well as employees, law clerks, interns, externs, and other volunteers. It recognized that, despite the Judicial Branch's many shared characteristics with other workplaces, the judicial workplace is unique in certain respects. On the one hand, the Judiciary has distinct features that are likely to lessen the risk of employee harassment. For example, the Judiciary, by virtue of its institutional role, is committed to fairness and the rule of law; it has a tradition of formality and decorum; its Article III judges are subject to rigorous screening through the judicial confirmation process; its bankruptcy and magistrate judges are carefully vetted before appointment; its executives and most employees are subject to pre-employment background investigations; it has long maintained codes of professional conduct; it has developed and maintained a host of fair employment training and educational programs; and it is subject to both statutory and regulatory programs to investigate and remedy misconduct.<sup>9</sup> But on the other hand, some elements of the judicial workplace can increase the risk of misconduct or impose obstacles to addressing inappropriate behavior effectively. For example, there are significant "power disparities" between judges and the law clerks and other employees who work with them, which may deter a law clerk or employee from challenging or reporting objectionable conduct. Judges enjoy life tenure, and they are subject to discipline only through formal processes. Further, the judicial decision-making process requires a high degree of confidentiality, and law clerks and other

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<sup>8</sup> *Id.* at 66-71.

<sup>9</sup> See Appendix 4: Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Feb. 16, 2018).

chambers employees may mistakenly believe that the obligation of confidentiality extends to the reporting of misconduct.

The Working Group accordingly embraced the recommendations set forth in the EEOC Study, but it focused additional effort on identifying those factors that distinguished the Judiciary and called for further refinement of the standards that would apply in other workplaces. The Working Group sought out the views of interested constituencies, including current and former law clerks, court employees, and Judicial Branch advisory councils. It conducted in-person meetings with representative law clerks, employees, and industry experts, including the co-chairs of the EEOC Study.<sup>10</sup> The Working Group broadly solicited input through an “electronic mailbox” that enabled any current or former Judiciary employee to provide anonymous or attributable suggestions and comments. The Working Group sought and received input from several circuits’ own workplace conduct working groups. Based on its input from these sources and its members’ own experiences in the Judiciary, the Working Group then engaged in a review of: (1) the Judiciary’s codes of conduct and published guidance for judges, law clerks, and other judiciary employees; (2) the existing statutory framework for misconduct complaints under the Judicial Conduct and Disability Act (JC&D Act) and the Judiciary’s internal framework of Employment Dispute Resolution Plans (EDR Plans); and (3) the Judiciary’s educational programs and publications for promoting fair employment practices and workplace civility.<sup>11</sup>

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<sup>10</sup> The Working Group appreciates the written submissions and detailed in-person discussions during meetings between the Working Group members and the co-chairs of the EEOC Study (*supra* note 6), Acting Commission Chair Victoria A. Lipnic and Commissioner Chai R. Feldblum, and with current and former law clerks Jaime Santos, Kendall Turner, Deeva Shah, Claire Madill, and Sara McDermott, as well as many other current employees within the Judiciary.

<sup>11</sup> In the course of this undertaking, the Working Group briefed the Judicial Conference and all Judiciary employees on its progress, answered media inquiries, and responded to communications from interested members of Congress. *See, e.g.*, Appendix 4, *supra* note 9. *See also* Appendix 5: Letter from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein (Mar. 8, 2018); Memorandum from James C. Duff, Director of the Administrative Office, seeking comments from all Judiciary employees (Feb. 20, 2018); Press Release, Judiciary Workplace Conduct Group Seeks Law

The product of these efforts is this report to the Judicial Conference of the United States. The Judicial Conference, presided over by the Chief Justice, is the national policy-making body for the federal courts. It establishes policies based on the advice of its various committees. The Working Group's Report offers a number of recommendations to the Judicial Conference and its committees for their consideration and further action. The Report also includes recommendations that the Administrative Office, as the administrative arm of the Judiciary, and the FJC, as the Judiciary's education and research agency, can implement directly.

The Report first provides a summary of what was learned through the meetings with affected constituencies, subject-matter experts, and other interested groups, and from comments submitted by employees. The Report then sets forth recommendations and identifies steps already taken to: (1) revise and clarify the Judiciary's codes and other published guidance for promoting appropriate workplace behavior; (2) improve the procedures for identifying and correcting misconduct, including the creation of new avenues for employees to seek advice and register complaints; and (3) enhance educational and training programs to raise awareness of conduct issues, prevent harassment, and promote an exemplary workplace environment.

The Working Group's submission of this Report does not conclude its work. Under the Chief Justice's direction, the Working Group intends to monitor ongoing initiatives and measure progress to ensure its goals are fulfilled.

## **I. FINDINGS**

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Clerk, Employee Input (Feb. 21, 2018); Memorandum from James C. Duff, Director of the Administrative Office, to all United States Judges (Feb. 28, 2018). *See* Appendix 6: Press Release, Judicial Conference Receives Status Report on Workplace Conduct Review (Mar. 13, 2018).

The EEOC Study of harassment in the workplace provided the Working Group with a current and reliable empirical baseline to understand the problem and focus its inquiries. The EEOC Task Force conducted its study over 18 months from January 14, 2015, through June 2016. The 88-page report convincingly explains that workplace harassment is a persistent and pervasive problem in all economic sectors, in all socioeconomic classes, and at all organizational levels. The EEOC Study noted that almost one third of the 90,000 charges it received in 2015 included an allegation of workplace harassment. Those charges included harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion.<sup>12</sup> The EEOC Study found that between 25 percent and 85 percent of women in the private sector and federal sector workplace experienced sexual harassment, depending on how that term is defined.<sup>13</sup> The EEOC Study stated that three out of four individuals who experienced harassment never talked to a supervisor or manager about it.<sup>14</sup> In short, the EEOC Study confirmed that the problem of workplace harassment is both widespread and underreported in workplaces throughout the nation, and—as the Chief Justice noted in his *Year-End Report*—there is no reason to believe that the Judiciary is immune.<sup>15</sup>

The information that the Working Group gathered is generally consistent with the EEOC Study. The Judicial Branch employs 30,000 individuals in a broad range of occupations. Based on input from the electronic mailbox, the advisory groups, and circuit surveys (much of which was anonymous), and from interviews with employees, including law clerks, the Working Group believes that inappropriate conduct, although not pervasive in the Judiciary, is not limited to a

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<sup>12</sup> *EEOC Study*, *supra* note 6, at iv.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at v.

<sup>15</sup> As the EEOC Study points out, harassment for any reason is problematic, and the Working Group's references to harassment are therefore not limited to harassment of a sexual nature.

few isolated instances. This information suggests that, of the inappropriate behavior that does occur, incivility, disrespect, or crude behavior is more common than sexual harassment. As the EEOC Study noted, “incivility is often an antecedent to workplace harassment.” The Working Group agrees that, rather than focusing simply on eliminating unwelcome behavior, the Judiciary should “promot[e] respect and civility in the workplace generally.”<sup>16</sup>

The EEOC Study was useful in another important respect. It provided the Working Group with a cogent approach for assessing and addressing the problem of workplace harassment and inappropriate behavior within the Judiciary. The EEOC Study’s recommendations, which the co-chairs recently distilled in a *Harvard Business Review* article,<sup>17</sup> identify five key steps that employers can take to end harassment:

- Demonstrate Committed and Engaged Leadership
- Require Consistent and Demonstrated Accountability
- Issue Strong and Comprehensive Policies
- Offer Trusted and Accessible Complaint Procedures
- Provide Regular, Interactive Training Tailored to the Organization.

Those elements provide a sound framework for evaluating the information that the Working Group received from its in-person interviews, electronic mailbox submissions, advisory council input, and other sources.

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<sup>16</sup> EEOC Study, *supra* note at 55.

<sup>17</sup> Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, Harvard Business Review (2018), <https://hbr.org/2018/01/breaking-the-silence>, (*Breaking the Silence*).



*A. Does the Judiciary Demonstrate Committed and Engaged Leadership?*

The EEOC Study emphasizes that the leadership of an organization must show its commitment “to a diverse, inclusive, and respectful workplace in which harassment is not accepted.”<sup>18</sup> Additionally, “leadership must come from the very top of the organization.”<sup>19</sup>

The Chief Justice’s formation of this Working Group, and the Judicial Conference’s interim review of the Working Group’s progress at the March 2018 Judicial Conference session, demonstrate a commitment “from the top” of the Judiciary.<sup>20</sup> But that leadership must extend throughout the Judiciary, beginning with judges. The Judicial Branch’s administration and management is dispersed through thirteen circuit courts, 94 district courts, and a host of other judicial entities. Many of those entities have already expressed a commitment to the goals of a welcoming and civil workplace. For example, several circuits and district courts already have launched their own workplace initiatives.<sup>21</sup> Other circuits and district courts are following suit.

The Working Group received anonymous anecdotal reports about harassment or other inappropriate behavior that were not properly addressed. It 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.

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<sup>18</sup> *EEOC Study*, *supra* note 6 at 31.

<sup>19</sup> *Id.*

<sup>20</sup> *See* Appendix 6, *supra* note 11.

<sup>21</sup> *See, e.g.*, Press Releases, Ninth Circuit Committee Begins Workplace Environment Review (Feb. 28, 2018) and Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations (May 21, 2018). *See also* United States Court of Appeals for the Seventh Circuit Announcement by Chief Judge Diane Wood appointing Committee to examine harassment claims process. (Dec. 29, 2017). On April 18, 2018, the District Court for the District of Utah issued recommendations for how to promote a respectful workplace in its court.

*B. Does the Judiciary Require Consistent and Demonstrated Accountability?*

The EEOC Study co-chairs have noted that “[e]mployees have to see that bad behavior will not stand and that everyone complicit in that behavior will be held responsible.”<sup>22</sup>

Additionally, when an instance of harassment has been determined, “the discipline that follows must be proportionate.”<sup>23</sup> “There should be zero tolerance for harassment, but that does not mean that all harassers should be disciplined the same way—that is, by being fired.”<sup>24</sup>

Judicial employees who are subject to harassment or other forms of workplace abuse currently have two principal mechanisms for seeking redress. First, if an employee is harassed or mistreated by a judge, the employee may file a written complaint under the Judicial Conduct and Disability Act (JC&D Act), 28 U.S.C. §§ 351-364, a statutory mechanism specifically designed for disciplining judges. The filing of a written complaint triggers a formal review process, which can result in sanctions ranging from a private reprimand to a recommendation of impeachment.<sup>25</sup> The JC&D Act and the Rules for Judicial Conduct and Judicial Disability Procedures (Conduct Rules) provide authority for a chief circuit judge to initiate an inquiry and identify a complaint even if that judge receives information about misconduct in a form other than a formal, signed complaint.<sup>26</sup>

Alternatively, an employee subjected to misconduct, whether by a judge, supervisor, or other employee, may report the wrongful conduct or initiate a claim under one of the Employment Dispute Resolution Plans (EDR Plans) that have been established in all thirteen of the nation’s judicial circuits. An EDR Plan is a judicially created program, based on the

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<sup>22</sup> *Breaking the Silence*, *supra* note 17 at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Appendix 7: An Executive Summary of the current JC&D Act.

<sup>26</sup> See Conduct Rule 5. This mechanism has been used in the past to initiate complaints against judges.

Judiciary’s Model Employment Dispute Resolution Plan (Model EDR Plan), for resolving a wide range of employee disputes.<sup>27</sup>

The Judiciary has a good record for accountability under both of these disciplinary mechanisms. Under either system, a complaint, reported matter, or claim receives careful evaluation. In the case of the JC&D Act, very few complaints are filed alleging workplace harassment. Rather, the bulk of the complaints are filed by litigants who are dissatisfied with the outcome of their cases or incarcerated individuals challenging their confinement, both of which are not cognizable under the Act.<sup>28</sup> The Judiciary’s publicly reported data shows that, of the 1,303 judicial “misconduct” complaints filed nationwide under the JC&D Act procedures in fiscal year 2016, over 1,200 were filed by dissatisfied litigants and prison inmates. No misconduct complaints were filed under these procedures by law clerks or judiciary employees that year. And, none of the four complaints that were referred to a special committee for further investigation involved sexual misconduct. This pattern of filings is true year after year. But in those instances where complaints have identified judges as subjecting employees to sexual harassment or other forms of misconduct, the process has triggered a thorough investigation and, when the claim is substantiated, the process has resulted in reprimand, removal, or retirement of the judge.<sup>29</sup> An important feature of the JC&D Act process is that serious complaints that reach the investigative stage receive multiple levels of review by multiple panels of judges.

The Working Group found that the JC&D Act and the EDR Plans are effective *when their provisions are invoked*. But there is room for improvement in terms of transparency and accessibility. The Working Group received suggestions that the complainants should have

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<sup>27</sup> See Appendix 8: Executive Summary of Model Employment Dispute Resolution Plan.

<sup>28</sup> 28 U.S.C. § 352(b)(1)(A)(i).

<sup>29</sup> See Appendix 4, *supra* note 9, at 9-17.

additional time under the EDR Plans for filing complaints, and complainants should receive more communication and updates during the investigatory phase of the proceedings. Confidence in court EDR Plans could be increased if those plans required chief district judges and chief bankruptcy judges to inform their chief circuit judge or circuit judicial council of reports of wrongful conduct by judges in their district and how those reports were addressed locally. Ensuring that the circuit court is informed of such reports would provide an additional incentive to investigate that report properly, could provide the basis for identification of a JC&D Act complaint, as discussed below, and would create a record at the circuit level that could prove relevant if there are future complaints against the same judge.

The Working Group found that public confidence in the JC&D Act would benefit if the Judiciary specifically identified harassment complaints in its statistical reports and made decisions on those complaints more readily accessible through searchable electronic indices. Some commenters noted that accountability could be strengthened through better communication about the outcome of disciplinary proceedings. Commenters noted the value of more regular employee input on workplace conditions and implementing exit interviews for employees who leave the workforce more consistently.

Law clerks and others with whom the Working Group spoke expressed concern about the seeming lack of punishment for a judge who, under allegations of serious misconduct, retires or resigns and thereby terminates the disciplinary proceeding. Some believe that if the disciplinary process compels a life-tenured judge to leave the bench under the cloud of alleged misconduct, then the process has produced an appropriate result, and the removal of that judge from the bench without much expense or delay is beneficial. But others noted that a judge who meets the service requirements for retirement benefits suffers no monetary penalty and may return to legal

practice. They have expressed the view that additional steps, such as a report to the local bar association, should be considered. More generally, commenters have noted that the termination of a disciplinary action should not prevent the Judiciary from continuing an institutional review to determine if there are systemic problems within a court or judicial organization that require correction.

The most significant challenge for accountability, however, arises from the reluctance of victims to report misconduct. Neither the JC&D Act nor the EDR Plans can ensure accountability if victims are unwilling to come forward. Victims 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. Additionally, some forms of inappropriate conduct—such as isolated acts, insensitive comments, or unintentional slights—do not lend themselves to a formal complaint process and are better addressed through less formal mechanisms. As explained below, the Working Group found that the Judiciary must both reduce barriers to reporting and provide alternative avenues for seeking advice, counseling, and assistance.

Although the reluctance to report misconduct arises in all employment categories, it deserves special attention in the case of law clerks, most of whom serve in the courts for only one to two years. The Working Group met with law clerk representatives who provided invaluable insight into the problems they and their peers face when confronted with harassment. Law clerks, who are typically at the start of their legal careers, must step into a new, unfamiliar, and sometimes daunting work environment when they join a judge's chambers. They work in close quarters with their judge, providing confidential support in an isolating environment.

There is an acute “power disparity” between a life-tenured judge, who is a person of stature and influence, and a law clerk. Law clerks face strong disincentives to report inappropriate conduct. The law clerk who reports misconduct may understandably fear that the complaint will permanently destroy the bond of trust between the judge and clerk and cause unwelcome strife in the chambers. Law clerks know that a judge’s recommendation often plays a crucial role in the individual’s future job prospects. A judge’s rancor may result in embarrassment among peers, tarnish the clerk’s professional reputation, and curtail career opportunities. The Judiciary has a need to provide clear avenues for relief that recognize those legitimate concerns.

The Working Group believes that an important first step is vigilance on the part of judges themselves. Under the Code of Conduct for United States Judges, judges have a responsibility to promote appropriate behavior in the workplace, and that responsibility should extend beyond one’s own chambers. Judges respect one another’s independence, and each is reciprocally disinclined to intrude into another’s relationships with employees. But the virtues of mutual respect, independence, and collegiality should not prevent a judge from intervening when necessary to protect an employee from another judge’s inappropriate conduct.

The Working Group knows from firsthand experience that many judges, especially chief judges, take action when they observe, or become aware of, a colleague’s inappropriate behavior. But neither the Judiciary’s Code of Conduct nor its educational programs have provided sufficiently focused guidance on this matter. 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 should provide direction on how to navigate this sensitive issue without eroding the distinctive values of the Judicial Branch.

### *C. Does the Judiciary Have Strong and Comprehensive Policies?*

The EEOC Study co-chairs have observed that employees in workplaces without express anti-harassment policies report the highest levels of harassment. They urge the adoption of anti-harassment policies that: (1) provide clear and simple explanations of prohibited conduct; (2) assure employees who report harassment that they will be protected from retaliation; (3) describe multiple avenues for making complaints; (4) provide confidentiality to the extent possible; (5) lead to prompt, thorough, and impartial investigations; and (6) result in proportionate corrective action.<sup>30</sup>

The Judiciary has long had in place a number of codes of judicial and employee conduct and a large body of publications designed to maintain high standards of behavior and preserve the independence and integrity of the Judicial Branch. Those carefully conceived publications, individually and collectively, reflect the essential characteristics that the EEOC Study has highlighted. The Working Group found, however, that those codes and publications were not developed with the aim of addressing the particular issues of workplace harassment or incivility, and they do not take full account of the nuances of these problems. 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.

First, commenters noted that many employees are not aware of the codes, publications, other sources of information regarding appropriate workplace behavior, and the mechanisms for recourse that are available when workplace issues arise. That information is usually provided commingled with a large amount of other information at the commencement of the employee's

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<sup>30</sup> *Breaking the Silence*, *supra* note 17, at 6.

tenure and, unless reinforced through regular training, may be overlooked or forgotten when inappropriate conduct arises.

Second, the codes and publications do not provide sufficiently clear advice on some pivotal questions respecting prohibited conduct and responses to harassment. For example, a number of commenters did not understand that the confidentiality provisions, which are designed to ensure the integrity of the judicial decision-making process, do *not* prevent an employee from reporting misconduct. Others noted that the codes and publications do not provide clear guidance on protection from harassment based on sexual orientation or gender identity. Still others suggested that the guidance documents do not highlight sufficiently the prohibitions on retaliation for reporting misconduct.

Third, law clerks and others expressed concern that efforts to avoid situations that might raise the potential for inappropriate behavior, or the perception of it, should not lead to diminished opportunities for any group of people. Efforts to promote a respectful workplace should promote, not detract from, an inclusive workplace.<sup>31</sup>

Fourth, commenters expressed a desire for simplified and easily accessible mechanisms for seeking relief from inappropriate behavior. The Working Group discusses those options in the following section. But for present purposes, there is also a strong desire to simplify and clarify, to the extent possible, the existing JC&D Act and EDR Plan processes. Among the proposals, commenters have suggested that: court websites should provide “one-click” electronic access to JC&D Act and EDR Plan information; information and the EDR Plans themselves should be clear and easy to understand; and the Administrative Office should develop

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<sup>31</sup> *SDNY Chief Judge Colleen McMahon Takes on Sexual Harassment* (Dec. 12, 2017), <https://finance.yahoo.com/news/sdny-chief-judge-colleen-mcmahon-163150749.html>.



concise visual flowcharts of the complaint processes under the JC&D Act and the EDR Plans. A graphical overview of the Judicial Conduct and Disability process, as well as a collection of frequently asked questions, already exist, but could be improved.<sup>32</sup> A list of key contacts should be readily available in all relevant employee guidance publications, including the *Law Clerk Handbook* and other resources on the courts' intranet sites.

Fifth, commenters suggested programmatic improvements. They noted the need for better qualifications and training of EDR Coordinators who assist employees in navigating the EDR reporting and claims process. They proposed that the Judiciary develop mechanisms for separating alleged harassers or abusers from complainants during the investigation process and, if necessary, following resolution of the complaint. Commenters noted that law clerks may feel especially vulnerable if required to remain in close proximity to a judge during a misconduct inquiry, especially in small judicial districts, and there are currently no formal mechanisms for relocating law clerks to other chambers or work stations. Employees commented on the lack of options available to be reassigned or transferred during the pendency of a complaint or after a resolution finding misconduct occurred.

Finally, commenters noted the need for greater uniformity in approach across circuits. They noted, for example, that EDR Plans vary from circuit to circuit on coverage of chambers employees, law clerks, and interns/externs.

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<sup>32</sup> See FAQs: Filing a Judicial Conduct and Disability Complaint Against a Federal Judge (June 2016), <http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint>.

*D. Does the Judiciary Provide Trusted and Accessible Complaint Procedures?*

The EEOC Study co-chairs observe that institutions must not only create effective complaint procedures, but they should also offer workers multiple channels for seeking relief.<sup>33</sup> As previously discussed, the Judiciary employs two formal mechanisms for reporting misconduct: (1) the JC&D Act's statutory procedures for complaints against judges; and (2) the EDR Plans developed in each circuit, based on the Model EDR Plan approved by the Judicial Conference, for reporting and making claims against both judges and other judicial employees. The Working Group found that, while each of those procedures fulfills an important function, the Judiciary should develop additional, less formal alternatives for addressing inappropriate workplace behavior.

Judges, managers, and employees all recognized the virtue of having other options, apart from a formal complaint, for guidance, counseling, and relief related to workplace conduct issues. Inappropriate workplace behavior can take many forms, ranging from unconscious verbal slights to intentional physical assaults. There is a corresponding need to have a range of avenues for advice, counseling, mediation, and relief that are calibrated to the nature of the conduct. There is a need for response mechanisms at the local, regional, and national level.

The Working Group received suggestions that individual courts identify, enlist, and train trusted individuals within their workplace who can provide employees with informal and confidential counseling and mediation of disputes at the local level. The Working Group heard concerns that those employees also need to have avenues for advice and assistance from outside the local environment, and the Judiciary should therefore provide counseling and mediation services on a confidential basis as appropriate at the regional or national level by persons who

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<sup>33</sup> *Breaking the Silence*, *supra* note 17, at 7.

are free from any perception of local bias. Commenters noted that law clerks and employees may need post-employment advice and assistance. Finally, the Working Group received suggestions that the courts strengthen their relationships with law schools, which receive feedback from former students who serve as law clerks about the working environment in the Judiciary to gain additional insights into the problem of workplace harassment of law clerks.

*E. Does the Judiciary Provide Regular, Interactive Training Tailored to the Organization?*

The EEOC Study identifies effective training as an essential component of an anti-harassment effort, but that training must be part of a holistic effort, coupled with committed leadership, demonstrated accountability, clear policies, and effective complaint procedures.<sup>34</sup> The EEOC Study co-chairs note that not all traditional anti-harassment training has proven effective, and the most promising programs focus on “compliance training,” “workplace civility,” and “bystander intervention.”

The Judiciary’s FJC has, as one of its core missions, the responsibility to “stimulate, create, develop, and conduct programs of continuing education and training for judges and employees of the Judicial Branch.”<sup>35</sup> Working with the Administrative Office and individual courts, the FJC has created a broad range of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility.<sup>36</sup> For example, the FJC has regularly provided training programs for court employees in individual districts. It offers a program entitled “Preventing Workplace Harassment” in two versions, one for managers and one for employees. It offers a program on workplace civility called “Respect in the Workplace,” and another on the Code of Conduct. These programs each use an FJC-designed

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<sup>34</sup> *EEOC Study*, *supra* note 6, at 45.

<sup>35</sup> 28 U.S.C. § 620(b)(3).

<sup>36</sup> See Appendix 9: List of Federal Judicial Center training resources.

lesson plan and materials tailored specifically to the judicial workplace and delivered by FJC-trained faculty. Since 2016, the FJC has arranged for these three programs to be conducted nearly 200 times in courts around the country. The Judicial Conference's Committee on Codes of Conduct also provides programs on a variety of ethical issues, including the duty to report misconduct.

The Administrative Office, through its Office of the General Counsel, Office of Fair Employment Practices, and Office of Human Resources, provides training through the Human Resources Academy and by videoconference on the employee dispute resolution process, employment laws, wrongful conduct, and unconscious bias, as well as other relevant topics. Furthermore, individual circuits, courts, and various committees have taken the initiative to develop their own training programs, building on the materials and resources provided by the FJC and the Administrative Office.

Although the Judiciary has very vigorous training programs, the Working Group found several areas in which those efforts could be improved or refined. First, the Judiciary would benefit from a more focused emphasis on workplace civility training as part of the orientation program for *all* new employees, including law clerks and judges, with “refresher” training repeated at regular intervals. Use of the current programs varies from court to court and even within individual court systems. Second, there may be opportunities to integrate training on those subjects into existing programs on judicial management, court administration, and courtroom practices, emphasizing that civility is a responsibility—not an option—and each judge and employee should actively promote appropriate workplace conduct as an integral element of their day-to-day duties. Third, judicial managers could benefit from increased emphasis on proactive measures, including how to encourage civility and identify the risk factors for abusive

work environments before problems develop. Fourth, the Judiciary should place greater emphasis on “bystander intervention,” encouraging all who witness misconduct to take action through channels for reporting and response. Finally, the Working Group endorsed the observation of the EEOC Study’s co-chairs that training programs should be continuously evaluated to determine their effectiveness, paying close attention to new learning, techniques, and developments in this field.

## **II. RECOMMENDATIONS**

The Judiciary has already taken important steps under each of the EEOC Study’s benchmarks for preventing harassment. The Judiciary has shown leadership in responding to reported sexual harassment, and it has demonstrated a genuine commitment to accountability through its past disciplinary actions. The Judiciary has detailed codes of conduct and guidance documents for judges and other judicial employees, and it has carefully reticulated complaint procedures that have proven effective when invoked. The Judiciary also has a variety of judicial and employee training programs to address the problems of fair employment practices and to promote workplace civility.

*But meeting those benchmarks is not enough, nor has it proven sufficient to address the issue fully.* The Judiciary should set as its goal the creation of 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. The Judiciary cannot guarantee that inappropriate behavior will never occur, but when it does, the Judiciary should ensure that every employee has access to clear avenues to report and to seek and receive remedial action free from retaliation.

The Working Group offers recommendations in three discrete areas that are central to achieving these goals: (1) substantive standards; (2) procedures for seeking advice, assistance,

or redress; and (3) educational efforts. 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. These efforts will require the concerted efforts and collaboration of the Administrative Office, the FJC, and the Judicial Conference. Those organizations have all expressed strong support for this undertaking, and significant work in many areas already is underway.

*A. Codes of Conduct and Guidance Documents*

The Judicial Conference has adopted the Code of Conduct for United States Judges as a set of ethical principles to guide judges in the conduct of their responsibilities. The Code consists of five basic Canons and related commentary.<sup>37</sup> The captions of the five Canons capture their essential themes: (1) A Judge Should Uphold the Integrity and Independence of the Judiciary; (2) A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities; (3) A Judge Should Perform the Duties of the Office Fairly, Impartially, and Diligently; (4) A Judge May Engage in Extrajudicial Activities that Are Consistent with the Obligations of Judicial Office; and (5) A Judge Should Refrain from Political Activity.<sup>38</sup>

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<sup>37</sup> See *Code of Conduct for United States Judges*, Committee on Codes of Conduct, Judicial Conference of the United States (rev. Mar. 2014).

<sup>38</sup> *Id.*

Canon 1 of the Code sets out the most fundamental principle:

A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the Judiciary may be preserved.

As the commentary to Canon 1 explains, the Canons are rules of reason. They are aptly described as an “aspirational” set of standards that judges should follow to promote public confidence in the integrity of our judicial system.<sup>39</sup> They may provide standards of conduct for application in proceedings under the JC&D Act, but not every violation of the Code should lead to disciplinary action, nor is the Code designed or intended as a basis for civil liability or criminal prosecution.<sup>40</sup>

The Canons contain a number of provisions that indicate, either expressly or by clear implication, that judges have a duty to refrain from and prevent harassment and other inappropriate workplace conduct. For example, Canon 2 notes that “[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>41</sup> The associated commentary notes:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.<sup>42</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at Canon 2A.

<sup>42</sup> *Id.* at Canon 2A Commentary.

Canon 2 does not specifically mention employee harassment or inappropriate workplace behavior. But the lack of specificity is not surprising. The commentary explains, “[b]ecause it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code.”<sup>43</sup> Canon 3 addresses the matter of incivility with greater specificity. In addressing a judge’s adjudicative responsibilities, Canon 3 states that “[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”<sup>44</sup> But Canon 3 does not provide a similar prescription when addressing a judge’s administrative responsibilities, including supervision of chambers employees, and interactions with other court employees.<sup>45</sup> Rather, as the Commentary to Canon 2 indicates, the Code has relied on the ability of judges to discern that incivility is harmful or otherwise wrong in the administrative setting.

The Working Group does not doubt that judges and judiciary employees should be able to discern that harassment and other inappropriate workplace behavior is impermissible in any setting. But public confidence in the Judiciary would be strengthened if the Code made clear, through express language in the Canons or the associated commentary, that judges have an obligation to promote civility and maintain a workplace that is free from harassment. The Code of Conduct was last substantially revised in 2009. The time is ripe for the Judicial Conference’s Committee on Codes of Conduct to consider revisions to the Canons and their commentary that would provide more specific guidance to judges regarding their responsibilities. The Working Group does not propose specific language because that is the province of the Committee.

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at Canon 3A(3).

<sup>45</sup> *Id.* at Canon 3(B).



Significant work in this area already is underway. The Working Group believes that the Committee should clarify three key points.

First, the Code should make clear that a judge has an affirmative duty to promote civility, not only in the courtroom, but throughout the courthouse. As the EEOC Study indicated, leadership is critical to the prevention of harassment. Judges set the tone for conduct in the judicial workplace. They must demonstrate, through their words and actions, their own commitment to high standards of conduct. Canon 3 admonishes judges to show patience, dignity, respect, and courtesy to litigants, jurors, witnesses, lawyers, and others. The Code should impress upon judges that those virtues are vital in their chambers and throughout the court building as well.

Second, the Code should expressly recognize that a judge should neither engage in nor tolerate workplace misconduct, including comments or statements that could reasonably be interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The Committee should examine whether a more specific statement is needed in proscribing harassment, bias, or prejudice based on race, color, religion, national origin, sex, age, disability, or other bases. For example, studies reveal high rates of harassment in the private workforce based on sexual orientation or gender identity.<sup>46</sup> The Committee should indicate that harassment on those bases is impermissible.

Third, the Committee should provide additional guidance on a judge's responsibility to curtail inappropriate workplace conduct by others, including other judges. Canon 3B(5) of the Code currently states that "a judge should take appropriate action upon learning of reliable

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<sup>46</sup> See, e.g., *Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide* (Christine Michelle Duffy, Denise M. Visconti, D'Arcy Kemnitz and National LGBT Bar Association eds., 2014).

evidence indicating the likelihood that a judge’s conduct contravened this Code[.]” The Committee should clarify that the obligation to take appropriate action extends to inappropriate treatment of court employees, including chambers employees. The Judiciary would benefit from explicit recognition that the judicial virtues of mutual respect, independence, and collegiality should not prevent a judge from intervening when necessary to protect an employee from another judge’s inappropriate conduct. The Canon 3B(5) Commentary states that “appropriate action” can include “direct communication with the judge” or “reporting the conduct to appropriate authorities,” noting that “a judge should be candid and honest with disciplinary authorities.” The Committee could usefully clarify that “appropriate action” depends on the circumstances, but that action should be reasonably likely to address the misconduct, prevent harm to those affected by it, and promote public confidence in the integrity and impartiality of the Judiciary.

The Working Group suggests that the revision of the Code of Conduct for United States Judges be the first of several steps to clarify substantive standards. There are other codes and guidance documents that require comparable revisions. For example, the Judiciary maintains a Code of Conduct for Judicial Employees (Code for Employees), which similarly consists of an aspirational set of standards expressed through five Canons that mirrors the Code for Judges.<sup>47</sup> Like Canon 3 of the Code for Judges, Canon 3C of the Code for Employees provides guidance

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<sup>47</sup> The captions of those five Canons state: (1) A Judicial Employee Should Uphold the Integrity and Independence of the Judiciary and of the Judicial Employee’s Office; (2) A Judicial Employee Should Avoid Impropriety and the Appearance of Impropriety in All Activities; (3) A Judicial Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office; (4) In Engaging in Outside Activities, A Judicial Employee Should Avoid the Risk of Conflict with Official Duties, Should Avoid the Appearance of Impropriety, and Should Comply with Disclosure Requirements; and (5) A Judicial Employee Should Refrain from Inappropriate Political Activity. See *Code of Conduct for Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States (Mar. 2014).

on an employee's responsibility to those who use the courts, but does not expressly address the employee's responsibility to fellow employees:

A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control.<sup>48</sup>

The Code for Employees would similarly benefit from more specific direction regarding the duty of employees—and especially supervisors—to promote workplace civility, avoid harassment, and take action when they observe misconduct by others. The Committee on Codes of Conduct should consider additional changes to the Code for Employees to ensure that both judges and judicial employees understand that confidentiality obligations should never prevent any employee—including law clerks—from revealing abuse or reporting misconduct by any person. Canon 3D of the Code for Employees currently states:

A judicial employee should never disclose any confidential information received in the course of official duties except in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.<sup>49</sup>

As the Working Group noted in its findings, some law clerks have misunderstood their obligation of confidentiality to require that they refrain from reporting misconduct. The Committee should make revisions to the Code to cure that misunderstanding and make

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

absolutely clear that the general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee from revealing abuse or reporting misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person. Those revisions should also make clear that retaliation against a person who reports misconduct is itself serious misconduct that will not be tolerated.

The Judiciary has a wide range of guidance documents, policy statements, and instructions issued by the Administrative Office, individual courts, and other Judicial Branch entities that should be revised in parallel fashion to ensure that the Judiciary's substantive standards of workplace conduct are set out and explained in a consistent and cohesive manner. As one example, the Working Group reviewed a model confidentiality statement that was posted on the Judiciary's internal website. The Working Group found that this statement contained ambiguous language that could unintentionally discourage law clerks or other employees from reporting sexual harassment or other workplace misconduct. The Judicial Conference, at the recommendation of its Committee on Codes of Conduct, removed that model statement from the internal website and its text is in the process of being reviewed. The Judiciary has already revised language in the *Law Clerk Handbook* to clarify that nothing in applicable confidentiality provisions precludes consulting about instances of misconduct or the filing of a misconduct complaint.

The Working Group recommends that the Administrative Office and the FJC take on the challenge of reviewing all of their guidance respecting workplace conduct and civility to ensure that they provide a consistent, accessible message that the Judiciary will not tolerate harassment or other inappropriate conduct. Those efforts should include both traditional publications and electronic information that employees can access through Judiciary websites. All employees

need to know that they have access to a variety of mechanisms, including those described in the following section, to obtain relief without fear of retaliation.

*B. Procedures for Identifying and Correcting Misconduct*

The Judicial Conference promulgated the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees to set out the substantive standards of conduct for judges and employees. As explained in the Working Group’s findings, judges are subject to discipline through the statutory procedures set out in the JC&D Act, which the Judicial Conference has implemented through its Conduct Rules.<sup>50</sup> In addition, both judges and employees are subject to EDR Plans already in place in all thirteen circuits. The Working Group suggests some changes to both of these procedures. But the Working Group concludes that, beyond those changes, there is a pressing need to develop responsive informal processes to counsel employees and rectify inappropriate behavior. The Judiciary should also recognize the value, in appropriate cases, of systemic institutional review of workplace misconduct apart from individual disciplinary proceedings.

1. The Judicial Conduct and Disability Act

The JC&D Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct “prejudicial to the effective and expeditious administration of the courts” or has become, by reason of a mental or physical disability, “unable to discharge all the duties” of the judicial office.<sup>51</sup> Congress enacted the statute to provide “a fair and proper procedure whereby the Judicial Branch of the Federal Government can keep its own house in order” by identifying and correcting instances of judicial misconduct and disability that do not involve

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<sup>50</sup> See *Guide to Judiciary Policy*, Vol. 2E, Ch. 3 (as amended Sept. 17, 2015), <http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability>.

<sup>51</sup> 28 U.S.C. §§ 351-364.

impeachable offenses.<sup>52</sup> The Judicial Conference has formulated its Conduct Rules to provide mandatory and nationally uniform provisions for implementing the JC&D Act.<sup>53</sup>

In 2004, Chief Justice Rehnquist established a study committee to examine the effectiveness of the JC&D Act. The study committee submitted a comprehensive report in 2006 that found “no serious problem with the judiciary’s handling of the vast bulk of complaints under the Act,” but that recommended a number of changes in the Conduct Rules to further enhance the effectiveness of the Act.<sup>54</sup> The Judicial Conference’s Committee on Judicial Conduct and Disability drafted proposed changes, which the Judicial Conference adopted.<sup>55</sup> The Working Group has found that the JC&D Act procedures generally work well in addressing workplace misconduct in the instances when they are invoked. Like the Chief Justice’s study committee, the Working Group sees no need for any legislative changes. The Working Group does recommend, however, that the Judicial Conference’s Committee on Judicial Conduct and Disability consider clarifying amendments to the Conduct Rules and publications describing the JC&D Act procedures. The Committee is in the best position to determine whether the clarifications should be implemented through the Rules themselves, the associated commentary, or other publications. That Committee has in fact already begun examination of some of those matters.

First, the Working Group recommends that the Conduct Rules or associated commentary state with greater clarity that traditional judicial rules respecting “standing”— viz., the requirement that the complainant himself or herself must claim redressable injury from the

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<sup>52</sup> S. Rep. No. 96-362, (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4325.

<sup>53</sup> See Appendix 7, *supra* note 25, for a more detailed description of the JC&D Act and its associated Conduct Rules.

<sup>54</sup> *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, The Judicial Conduct and Disability Act Study Committee (Sept. 2006).

<sup>55</sup> JCUS-MAR 08, p. 21.

alleged misconduct—do not apply to the JC&D Act complaint process. The Conduct Rules currently provide that “[a] complaint is . . . a document that . . . is filed by *any person* in his or her individual capacity or on behalf of a professional organization” (emphasis added).<sup>56</sup> The Committee on Judicial Conduct and Disability and individual circuit judicial councils have regularly stated in their decisions that traditional standing requirements do not apply to judicial conduct and disability proceedings. *See, e.g., In re Complaints of Judicial Misconduct*, No. 93-372-001 (U.S. Jud. Conf. Nov. 2, 1993). Nevertheless, the Conduct Rules or commentary should state so expressly to ensure that complainants understand that they need not themselves be the subject of the alleged misconduct. That clarification should encourage and facilitate early reporting and action on potential misconduct.

Second, the Working Group suggests that the Conduct Rules or commentary include express reference to workplace harassment within the definition of misconduct.<sup>57</sup> The Working Group has previously suggested that the Committee on Codes of Conduct should consider more specific substantive guidance on the subject of harassment and impermissible behavior in the codes of conduct for judges and employees, including a clear proscription on harassment based on sexual orientation or gender identity. The Committee on Judicial Conduct and Disability should adopt language and examples in its procedural rules that are congruent with any changes in the codes.

Third, the Working Group proposes that the Committee on Judicial Conduct and Disability make clear through the Conduct Rules, commentary, or other guidance documents that confidentiality obligations should never be an obstacle to reporting judicial misconduct or

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<sup>56</sup> See Appendix 7, *supra* note 25, Conduct Rule 3(c)(1).

<sup>57</sup> See *id.* Conduct Rule 3(h)(1) (providing a non-exclusive list of actions that constitute misconduct).

disability. The Conduct Rules discuss confidentiality primarily in the context of protecting the complainant and judge from publicity during the investigatory process.<sup>58</sup> But complainants additionally need to understand that the obligations of confidentiality that judicial employees must observe in the course of judicial business do not shield a judge from a complaint under the JC&D Act. To promote this goal, the Committee should consider clarification that the confidentiality provisions in both the JC&D Act and the Conduct Rules relate to the fairness and thoroughness of the judicial conduct and disability complaint process, and not to reporting or disclosing judicial misconduct or disability.

Fourth, the Working Group recommends that the Committee on Judicial Conduct and Disability provide additional guidance, consistent with the proposal to the Committee on Codes of Conduct, on a judge's obligations to report or disclose misconduct and to safeguard complainants from retaliation. These substantive obligations, which are critical in maintaining public confidence in the Judiciary, warrant repetition in the Conduct Rules. If judges ignore or conceal potential misconduct, they undermine employee and public respect for the justice system. The Conduct Rules and commentary or associated guidance should reinforce the principle that retaliation for reporting or disclosing judicial misconduct constitutes misconduct.

Fifth, the Working Group recommends that the Judiciary as a whole consider possible mechanisms for improving the transparency of the JC&D Act process. As the Working Group noted in its findings, employees—as well as members of the press and public—seek greater insight on the progress of individual complaints and the complaint process generally. In some circumstances, the most appropriate remedy for misconduct—particularly for minor or unintentional infractions—is a private reprimand. But in other cases, there is considerable value

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<sup>58</sup> See *id.* Conduct Rule 23.



in revealing disciplinary action so that the complainant, other judicial employees, and the public can see that misconduct is met with a proportionate response. Chief circuit judges should be mindful of their authority under Conduct Rule 23(a) to “disclose the existence of a proceeding...when necessary or appropriate to maintain public confidence in the judiciary’s ability to redress misconduct or disability.” As previously noted in the Working Group’s findings, public confidence in the JC&D Act will benefit from efforts, already agreed upon by the Administrative Office to identify harassment complaints in its statistical reports. Individual circuits should seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.

## 2. Employment Dispute Resolution Plans

The Judicial Conference, through its Committee on Judicial Resources, has developed the Model EDR Plan to set out recommended policies and procedures for resolving a wide range of employee disputes. The Model EDR Plan specifically provides at Ch. II, § 1:

Discrimination against employees based on race, color, religion, sex (including pregnancy and sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited. Harassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited. All of the above constitute “wrongful conduct.”

Although individual court units may create their own EDR Plans, most follow the parameters of the Model EDR Plan. Judiciary employees may report wrongful conduct, which will result in a confidential investigation and possible disciplinary action.<sup>59</sup> Employees who believe they have been harassed or discriminated against on the basis of race, color, religion,

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<sup>59</sup> See Appendix 8, *supra* note 27, Model EDR Plan Ch. IX.

national origin, sex, age, or a disability may seek remedies through the dispute resolution procedures of their court's EDR Plan.<sup>60</sup> The Model EDR Plan's dispute resolution procedure consists of counseling and mediation, a hearing before the chief judge of the court (or a designated judicial officer), and a review of the hearing decision under procedures established by the judicial council of the circuit.<sup>61</sup> When an employee files a claim against a district judge under the Model EDR Plan, the claim is handled by the relevant circuit council, and the claim may be transferred for disposal to a court in the circuit other than the judge's own court.

As noted in its findings, the Working Group received comments from former and current employees concerning the accessibility, visibility, ease of use, and coverage limitations under the Model EDR Plan. Based on those concerns, the Working Group recommends the Judicial Conference consider amendments to the Model EDR Plan as described below. As in the case of the Working Group's proposed revisions to the Codes of Conduct and the Conduct Rules, the Model EDR Plan amendment process will involve initial consideration by the relevant Judicial Conference committee—in this case the Committee on Judicial Resources. The Working Group recommends revisions in several general areas.

First, the Working Group recommends that the Committee on Judicial Resources examine whether EDR Plans can be rendered more “user-friendly.” Commenters observed that the existence of EDR Plans is not well publicized, the text of individual EDR Plans is difficult to locate, and the language is sometimes difficult to understand. The Committee should examine whether the Model EDR Plan, and court plans based on it, can be featured more prominently on Judiciary websites, and whether the text can rely to a greater extent on “plain English” that is

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<sup>60</sup> See *id.* Model EDR Plan, Ch. X.

<sup>61</sup> See Appendix 8, *supra* note 27, for a more detailed description of the procedures established in the current Model EDR Plan.

more easily comprehensible. The Model EDR Plan might be helpfully shortened to prescribe more clearly and succinctly the steps to be followed in the employment dispute resolution process. The Model EDR Plan could, for example, include a one-page flowchart of the EDR claims process and could include answers to frequently asked questions.

Second, the Working Group recommends that the EDR Plans' scope of coverage be consistent throughout the Judiciary. For example, under the current Model EDR Plan, the term "employee" excludes interns and externs providing gratuitous service. Interns and externs are typically new to the Judiciary's workforce and may be at higher risk than other employees in encountering discrimination, harassment, and inappropriate behavior.<sup>62</sup> The Working Group recommends treating interns and externs as "employees" for purposes of EDR Plans, consistent with the coverage of the Code of Conduct for Judicial Employees. Some circuits exclude chambers employees from EDR Plan coverage. The Working Group recommends that the Committee on Judicial Resources ensure that EDR Plans uniformly cover all Judiciary employees, including those working in chambers.

Third, the Working Group recommends examination of the Model EDR Plan's reference to "sex discrimination." The current Model EDR Plan inartfully describes sex discrimination as "including pregnancy and sexual harassment."<sup>63</sup> That provision should be rewritten to describe sex discrimination in accord with established legal definitions and separately indicate that harassment, without regard to motivation, is wrongful conduct. The Working Group also recommends that various statements respecting sexual harassment, including a separate sample sexual harassment policy currently posted on the Judiciary's internal website as part of the

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<sup>62</sup> See *EEOC Study supra* note 6, at 27 (discussing youth and relative inexperience of some employees as a risk factor for encountering workplace harassment).

<sup>63</sup> See Appendix 8, *supra* note 27, Model EDR Plan, Ch. II, § 1.

Model EDR Plan, be removed and replaced with consistent statements of policy concerning harassment, which can be incorporated into a revised Model EDR Plan. Similarly, there should be a consistent definition of “wrongful conduct” in the workplace throughout the Judiciary.

Fourth, the Working Group notes that the EDR Plans provide an avenue for employees to report wrongful conduct without filing a claim for redress. The Working Group recommends that Chapter IX of the Model EDR Plan be revised to state that, when a chief district judge or chief bankruptcy judge receives a report of wrongful conduct that could constitute reasonable grounds for inquiry into whether a judge has engaged in misconduct under the JC&D Act, the chief judge should inform the chief circuit judge of the report and any actions taken in response.

Fifth, the Working Group recommends that the Committee on Judicial Resources extend the time for initiating an EDR claim. Currently, employees must request counseling—the first step in initiating an EDR claim—within 30 days of the alleged violation or within 30 days of the time the employee became aware of the alleged violation. The Working Group recommends extending the time limit to 180 days from the date of the alleged violation or when the complainant became aware of the violation to accommodate the additional time employees may reasonably need to ascertain and assess their options under the EDR Plan.

Sixth, the Working Group recommends that the Committee on Judicial Resources consider steps to improve the training and qualifications of EDR Coordinators. The Model EDR Plan envisions that each court will identify an EDR Coordinator who is responsible for overseeing the effectiveness of the program. The EDR Coordinator provides information and training to employees regarding their rights under the EDR Plan and assists them in accessing the claims procedures.<sup>64</sup> Given the critical role that EDR Coordinators play in the EDR process, the

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<sup>64</sup> See *id.* Model EDR Plan Ch. X, § 6.

Working Group recommends the Judiciary set forth minimum qualification requirements for EDR Coordinators and institute nationwide training of EDR Coordinators at regular intervals.

### 3. Alternative Informal Procedures

The JC&D Act and the EDR Plans provide useful formal mechanisms for responding to serious cases of harassment and workplace misconduct, but the Working Group found that they are not well suited to address the myriad of situations that call for less formal measures. For example, an employee may be uncomfortable with a well-meaning supervisor's familiarity or avuncular physical contact and seek advice on how to express discomfort. Or an employee may encounter crude or boorish behavior from a coworker and not want to file a formal complaint, but may want a supervisor to step in and curtail the conduct. Or an employee may encounter sexual advances from a judge and seek confidential advice on what support is available if a formal complaint is filed, such as placement in another chambers. Or a former law clerk, now in private practice, may seek advice on application of the Judiciary's confidentiality requirements in deciding whether to file a misconduct claim. Neither the JC&D Act procedures nor the EDR Plans are designed to address those situations.

It is clear from these examples, and from the input the Working Group received from employees in meetings, mailbox comments, and questionnaires, that there is a need for the Judiciary to develop multiple informal mechanisms that can provide a broad range of advice, intervention, and support to employees. This is consistent with the EEOC Study recommendation that "Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment."<sup>65</sup> Accordingly, the Working

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<sup>65</sup> *EEOC Study supra* note 6, at 43.

Group recommends the establishment of offices at both the national and circuit level to provide employees with advice and assistance with their concerns about workplace misconduct apart from the JC&D Act and EDR Plans. The assistance will range from a discussion of options to address their concerns, to intervention on their behalf with appropriate court personnel and similar support. One goal of these offices will be to address problems and concerns in an earlier stage, before more serious issues evolve.

In that regard, at the national level the Administrative Office is establishing an internal Office of Judicial Integrity to provide counseling and assistance regarding workplace conduct to all Judiciary employees through telephone and email service. This office should provide advice on a confidential basis to the extent possible. It should also be able to assist in resolving a matter when requested by an employee or when otherwise warranted. The newly created position at the Administrative Office could be combined with existing offices there that help ensure the integrity of the Judiciary. These offices provide and coordinate independent financial auditing and management analysis services to the courts to prevent and expose waste, fraud, and abuse in the Judiciary.<sup>66</sup>

At the circuit level, the Ninth Circuit Judicial Council recently announced the creation of a new office for a Director of Workplace Relations to oversee workplace issues and discrimination and sexual harassment training in that circuit.<sup>67</sup> The Working Group recommends that the Judicial Conference encourage and approve funding through its budgeting process for all other circuits to provide similar services for their employees.

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<sup>66</sup> See Appendix 10: Letters from James C. Duff, Director of the Administrative Office, to Chairman Charles E. Grassley (Jan. 12, 2018, and Jan. 22, 2018).

<sup>67</sup> Press Release, United States Courts for the Ninth Circuit, Ninth Circuit Judicial Council Acts on Workplace Environment Recommendations (May 21, 2018).

The Working Group believes that every employee should have the benefit of knowledgeable and responsive advisers who can counsel the employee on workplace rights and suggest practical solutions to the broad range of workplace issues that can arise, both in chambers and in the other offices that provide the courts with administrative support. The advisers must have sufficient rank and stature to engage actively with judges and supervisors. They must have the training necessary to initiate the difficult conversations that invariably result in addressing inappropriate workplace behavior. They must be independent of influence from local human resources and management. And they must have access to the resources necessary to engage in effective problem solving. Former employees should have access to guidance on the scope of the confidentiality requirements.

In addition to these national and circuit-level resources, every court should clearly identify for its employees local sources to which they can turn for advice or assistance about workplace conduct issues. Such sources could include the chief judge, another judge, a unit executive, or other persons. There could be multiple sources, particularly in large courts. Any such persons should be trained in conducting sensitive conversations and be thoroughly familiar with formal and informal options including the complaint process and remedies.

The Working Group believes that the introduction of innovations to respond to workplace misconduct will be effective only if those processes are well publicized, readily available to all employees, and considered a vital part of the Judiciary's existing human resources programs. The Working Group therefore recommends that the Judicial Conference should incorporate informal employee protection programs into its training and educational initiatives.

Protection programs should include contingency plans and funding to provide for a transfer or alternative work arrangements for an employee, including a law clerk, when

egregious conduct by a judge or supervisor makes it untenable for the employee to continue to work for that judge or supervisor. The absence of such a remedy can be a significant deterrent to reporting misconduct.

#### 4. Systemic Evaluations

The JC&D Act and the EDR Plans provide avenues to resolve specific misconduct complaints. They may lead to a wide range of disciplinary actions depending on the nature of the misconduct, and they do not foreclose the possibility, in cases of truly serious misconduct, of tort liability, separate disciplinary action by bar associations or other licensing bodies, criminal prosecution, or impeachment. But the Judiciary also has an institutional interest in determining, apart from any disciplinary action, what conditions enabled the misconduct or prevented its discovery, and what precautionary or curative steps should be undertaken to prevent its repetition. The Working Group believes that the Judicial Conference and the individual circuit judicial councils have ample authority to conduct such systemic reviews as part of their respective responsibilities to promote "the expeditious conduct of court business," 28 U.S.C. § 331, and to "make all necessary and appropriate orders for the effective administration of justice within [each] circuit." 28 U.S.C. § 332(d)(1). Systemic reviews of this sort can shed useful light on whether existing procedures are sufficient, whether workplace practices should be modified, and whether further training or other preventative measures are necessary. This Working Group's efforts, and those of individual circuits and courts, are in fact examples of that type of systemic institutional review.

#### 5. Follow-up Procedures



The Working Group received substantial input on the need for follow-up procedures when Judiciary employees, including law clerks, leave their positions for other employment. They may have valuable information about their experiences or have observed instances of harassment or other workplace misconduct that for whatever reason they chose not to report or share during the pendency of their employment. Exit interviews are useful for that purpose. Methods to capture that data can be useful not only in preventing future occurrences but may lend credence and support to a similar report or complaint that another employee might file. Follow up with law schools, which often keep track of experiences their former students had as law clerks, would also be useful.

### *C. Education and Training Programs*

The Working Group believes that rigorous and recurrent education programs are essential to cultivate and maintain a respectful workplace for all employees throughout the Judiciary. The Judiciary already has in place vibrant educational and training programs for judges, supervisors, and other employees. Those programs, managed by the FJC, the Administrative Office, and individual courts, include a wide array of publications, on-line resources, and in-person training programs to promote fair employment practices and workplace civility. Nevertheless, there are several areas related to education and training in the Judiciary that would benefit from further direction and refinement.

First, the Judiciary should ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation program, with “refresher” training conducted at regular intervals. The Working Group received numerous comments demonstrating a lack of awareness at all levels of the Judiciary about the existence of the JC&D Act and EDR processes, how they work in practice, and how to obtain assistance in filing a complaint, report,

or claim. The FJC has developed high-quality educational programs, but they are not reaching all employees—in significant part, because they are not consistently offered throughout the Judicial Branch. These programs will need to be retooled to reflect any revisions that the Judicial Conference implements with respect to the current standards, procedures, and informal avenues for relief.

Efforts in this area already are underway. In December 2017, the FJC amended the *Law Clerk Handbook* to clarify that the duty of confidentiality does not prohibit a law clerk or other employee from reporting misconduct by a judge or other person. The *Handbook* and other publications will continue to be reviewed for potential revision or updating. The FJC has already placed most of its handbooks and other published guidance online. Since January 2018, the FJC has included workplace conduct sessions in each of the following programs for judges: one conference for chief district judges; one conference for chief bankruptcy judges; one national workshop for district judges; one national workshop for bankruptcy judges; one national workshop for magistrate judges; and three orientation seminars for new district and court of appeals judges. The FJC will include sessions on workplace conduct in scheduled educational programs for new chief circuit, district, and bankruptcy judges, and for court unit executives, as well as in additional national workshops and orientation seminars for judges, all to be held during 2018. The FJC is revising its curriculum for managers and supervisors, and for other court employees, including law clerks, to expand coverage of workplace harassment issues. Circuit judicial conferences in 2018 will include sessions to address workplace conduct. Several courts already have conducted internal education programs on workplace conduct as well.

Second, the FJC should develop advanced training programs specifically aimed at developing a culture of workplace civility. The FJC already is considering opportunities to

integrate civility training into existing programs on judicial management, court administration, and courtroom practices to make civility an essential component in all aspects of court operations. There is a particular need to train judicial managers on proactive measures to encourage civility and defuse abusive work environments before problems develop. Those efforts should include training on “bystander intervention,” which would encourage judges, supervisors, and other employees who witness misconduct to take action through channels for reporting and response.

Third, the FJC, the Administrative Office, and individual courts should continuously evaluate their educational programs to assess their effectiveness, paying close attention to new learning techniques and developments in the field. Those components should consider new or revised offerings on a number of specific topics of special relevance to the judicial workplace, including:

- Judicial codes of conduct;
- The Judiciary’s procedures for seeking advice and assistance, and filing a complaint;
- Risk factors that can contribute to problems in the judicial workplace;
- Peer-to-peer interactions and bystander intervention;
- Gray areas: differing perceptions of what is inappropriate behavior;
- Promoting respect; and
- Equal treatment and opportunity.

Where feasible, the FJC should tailor its advanced programs to specific groups.

FJC programs for new chief circuit, district, and bankruptcy judges should devote considerable attention to effective leadership principles and techniques. Those programs should specifically address the chief judge’s role in fostering a positive working environment and in

holding others accountable for maintaining that environment. That training should include a focus on risk factors that are highly relevant in chambers, such as power imbalances and isolated workplaces, and it should encourage all judges to exercise leadership in modeling exemplary behavior. Those programs should specifically address the judge's duty to take appropriate action when learning of an apparent violation of the Code of Conduct or professional responsibility standards by another judge. Consistent with the Working Group's proposal for creation of informal avenues for advice and assistance, those programs should address both formal and informal ways to deal with judges and employees who are suspected of inappropriate behavior.

FJC programs for court executives should address their leadership roles and how to conduct effective education and training in their courts. Managers and supervisors should understand that their efforts to cultivate a positive workplace environment will be recognized in evaluating their job performance. Education for managers and supervisors should emphasize the importance of their "front line" position in fostering a positive workplace and in detecting and acting on instances of inappropriate behavior. For all persons in leadership and management positions, education should include methods for conducting difficult conversations. Managers cannot be reluctant to approach someone suspected of misconduct because of uncertainty about how to engage the individual. If leaders build skill and confidence in carrying out such conversations, they will be more effective in achieving positive outcomes.<sup>68</sup>

FJC programs for court employees, including law clerks, should emphasize standards and procedures, and highlight where and how to get advice and help. The FJC and the Administrative Office should develop materials on workplace conduct for courts to use in

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<sup>68</sup> As previously noted, the EDR program would benefit from more focused training for EDR Coordinators. They, and others whose responsibilities include advising or assisting employees reporting misconduct, should be well versed in the applicable standards and procedures, and they should receive training on skills for dealing effectively with persons who may be fearful or lack trust in the system.

orienting new employees. Those materials should include guidance on persons to contact in seeking advice and clear explanations on procedures for reporting misconduct. Most courts conduct initial orientation programs for new employees that cover a broad range of unfamiliar subjects, such as building security, computer usage, health and retirement benefits, and time-keeping. Programs on workplace conduct, including what to do when experiencing or witnessing inappropriate conduct, should be distinct. Workplace conduct training should be timed and offered in a way that critical information about the Judiciary's workplace standards and remedies does not get lost in the swirl of other new employee training.<sup>69</sup>

The Working Group notes concerns that some may try to avoid allegations or the appearance of harassment by simply reducing their interactions with members of a different gender, ethnicity, or other group. This would result in loss of opportunities for positions, mentoring, and professional growth for members of such groups. The Judiciary should strive to avoid this, primarily through education.

The Working Group took note of the many education and training opportunities already being developed in circuit and district courts across the country. The Working Group encourages the Judicial Conference, the Administrative Office, and the FJC to facilitate the sharing of best practices that can be tailored to the unique situations of individual courts, and further recommends that development of such programs be done in coordination with each circuit and with fellow courts.

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<sup>69</sup> Orientation programs for law clerks deserve special attention. Given the relatively short duration of law clerks' employment, training on workplace conduct must be timely and focused. The FJC has prepared an online Interactive Orientation for Law Clerks (IOLC), which should be updated to include more extensive coverage of standards of conduct, the scope of the duty of confidentiality, and ways to seek help or file a complaint. But those principles can be usefully reinforced through an in-person session with a chief judge, or other experienced jurist, who can authoritatively emphasize the importance of those principles.

Education aimed at promoting a positive and respectful workplace and preventing harassment and abusive conduct requires a sustained effort. The FJC and other Judiciary providers of education and training should consistently reexamine their programs and materials to ensure their relevance and effectiveness.

### **CONCLUSION**

The Judiciary should aspire to be an exemplary workplace, taking strong affirmative measures to promote civility, minimize the possibility of inappropriate behavior, remove barriers to reporting misconduct, and provide prompt corrective action when it occurs. The Working Group accordingly recommends that the Judicial Conference undertake an ongoing program, as described above, to promote a culture of mutual understanding and respect, through improvements to its standards of conduct, its procedures for addressing inappropriate behavior, and its educational and training programs for judges, supervisors, and employees. The Working Group remains committed to assisting with that effort and offers its continued service in whatever capacity the Chief Justice and the Judicial Conference direct.

## **APPENDIX 1**

**Memorandum from James C. Duff, Director of the Administrative Office, to all  
Judiciary Employees (Dec. 20, 2017)**



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

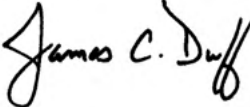
JAMES C. DUFF  
Director

WASHINGTON, D.C. 20544

December 20, 2017

MEMORANDUM

To: All United States Judges  
Circuit Executives  
Federal Public/Community Defenders  
District Court Executives  
Clerks, United States Courts  
Chief Probation Officers  
Chief Pretrial Services Officers  
Senior Staff Attorneys  
Chief Circuit Mediators  
Bankruptcy Administrators  
Circuit Librarians  
Judicial Assistants-Secretaries  
Law Clerks

From: James C. Duff 

RE: WORKPLACE CONDUCT (**ACTION REQUESTED**)

The Chief Justice has asked me to establish a working group to examine the sufficiency of the safeguards currently in place within the Judiciary to protect court employees, including law clerks, from wrongful conduct in the workplace. I plan to establish a working group in the coming weeks that will produce its report and recommendations by May 1, 2018.

In the meantime, this memorandum provides a reminder that processes and procedures exist for *all* Judicial Branch employees to report concerns of wrongful workplace conduct, including sexual harassment. This memorandum also provides information on the educational tools and materials available to help prevent illegal and prohibited conduct in our workplaces. It is important that all employees, including judges, court unit executives, and law clerks be aware of the applicable rules, recourse, and resources, that are available. **Please share this memorandum with all staff.**

*First*, any aggrieved employee may file a complaint regarding wrongful conduct under the Judicial Conduct and Disability Act (JC&D) which can result in remedial action against the subject of the complaint. Moreover, the Judiciary's Model Employment Dispute Resolution (EDR) Plan, which every circuit court, all 94 district courts, and all bankruptcy courts have



adopted in whole or with local modifications, identifies the range of personnel actions that are prohibited and states the procedures to initiate, pursue, and obtain resolution of a complaint. The Model EDR Plan and related resources can be found on the JNet. Court employees should follow their own court's EDR Plan and/or the JC&D process when filing a complaint. Coupled with the JC&D, these EDR plans provide all employees protection from wrongful conduct and recourse.

*Second*, the Administrative Office (AO) through its Office of the General Counsel, Office of Fair Employment Practices, and Office of Human Resources has created a range of on-line training through the HR Academy by video conference or, upon request, in-person, that addresses the EDR process, employment laws, wrongful conduct, and unconscious bias, among other relevant topics for the workplace.

*Third*, the Federal Judicial Center (FJC) added a statement in the Law Clerk Handbook this week that makes clear that nothing in the Handbook, nor the Code of Conduct, prevents a law clerk or any Judiciary employee from revealing or reporting misconduct, including sexual harassment. The FJC offers many in-person and video presentations that address prohibited workplace discrimination, as well as techniques to ensure a respectful and inclusive workplace. In-district training on the topic of "Preventing Workplace Harassment" has been utilized by many courts. Districts may request this training by contacting Phyllis Drum at the FJC at [PDrum@fjc.gov](mailto:PDrum@fjc.gov) or at 202-502-4134. Several videos provide valuable information for managers and employees on how to prevent and counter instances of prohibited misconduct, including harassment. The trainings and videos cover topics ranging from the definition of wrongful conduct, to the responses to it, to reducing the threats of it. The videos also provide training on techniques for improving overall communication, teamwork and morale. And they provide prevention and response tools for unwelcome behavior and procedures for reporting misconduct. The FJC is also assembling a list of relevant videos on its homepage. These can be accessed at <http://fjc.dcn/content/326872/preventing-sexual-harassment> or by clicking on [fjc.gov](http://fjc.gov) from this memorandum.

All of these resources are intended to help foster a safe, comfortable, and respectful workplace in the Judiciary. I encourage the courts to make full use of these resources and I also encourage all who are in the Judiciary to take action when they observe or encounter inappropriate conduct. Everyone who works in the Judiciary has recourse if they are subjected to inappropriate behavior.

As we re-examine our procedures, we welcome your input. You may contact me at 202-502-3000 or [JDuff@ao.uscourts.gov](mailto:JDuff@ao.uscourts.gov) with your suggestions.

## **APPENDIX 2**

**Chief Justice John G. Roberts, Jr., United States Supreme Court  
Year-End Report on the Federal Judiciary (2017)**

**EMBARGOED until 6 p.m. E.S.T.  
December 31, 2017 (No wires, TV,  
radio, Internet, or other formats  
before 6 p.m. E.S.T.)**

For further information, contact the  
Public Information Office  
[pio@supremecourt.gov](mailto:pio@supremecourt.gov)

## **2017 Year-End Report on the Federal Judiciary**

In October 1780, while American patriots engaged the British in decisive battles for independence, a storm was brewing in the Caribbean. The Great Hurricane of 1780—the deadliest Atlantic hurricane on record—tracked a course from the Lesser Antilles to Bermuda, leaving a trail of destruction that touched both Florida and Puerto Rico. Historians estimate that more than 20,000 people died. The “Great Hurricane” was just one of several storms that ravaged the Caribbean and Gulf of Mexico that fall. In all, more than 28,000 perished.

Nearly two and a half centuries later, we remain vulnerable to natural catastrophes. Modern communication has enhanced our ability to learn of impending disasters, take precautions, and respond to those in need. But today’s news cycle can also divert attention from the continuing consequences of calamities. The torrent of information we now summon and dispense at the touch of a thumb can sweep past as quickly as the storm

itself, causing us to forget the real life after-effects for those left in misfortune's wake.

Federal disaster response is primarily the responsibility of the executive and legislative branches of the federal, state, and territorial governments, which can muster, fund, and deploy the resources needed to respond to emergencies. Still, during this season of holidays and celebrations, we cannot forget our fellow citizens in Texas, Florida, Puerto Rico, and the Virgin Islands who are continuing to recover from Hurricanes Harvey, Irma, and Maria, and those in California who continue to confront historic wildfires and their smoldering consequences. The courts cannot provide food, shelter, or medical aid, but they must stand ready to perform their judicial functions as part of the recovery effort. The federal judiciary has an ongoing responsibility to prepare for catastrophes and ensure that the third branch of government remains open and functional during times of national emergency.

Court emergency preparedness is not headline news, even on a slow news day. But it is important to assure the public that the courts are doing their part to anticipate and prepare for emergency response to people in need.

The Administrative Office of the United States Courts is the agency within the judicial branch responsible for providing the broad range of managerial and program support necessary for federal courts throughout the country. The Administrative Office staff addresses matters that span the federal court system, including human resources, information technology, and facilities stewardship. The Administrative Office has established an Emergency Management and Preparedness Branch that maintains continuity of operations programs within that agency and provides training and consulting functions for hundreds of court units across the country. That's no small task for a court system that employs 30,000 people and includes 12 regional courts of appeals, 94 district courts, 90 bankruptcy courts, and a collection of other specialized tribunals, probation and pretrial services offices, and federal defender offices.

Our federal courthouse communities vary in size. Some large cities, like Houston, are home to dozens of federal judges and have substantial support teams for busy dockets. Smaller locales, like Key West, may have only a single judicial officer and a handful of court employees. The deadly hurricanes of 2017 and other emergency events brought home the need for a national response capability to deal with emergencies on a scale both large and small. Preparation begins with planning. The judiciary must anticipate

the broad range of calamities that might strike, ranging from severe weather to earthquakes, from cyberterrorism to on-the-ground terrorist attacks. The planners must identify the particular risks and available resources by region and locality to calculate how to deploy manpower and maintain channels of communication. Plans must be scaled to enable prompt and flexible response to both foreseeable and unforeseeable consequences of emergency events.

The Emergency Management and Preparedness Branch provides critical consultation and planning support for federal courts throughout the country as they design their emergency plans and run drills. But the Branch also goes a step further by operating a Judiciary Emergency Response Team, which offers courts facing an emergency a single point of contact for logistical support. The Response Team serves as a principal node for communication and a clearinghouse for information. It provides a central source for assisting personnel and directing resources to support the affected court's administrative needs, including procurement, information technology, facilities, and security.

I recognize that this might sound like trying to fight fire with administrative jargon. But imagine yourself one of a handful of employees of the bankruptcy court in Santa Rosa, California, when raging wildfires

suddenly approach the courthouse where you work and state officials order evacuation—as happened this past September. The staff members did not face the emergency alone; they had at their disposal a professional response team to assist in making quick decisions to protect personnel, relocate services, and ensure continuity of operations.

The Administrative Office’s national support system includes the provision of remote information technology resources. These resources can enable courts to keep case management and electronic filing systems online for judges, attorneys, and court personnel, who can continue their work from safe locations during and after storms and other emergency events. These resources also allow courts with public websites to provide the bar and public with critical updates and notices about operations. During Irma, Harvey, and Maria, the Administrative Office’s communications team monitored the status of all affected courts and provided regular public updates on the judiciary’s own central website (<http://www.uscourts.gov>) and on the Administrative Office’s Twitter feed.

The courts are continuously enhancing and enlarging their response capabilities, building on gradual improvements over the past 30 years. The Administrative Office and individual courts learned valuable lessons from the Loma Prieta earthquake that struck San Francisco in 1989, the

September 11 terrorist attack in 2001, and Hurricanes Katrina and Rita, which devastated the city of New Orleans and other parts of Louisiana and Mississippi in 2005. Those upgraded emergency preparedness practices were put to the test by the 2008 floods in Cedar Rapids, Iowa, the 2012 Superstorm Sandy in New York and New Jersey, and the 2016 floods in Baton Rouge and surrounding parishes. The severe weather events of this past summer, affecting disparate parts of the country so close in time, placed unique challenges on our emergency response capabilities.

The hurricanes brought flooding, power outages, infrastructure damage, and individual hardship to Texas and Florida. But the judicial districts of the Virgin Islands and Puerto Rico were especially hard hit. Judges and court employees responded in dedicated and even heroic fashion. They continued to work even in the face of personal emergencies, demonstrating their commitment to their important public responsibilities.

The Judicial Emergency Response Team assisted local judges and court employees in finding missing court personnel, securing buildings, and continuing or resuming court operations. But the efforts did not stop there. The storm also affected persons subject to the courts' continuing jurisdiction. For example, the courts have responsibility to hear legal claims of individuals detained in criminal proceedings prior to sentencing, and



special measures were required for those in custody in Puerto Rico and the Virgin Islands. Before Hurricane Maria made landfall, the Justice Department's Bureau of Prisons moved more than 1,200 detained individuals to mainland facilities in Mississippi, Florida, Alabama, and Georgia. In addition to facilitating secure transport arrangements with the U.S. Marshals Service, judicial personnel made arrangements to ensure assignment of mainland judges to handle urgent proceedings, the provision of necessary language interpreter services, and continued access to lawyers in the Federal Defender system. I happened to be in Jackson meeting with Mississippi federal judges when word arrived that a large number of the detainees would be sent to that state. Many of the judges in the room raised their hands on the spot to volunteer to take on the extra work.

For individuals who had completed terms of imprisonment but were serving sentences of supervised release, the Administrative Office's Probation and Pretrial Services Office stepped in to assist. The office joined in tracking individuals and responding to location monitoring alerts in every district affected by the hurricanes when local staff was unavailable. The Probation Office for the Southern District of New York took the initiative to help colleagues in the District of Puerto Rico by monitoring electronic arrest

notices. That office's generous support freed local probation officers to tend to their own families and homes.

The Administrative Office and affected courts also learned some lessons about improving future response. They discovered gaps in our communications protocols for Puerto Rico and the Virgin Islands arising from widespread power outages, impaired cellular networks, and limited internet connectivity. The scope of infrastructure damage on those islands impeded efforts to reach key personnel during and immediately after storms. Going forward, the Administrative Office will do more to pre-position essential equipment, such as satellite telephones, batteries, generators, and emergency supplies on islands and other areas susceptible to hurricanes and flooding. The Administrative Office will also identify and develop better backup communications systems and networks to reach critical personnel when routine telecommunications services are down or mainline power is lost.

The most important lesson learned is a gratifying one. Judges and court employees responded to daunting challenges with extraordinary neighborliness, generosity, and dedication. For example, when the chief probation officer for the District of Puerto Rico made it to work on the second business day following Hurricane Maria's destructive passage

through San Juan, he discovered 25 members of the District's probation staff already at the office, raring to go. They assembled search parties to fan out across the city and nearby areas to find the 40 staff members unaccounted for at that time. Another example comes from the Virgin Islands. Court employees in St. Thomas, who endured catastrophic damage from Hurricane Irma, took up a collection to assist their counterparts in St. Croix when it was hit by Hurricane Maria two weeks later—even as they themselves coped with their own loss of homes, food, clothes, and personal effects. Court employees around the country not only assisted with the workloads of the affected courts, but also contributed funds and sent care packages to help their colleagues struggling with loss or damage to their homes. And many other court employees have made generous contributions to disaster relief charities, directly or through the Combined Federal Campaign.

The courts also received critical assistance from our colleagues in the Executive Branch. The judiciary owes special thanks to the United States Marshals Service and the General Services Administration (GSA). Among other duties, the Marshals Service provides security for judges and staff. Deputy marshals and court security officers around the country safeguard our facilities and our people. The GSA, which manages the hundreds of courthouses and other federal buildings, worked with local court employees

to confront flooding, mold, damage to power generators, and the inherent challenge of operating when public electric and water services are unavailable. All these public servants helped us restore operations as quickly as possible.

Congress has provided that, “All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” 28 U.S.C. § 452. On fair weather days, it is easy to take that provision for granted. When disaster strikes, it can be honored only through the tireless efforts of judges, court employees, Administrative Office staff, and the many friends of the judiciary. I know full well that many members of the public, including members of our court family, continue to face hardship. We should continue to keep them in our thoughts and prayers.

Last year, in my annual report, I noted that federal trial judges must often work alone, without the benefit of collegial decision-making or the comfort of shared consensus. But this year, we have many rich examples of federal judges working together, with the support of court employees and Administrative Office staff, to keep courthouses open and operational. Those examples are a reminder that we have a national court system that can

work collectively to address challenges that would overwhelm individual courts.

\* \* \*

We have a new challenge in the coming year. 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. The judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.

I have asked the Director of the Administrative Office to assemble a working group to examine our practices and address these issues. I expect the working group to consider whether changes are needed in our codes of conduct, our guidance to employees—including law clerks—on issues of confidentiality and reporting of instances of misconduct, our educational programs, and our rules for investigating and processing misconduct complaints. These concerns warrant serious attention from all quarters of the judicial branch. I have great confidence in the men and women who comprise our judiciary. I am sure that the overwhelming number have no

tolerance for harassment and share the view that victims must have clear and immediate recourse to effective remedies.

Once again, I am privileged and honored to be in a position to thank the judges, court staff, and judicial personnel throughout the Nation for their continued excellence and dedication. Let's not forget the victims of the disasters that occurred over the past year. I hope we can all find opportunities to assist our fellow citizens who remain in need.

Best wishes to all in the New Year.

## Appendix

### Workload of the Courts

In the 12-month period ending September 30, 2017, the number of cases filed in the Supreme Court decreased. The number of cases filed in the regional appellate courts, the district courts, and bankruptcy courts also decreased. Cases activated in the pretrial services system declined, as did the number of persons under post-conviction supervision.

#### *The Supreme Court of the United States*

The total number of cases filed in the Supreme Court decreased by 2.63 percent from 6,475 filings in the 2015 Term to 6,305 filings in the 2016 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased by 3.47 percent from 4,926 filings in the 2015 Term to 4,755 filings in the 2016 Term. The number of cases filed in the Court's paid docket increased from 1,549 filings in the 2015 Term to 1,550 filings in the 2016 Term. During the 2016 Term, 71 cases were argued and 68 were disposed of in 61 signed opinions, compared to 82 cases argued and 70 disposed of in 62 signed opinions in the 2015 Term. The Court also issued one *per curiam* decision during the 2016 Term in a case that was not argued.

### *The Federal Courts of Appeals*

In the regional courts of appeals, filings fell 16 percent to 50,506. Appeals involving pro se litigants, which amounted to 50 percent of filings, declined 20 percent. Total civil appeals increased one percent. Criminal appeals fell 14 percent, appeals of administrative agency decisions decreased five percent, and bankruptcy appeals declined four percent.

Original proceedings in the courts of appeals, which include prisoner requests to file successive habeas corpus proceedings in the district court, dropped 60 percent this year to 5,486, accounting for most of the overall caseload decline. These filings had spiked in 2016, after the Supreme Court's decision in *Welch v. United States*, No. 15-6418 (Apr. 16, 2016), which provided a new basis for certain prisoners convicted under the Armed Career Criminal Act to challenge their sentences.

### *The Federal District Courts*

Civil case filings in the U.S. district courts fell eight percent to 267,769. Cases with the United States as defendant decreased 29 percent. That reduction returned filings to typical levels, following a spike in 2016 caused by post-*Welch* challenges to criminal sentences. Cases with the United States as plaintiff increased five percent because of actions related to foreclosures. Cases involving diversity of citizenship (i.e., disputes between



citizens of different states) fell seven percent as personal property damage cases dropped 40 percent.

Filings for criminal defendants (including those transferred from other districts) changed little, decreasing less than one percent to 77,018.

Defendants charged with property offenses fell six percent, mainly in response to a five percent drop in defendants charged with fraud.

Defendants accused of immigration violations declined two percent, with the southwestern border districts receiving 77 percent of national immigration defendant filings. Drug crime defendants, who accounted for 32 percent of total filings, fell one percent, although defendants accused of crimes associated with drugs other than marijuana rose four percent. Reductions also were reported for filings involving sex offenses, general offenses, and violent crimes. Filings for defendants prosecuted for firearms and explosives offenses rose 11 percent. Increases also occurred in filings related to traffic offenses, regulatory offenses, and justice system offenses.

### *The Bankruptcy Courts*

Bankruptcy petition filings decreased two percent to 790,830. Fewer petitions were filed in 56 of the 90 bankruptcy courts. Consumer petitions dropped two percent, and business petitions fell six percent. Filings of petitions declined two percent under Chapter 7 and five percent under

Chapter 11. Filings under Chapter 13 remained relatively stable, decreasing one percent.

This year's total for bankruptcy petitions is the lowest since 2007, which was the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last seven years.

*The Federal Probation and Pretrial Services System*

A total of 134,731 persons were under post-conviction supervision on September 30, 2017, a reduction of two percent from one year earlier. Of that number, 116,708 persons were serving terms of supervised release after leaving correctional institutions, a one percent decrease from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, declined three percent to 88,750.

## **APPENDIX 3**

**Press Release, Federal Judiciary Workplace Conduct Working Group Formed  
(Jan. 12, 2018)**

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# Federal Judiciary Workplace Conduct Working Group Formed

*Published on January 12, 2018*

James C. Duff, Director of the Administrative Office of the U.S. Courts, has established a Federal Judiciary Workplace Conduct Working Group to review the safeguards currently in place within the Judiciary to protect employees from inappropriate conduct in the workplace.

Chief Justice John G. Roberts, Jr., noted in his 2017 Year-End Report on the Federal Judiciary that he asked Director Duff to form the working group, observing, “The Judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure exemplary workplace conduct for every judge and every court employee.”

Chief Justice Roberts directed the working group to examine whether changes may be needed to the Judiciary’s codes of conduct; its guidance to employees – including law clerks – on issues of confidentiality and reporting instances of misconduct; its educational programs; and its rules for investigating and processing misconduct complaints.

Working Group Members are:

**James C. Duff**, Director of the Administrative Office of the U.S. Courts, Chairman. As Director and Secretary to the Judicial Conference, Mr. Duff has been involved in several high profile judicial misconduct matters and oversees staff support to Judicial Conference Committees, including the Codes of Conduct Committee and the Judicial Conduct and Disability Committee. Mr. Duff served as counselor to the Chief Justice during the Presidential impeachment trial in 1999.

**Chief Judge Jeffrey R. Howard**, First Circuit. Chief Judge Howard is a member of the Judicial Conference of the United States. As Circuit Chief, he has the statutory authority to review all judicial misconduct and disability complaints and presides over the Circuit Council. Before becoming a judge, he had been chair of the New Hampshire Governor’s Commission on Domestic Violence and Sexual Assault, which developed interdisciplinary response protocols that became the model for programs in a number of other states.

**Judge M. Margaret McKeown**, Ninth Circuit. Judge McKeown chaired the Judicial Conference Codes of Conduct Committee, is chair of the newly formed Ninth Circuit Workplace Environment Committee, and served on various committees, working groups, and panels related to workplace and gender discrimination while on the bench and in private practice.

**Chief Judge Julie A. Robinson**, District of Kansas. Judge Robinson served on the Tenth Circuit Judicial Council and was a member of the committee that developed the 2010 and 2015 Strategic

Plan for the Federal Judiciary, which dealt with workplace issues, ethics, and integrity, as well as other topics.

**Judge Sarah S. Vance**, Eastern District of Louisiana. Judge Vance is a former Chief Judge of the district and a former member of the Fifth Circuit Judicial Council. She also was a member of the Executive Committee of the Judicial Conference of the United States and the Board of the Federal Judicial Center.

**Margaret A. Wiegand**, Circuit Executive for the Third Circuit. Ms. Wiegand supports the Chief Circuit Judge in administering the Judicial Conduct and Disability Act and manages and supports the workplace complaint process under the Consolidated Equal Employment Opportunity and Employee Dispute Resolution Plan. She also chairs the federal Judiciary's Human Resources Advisory Council.

**Jeffrey P. Minear**, Counselor to the Chief Justice for the past 11 years. Previously Mr. Minear clerked for a federal appellate judge and before joining the Supreme Court, held a variety of policy, legislative, and appellate positions at the Department of Justice.

**John S. Cooke**, Deputy Director of the Federal Judicial Center for the last 12 years. Before joining the center in 1998 as Director of Judicial Education, Mr. Cooke was the Chief Judge of the Army Court of Criminal Appeals. In 2013-2014 he served on a committee established by the Secretary of Defense to study responses to sexual assault in the armed forces.

**Sheryl Walter**, General Counsel at the Administrative Office of the U.S. Courts, will serve as counsel to the working group. She previously held senior positions at the Department of Justice and Department of State and on the staff of the Senate Judiciary Committee. She also clerked for a federal appellate judge.

In the course of its review, the working group will examine workplace relations practices in the public and private sectors and consult with other authorities as appropriate. The group will also solicit input from federal judges, law clerks, and other judicial employees. In addition, the group will coordinate its efforts with those of other federal courts that are reviewing similar matters. It will submit a written report and recommendations to the relevant committees of the Judicial Conference of the United States.

## **APPENDIX 4**

**Letter from James C. Duff, Director of the Administrative Office, to  
Chairman Charles E. Grassley and Ranking Member Dianne Feinstein  
(Feb. 16, 2018)**



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

JAMES C. DUFF  
Director

WASHINGTON, D.C. 20544

February 16, 2018

Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Grassley and Senator Feinstein:

Thank you for your letter of last Friday, February 9, 2018, concerning the status of the Federal Judiciary Workplace Conduct Working Group (Working Group). As the Chief Justice said in his 2017 year-end report, "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 it clear that the Judicial Branch is not immune." We have acted quickly on this. At the national level, I established the Working Group. Our group is actively examining policies and procedures within the Judiciary to protect employees from inappropriate workplace conduct and, where necessary, developing enhancements to those protections. Some of the circuits and district courts have similar initiatives in progress and we are coordinating closely with them. We, of course, not only share your interest in this serious issue, we have been working on it in earnest since the formation of the Working Group in January and are pleased to update you on our progress. We certainly appreciate your staffs' willingness to discuss these matters with us and look forward to continuing that dialogue. We will address your questions in order.

1. *On December 31, 2017, Chief Justice Roberts announced that he was creating a working group to examine protections against sexual harassment in the Judiciary. The working group was directed to explore whether the Judiciary has proper procedures in place that protect law clerks and other courtroom employees from sexual harassment.*

*a. How were the seven members of the working group chosen?*

Immediately upon receiving direction from Chief Justice Roberts to form a working group to examine our practices and address these issues, I identified and assembled a diverse team of leaders in the Federal Judiciary who are uniquely qualified for this important task. The seven individuals I appointed to the Working Group and the group's counsel have a breadth of experience in a wide range of judicial operations, the utmost respect from all who work in the Judicial Branch, and subject matter experience and expertise in the matters before our Working Group. Enclosed is a summary of the credentials of the Working Group and its counsel.

*b. How often will the working group meet?*

The Working Group has held one day-long in-person meeting and has another in-person meeting scheduled in two weeks. We will meet in person as often as needed, and we communicate in between meetings on a regular if not daily basis. We have set a very aggressive schedule to complete our work.

*c. When will the working group begin to make recommendations?*

The answer is immediately. In fact, we already have acted on several matters, including:

- revising the Confidentiality provisions in several employee/law clerk handbooks to reflect that nothing in those provisions prevents the filing of a complaint;
- establishing a comment mailbox on the [uscourts.gov](http://uscourts.gov) public website for current and former law clerks and other employees to send comments and suggestions to the Working Group;
- removing temporarily the Model Confidentiality Statement from the courts' intranet website in order to revise it and clarify that nothing in that statement prevents law clerks or employees from reporting sexual harassment or other workplace misconduct and filing a complaint relating to that conduct;
- enhancing and raising awareness of the data the Judiciary collects and publishes relating to judicial misconduct complaints under the Judicial Conduct and Disability (JC&D) Act to identify specifically any complaints filed relating to sexual harassment. (In many years, including 2016, there have been zero.)



Additional steps will be taken throughout our review and some issues likely will be addressed in the form of recommendations to the Judicial Conference of the United States.

*d. Will the working group make their recommendations publicly available?*

All final recommendations will be publicly available. We will make some recommendations public during our review. Others will be announced after the Judicial Conference considers and acts upon them.

*2. Will the working group seek input from current and former law clerks and other court employees?*

Yes, representatives from the group of law clerks, both current and former, who wrote to us in January, along with other court employees, will attend our next Working Group meeting to provide us with their comments and suggestions for improving our policies and processes. We are also soliciting comments through the Judiciary's Advisory Groups. Additionally, as mentioned above, we are creating a comment mailbox on the [uscourts.gov](https://uscourts.gov) website for input from current and former law clerks and court employees.

*3. Will the working group consider changes in sexual harassment training and staff development?*

Yes. The Federal Judicial Center (FJC) has several initiatives underway. There are three programs relating to workplace harassment that the FJC conducts in courts throughout the country. Preventing Workplace Harassment; Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct for U.S. Judges. These programs use a lesson plan developed by the FJC and are conducted by FJC-trained faculty in courts that request them.

Meet on Common Ground: Speaking Up for Respect in the Workplace

- FY 16: 3 programs;
- FY 17: 20 programs;
- FY 18 (to date): 6 programs

Code of Conduct

- FY 16: 14 programs;
- FY 17: 24 programs;
- FY 18 (to date): 5 programs

Preventing Workplace Harassment

- FY 16: 49 programs;
- FY17: 45 programs;
- FY18 (to date): 24 programs

The FJC will train additional trainers this spring for the Preventing Workplace Harassment program to meet increased demand.

For judges, sessions on the Code of Conduct are included in all orientation seminars and in general-subject continuing education workshops. Henceforth, these seminars and workshops will include sessions specifically devoted to workplace harassment; the first one was held in an orientation for new district judges earlier this month. Sessions devoted to workplace harassment are also scheduled for in-person education programs for chief district and bankruptcy judges this spring and for new chief judges of all kinds in the fall.

An FJC national conference for court unit executives in the fall will include workplace harassment training.

The FJC provides an online orientation for new law clerks each year. This is now being revised to include a separate segment on workplace harassment.

In addition to a change made in the Law Clerk Handbook in December, to clarify that law clerks' duty of confidentiality does not extend to misconduct by a judge, the FJC will make further revisions in this and other publications to address workplace harassment, including reporting procedures.

The Working Group also has under consideration changes in training for EDR counselors and others who may advise or assist court personnel about workplace harassment issues.

4. *What action, if any, has the AO taken following the allegations to strengthen the employee resolution process?*

The Working Group will be specifically examining all aspects of the Employment Dispute Resolution process to look for areas for possible enhancements as part of its key objectives. In an example of the Judiciary's commitment to this principle, the AO, with direct senior leadership involvement, recently finalized a years-long initiative on behalf of the Judicial

Conference to ensure that all courts have protection against retaliation for whistleblowers and to incorporate these protections into their local EDR Plans. As a result, all circuit courts, all district courts, and all bankruptcy courts have whistleblower retaliation prohibitions.

5. *What current policies for sexual harassment training are currently in place in the Judiciary? Do law clerks and court employees participate in training?*

Orientation programs for new judges, annual continuing education workshops, and periodic ethics advisories from the Code of Conduct Committee of the Judicial Conference have for many years included training on ethics and the Code of Conduct for judges.

In our response to Chairman Grassley's letter to me of December 6, 2017, we provided a detailed response, including a lengthy chart, outlining numerous types of training provided to judges, law clerks, and court staff on a variety of management and oversight responsibilities, including training on prohibited personnel practices, ethics, and general court management. (See my letter to Chairman Grassley, January 12, 2018, response to question 5 (enclosed).)

This year, the Federal Judiciary's orientation programs for new judges include specific training on "Respect in the Workplace" (a program that includes the topic of harassment). This training will also be included in continuing education workshops for judges, as well as in other programs for new and experienced judges.

Staff training includes Preventing Workplace Harassment, Meet on Common Ground (a program about diversity and civility in the workplace); and the Code of Conduct for Judiciary Employees. Law clerks are trained on the Code of Conduct through in-person and video training. There will also be harassment training at upcoming sessions for court unit executives. And there will be training for Chief District Judges in a March 2018 training session.

The FJC is also revising the Law Clerk Handbook and online orientation for new law clerks to address harassment directly, including harassment reporting procedures.

The Office of Fair Employment Practices (OFEP) also provides the following training:

- “Managing Employee Dispute Resolution Issues in the Judiciary” is web-based training the OFEP created with the Office of Human Resources that covers Title VII, sexual harassment, and sex-based harassment as part of the discussion of the “Nine Laws” applicable to the EDR Plans. This is typically directed at EDR coordinators (who are court employees).
  - “EDR Training for the Judiciary” is in-person training the OFEP provides upon request to court units, generally those responsible for overseeing or those responsible for carrying out duties in the EDR process. It covers Title VII, sexual harassment, and sex-based harassment, as part of the discussion of the “Nine Laws” applicable to the EDR Plans.
  - “Harassment in the Workplace” is in-person training or video conference training the OFEP provides, upon request, to court units that is customized to the needs of the court unit. It has been done, for example, with the FJC, and involved preparation of training for all employees, all managers, and judges (where the OFEP was responsible for the judges’ portion).
6. *Do anti-retaliation statutes protect law clerks or courtroom employees if they report sexual harassment against federal judges?*

The Rules for Judicial-Conduct and Judicial-Disability (RJCD) Proceedings, which along with the Judicial Conduct and Disability (JC&D) Act of 1980, 28 U.S.C. §§ 351–364, establish standards and procedures for addressing conduct and disability complaints against a federal judge, prohibit retaliation against a law clerk or courtroom employee for reporting sexual harassment by a federal judge. Specifically, Rule 3(h)(1)(H) provides that “retaliating against complainants, witnesses, or others for participating in [the conduct and disability] complaint process” constitutes “cognizable misconduct.” See Guide to Judiciary Policy, Vol. 2, Part E, Ch. 3, § 320, Article I(3)(h)(1)(G).

As I previously provided to you in correspondence on January 12, 2018, the Federal Judiciary also has put in place comprehensive protections for its employees generally including law clerks against retaliation (by judges or other judiciary employers) that mirror anti-retaliation statutes. Thus, retaliation against any Federal Judiciary employee, including law clerks or courtroom employees, for reporting sexual harassment by a federal judge is prohibited under the Federal Judiciary’s policies. Specifically, harassment against any employee based on certain protected classes, including sex, or retaliation for engaging in any protected activity is expressly prohibited under the Model Employment Dispute Resolution Plan (“Model EDR Plan”) as adopted by the Judicial Conference of the

United States. See question 7 for a discussion of our efforts to ensure the EDR plans cover all law clerks.

*7. Some federal court districts allow law clerks to participate in the Judiciary's employee dispute resolution program. How many districts allow this type of dispute resolution? Why might a district not allow their law clerks to participate in this program?*

The Judiciary's Model EDR Plan explicitly covers law clerks. Nine of the eleven federal circuits have included law clerks in the EDR plans for all of the courts within their jurisdiction. The only two federal circuits that do not currently cover law clerks within the EDR plans of their individual courts are the Seventh and Eleventh circuits. Those circuits have not covered law clerks in their EDR process because law clerks may raise allegations regarding harassment by a judge through the Judicial Conduct and Disability Act complaint process. Nonetheless, the Working Group is encouraging both the Seventh and Eleventh circuits to update their EDR plans to include law clerks. Both the Seventh Circuit and the Eleventh Circuit are now reviewing their EDR plans and are considering that action.

*8. How many complaints alleging sexual harassment or misconduct are filed by courtroom staff and federal law clerks each year? How many of these complaints are investigated? How many result in findings for and against judges?*

There are two ways in which the Judiciary typically compiles complaints from courtroom staff and federal law clerks alleging sexual harassment by a judge: the Judicial Conduct and Disability ("JC&D") complaint process and the Employment Dispute Resolution ("EDR") program.

In 2016, there were no complaints alleging sexual harassment by a federal judge filed by courtroom staff or law clerks under the JC&D Act procedures.

In 2016, there was one EDR claim alleging sexual harassment by a judge filed by a law clerk. In accordance with the applicable EDR plan, the employee initiated an action by requesting counseling. As set forth in the Model EDR Plan, which is attached in our response to Question 10, counseling involves a designated EDR counselor discussing the employee's concerns, eliciting information regarding the matter, advising the employee of his/her rights and responsibilities and the procedures applicable to the EDR process, evaluating the matter, and assisting the employee in achieving an early resolution of the matter, to the extent possible. In this situation from 2016, the employee and the employing office were

able to achieve an equitable resolution of the matter during the EDR counseling process, which concluded the matter prior to the initiation of further fact-finding.

*9. Describe the process the Judiciary uses to investigate a claim of misconduct.*

Misconduct claims can be filed under the JC&D Act or under the Model EDR Plan.

Complaints of judicial misconduct are governed by the JC&D Act, 28 U.S.C. §§ 351–364, and the JC&D Rules. Any person can file a complaint or a circuit chief judge can identify a complaint. Every complaint is reviewed and considered by the circuit chief judge. The circuit chief judge must refer a complaint raising factual issues to a special committee of district and circuit judges for an investigation as extensive as necessary. The special committee then submits a report, including fact-finding and recommendations to the judicial council, for consideration. A complainant can file a petition for review from a judicial council's order following appointment of a special committee to the Judicial Conduct & Disability Committee. Where a judicial council determines that a subject judge may have engaged in conduct that might constitute grounds for impeachment, the judicial council must certify such a determination to the Judicial Conference, and the Judicial Conference – if it concurs – must certify and transmit the determination and record of the proceeding to the House of Representatives.

The Model EDR Plan includes a reporting provision that encourages any judiciary employee who experiences or observes sexual harassment or other wrongful discrimination to report that to one of the court's EDR Coordinators, a unit executive or supervisor, a human resource manager or the Chief Judge. Any of those persons who receive a report of harassment are obligated to immediately notify the Chief Judge, who will then ensure that an appropriate investigation is conducted by an impartial investigator. Retaliation against any employee making such a report is prohibited. The goal of this reporting provision is to bring to the court unit's attention any sexual, racial, or other discriminatory harassment so that it can promptly be prevented or corrected.

*10. Please supply all rules and procedures that may govern a claim of misconduct against a judge.*

Copies of the Model EDR, the JC&D statute, and the RJCD are enclosed with this letter.

*11. News reports have pointed to several specific investigations of judges accused of sexual misconduct. For each of the following individuals, please describe what action, if any, the Judiciary took to investigate and resolve these claims.*

The following summaries are provided in response to this question. All of the judges you have identified are no longer on the bench. Relevant decisions and orders are enclosed.

*a. U.S. District Court Judge Walter Smith on the U.S. District Court for the Western District of Texas, who in 1998 was accused of sexual harassment by a deputy court clerk.*

Judge Walter S. Smith, Jr. (W.D. Tex.): Matter Investigated and Judge Resigned. On September 8, 2014, attorney Ty Clevenger filed a complaint alleging Judge Smith engaged in abusive sexual conduct toward a clerk's office employee on January 22, 1998.

The Chief Judge of the Fifth Circuit appointed a Special Committee on October 28, 2014. The Special Committee began its investigation in January 2015, and interviewed witnesses and took depositions throughout the first part of that year. The investigation was completed by mid-May. Judge Smith met with the Committee and testified under oath on August 18, 2015. In October 2015, the Special Committee provided its Report to the Judicial Council.

The Judicial Council issued an order on December 3, 2015, finding the following: (1) Judge Smith "made inappropriate and unwanted physical and non-physical sexual advances toward [the clerk's office employee];" (2) Judge Smith "does not understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts;" and (3) Judge Smith "allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation." The Judicial Council issued a reprimand to Judge Smith, instructed the Clerk of Court for the Western District of Texas to suspend the assignment of new cases to Judge Smith for one year, and directed Judge Smith to complete sensitivity training.

Mr. Clevenger filed a petition for review to the JC&D Committee on January 18, 2016, in which he requested the Committee "suspend Judge Smith from the bench immediately and recommend impeachment."

Mr. Clevenger also noted he submitted “the names of witnesses to other alleged incidents wherein Judge Smith sexually harassed women in the courthouse” and alleging that “the assault of [the court employee] was [not] an isolated incident.”

On July 8, 2016, the JC&D Committee issued a decision returning the matter to the Fifth Circuit Judicial Council to make additional findings related to the other individuals who allegedly witnessed other instances of Judge Smith’s sexual harassment of women in the courthouse, which raised the question whether there was a “pattern and practice of such behavior,” and requesting “additional findings and recommendations as to the manner in which Judge Smith’s conduct adversely impacted or interfered with the inquiry, if at all.”

The Special Committee re-engaged its prior investigators. In the second investigation, over the course of approximately two months, the investigators ensured that all witnesses identified by the complainant, as well as all witnesses potentially having information relevant to the issues raised in the order of remand, were interviewed. The investigators obtained statements or affidavits from, and/or conducted depositions of, all people having relevant information. Overall, the investigators communicated with, received statements or affidavits, from or deposed over 50 people.

Before the Committee could conduct hearings, Judge Smith retired from office under 28 U.S.C. § 371(a) on September 14, 2016. Following Judge Smith’s retirement, the Judicial Council concluded

Mr. Clevenger’s complaint against Judge Smith on September 28, 2016, on the basis that a judge who retires under Section 371(a) is “no longer a judicial officer” and is “no longer subject to the disciplinary procedures of [the Act] and the remedies they prescribe.” The JC&D Committee denied Mr. Clevenger’s subsequent petition for review, concluding that “[t]he Circuit Judicial Council properly concluded the conduct and disability proceeding was unnecessary because Judge Smith . . . retired under 28 U.S.C. § 371(a).”

*b. U.S. District Court Judge Edward Nottingham on the U.S. District Court of Colorado faced a judicial misconduct complaint involving allegations that he spent thousands of dollars at strip clubs and was involved in a prostitution ring.*

Judge Edward W. Nottingham (D. Colo.): Matter Investigated and Judge Resigned. In August 2007, following media reports regarding allegations against Judge Nottingham, the then Chief Circuit Judge identified a misconduct complaint against Judge Nottingham. The complaint alleged that Judge Nottingham spent more than \$3,000 at a sexually oriented nightclub in one evening, that he could not



remember how he had spent that much money because he had a lot to drink, and that this conduct may have brought disrepute to the Judiciary and constituted misconduct. Based on other allegations in the news, the complaint also alleged that Judge Nottingham may have violated court policy by viewing sexually explicit images on his court computer. The Circuit Chief Judge referred the matter to a Special Committee.

On September 19, 2007, a separate misconduct complaint was filed alleging that Judge Nottingham had parked illegally in a handicapped parking space and, in an ensuing conversation with the complainant, had misused his authority by identifying himself as a federal judge and threatening to call the U.S. Marshals. The Circuit Chief Judge also referred this complaint to the Special Committee.

The Special Committee determined that Judge Nottingham may have made false statements in his initial response to the allegations regarding computer use and in a transcribed interview, and expanded the scope of the complaint to include these alleged false statements.

In March 2008, the Circuit Chief Judge and the Special Committee learned from news reports of allegations that Judge Nottingham had solicited prostitutes. Following an informal investigation into these allegations and two hearings, the Circuit Chief Judge identified a misconduct complaint against Judge Nottingham on October 1, 2008, alleging that he had been a client of prostitution businesses in violation of Colorado law, had misused his court-owned cell phone in making calls to prostitutes, and had made false statements during the investigation. This matter was referred to a new Special Committee. On October 8, 2008, the two Special Committees submitted a joint report to the Judicial Council.

On October 10, 2008, another misconduct complaint was filed against Judge Nottingham. The complainant alleged that she had been a prostitute and that Judge Nottingham had been one of her clients. She further alleged that on February 29, 2008, Judge Nottingham asked her to lie to federal investigators about the nature of their relationship and not to disclose that she was a prostitute whom he paid in exchange for sex.

Judge Nottingham resigned his commission as a United States district judge effective October 29, 2008. The Judicial Council found that the resignation was in the interest of justice and the Judiciary. The Judicial Council further noted that the misconduct procedures apply only to federal judges, and determined that the misconduct complaints should be concluded because Judge Nottingham's resignation made further proceedings unnecessary.

*c. U.S. District Court Judge Richard Cebull on the U.S. District Court of Montana, accused of making racist jokes and disparaging statements about women and certain allegations.*

Judge Richard F. Cebull (D. Mont.): Matter Investigated and Judge Retired. In February 2012, Judge Cebull used his court email account to forward a racist joke about President Obama to six acquaintances, which prompted widespread reporting in the local and national press. When the incident became public, Judge Cebull wrote a letter of apology to the President and asked the Chief Judge of the Ninth Circuit to identify a complaint against him. A judge from another circuit court also filed a complaint against Judge Cebull based on the same incident. The Chief Judge of the Ninth Circuit referred both complaints to a Special Committee.

The Special Committee issued its Report on December 17, 2012, describing its investigation, which included: (1) retrieval, review, and analysis of approximately four years of Judge Cebull's emails; (2) interviews with over 25 witnesses; (3) analysis of Judge Cebull's cases (with particular attention to sentencing practices, civil rights cases, and appeals); and (4) an interview with Judge Cebull and materials submitted by his counsel. The Special Committee's investigation found that there were hundreds of inappropriate emails, including a significant number of emails concerning women and/or sexual topics that were disparaging of women. The Special Committee's investigation found no evidence of bias in Judge Cebull's rulings or in his sentencing practices, and no cases that were "troubling." The Order noted the Special Committee interviewed "key individuals in Montana's legal community, court staff and Judge Cebull's professional and social contacts," and found that "[w]itnesses generally regarded Judge Cebull as a good and honest trial lawyer, and an esteemed trial judge."

On March 15, 2013, the Ninth Circuit Judicial Council issued an Order finding that Judge Cebull engaged in misconduct, as defined under the JC&D Act, and violated Canon 2 of the Code of Conduct for U.S. Judges, and issuing sanctions against Judge Cebull. The Judicial Council issued a public reprimand, ordered that no new cases be assigned to Judge Cebull for 180 days, and ordered Judge Cebull to complete training on judicial ethics, racial awareness, and elimination of bias. Further, the Judicial Council condemned Judge Cebull's initial apology as insufficient and required that he issue a second apology, approved by the Judicial Council that would "acknowledge the breadth of his behavior and his inattention to ethical and practical concerns surrounding personal email." Two members of the Judicial Council wrote a concurring statement that "the Judicial Council should request that Judge Cebull voluntarily retire from the Judiciary under 28 U.S.C. § 371(a) in recognition of the severity of his violation and the breadth of the public reaction."

On April 2, 2013, the Ninth Circuit Judicial Council announced that Judge Cebull had decided to retire, effective May 3, 2013. On May 13, 2013, the Judicial Council issued an Order vacating its March 15 Order as moot in light of Judge Cebull's retirement and stating it would "consider appropriate revisions" at a forthcoming meeting. The judge complainant filed a Petition for Review to the Judicial Conduct and Disability Committee seeking review of the May 13 vacatur.

On July 2, 2013, the Judicial Council issued an Order that "dismissed the complaints as moot," declared that the "intervening event of Judge Cebull's retirement "conclude[d] these proceedings," and that the vacatur of the March 15 Order had been predicated on "changed circumstances" resulting from Judge Cebull's retirement. The July 2 Order presented a truncated version of the March 15 Order's findings, including the description of the inappropriate emails. The judge complainant filed a second Petition for Review on July 23, 2013, incorporating the first Petition and requesting review of the July 2 Order based on the judge's "concern about the propriety of a Judicial Council issuing a final order making detailed findings of extensive judicial misconduct and then, after the subject judge retires, sua sponte vacating its own final order and issuing a new order that effectively conceals the judicial misconduct that previously had been identified and detailed."

On review, the Judicial Conduct and Disability Committee concluded that the March 15 Order was subject to the publication requirements under the JC&D Act because it was "a final decision on the merits" and Judge Cebull's retirement was not an "intervening event" because it came after the adjudication of the merits. The Judicial Conduct and Disability Committee ordered publication of the Judicial Council's March 15 Order as the final order disposing of the complaints on the merits while recognizing that the provisions commanding Judge Cebull to take remedial action were inoperative.

*d. U.S. District Court Judge Samuel Kent on the U.S. District Court for the Southern District of Texas, indicted on three counts of abusive sexual contact and attempted aggravated sexual abuse. Judge Kent later pled guilty to a lesser offense.*

Judge Samuel B. Kent (S.D. Tex.): Matter Investigated; Judge faced remedial action; Matter reinvestigated; Judge pled guilty to criminal charges; Matter referred for impeachment; Judge impeached and resigned. A judicial misconduct complaint was filed on May 21, 2007, against Judge Kent alleging sexual harassment of a judicial employee. The Chief Judge of the Fifth Circuit appointed a Special Committee. The Special Committee recommended reprimanding the

judge, as well as other remedial actions. The Judicial Council accepted the recommendations of the Special Committee and concluded the proceedings because appropriate remedial action had been taken, including the judge's four-month leave of absence from the bench, reallocation of the Galveston/Houston docket, and other measures. The Judicial Council also reprimanded Judge Kent based on the conduct described in the Special Committee report. See September 28, 2007 Order.

The complainant filed a motion for reconsideration, seeking a determination that Judge Kent may have engaged in conduct in violation of specific federal criminal statutes that might constitute one or more grounds for impeachment, and also asked the Council to certify such a determination, if made, to the Judicial Conference of the United States. The complainant also alleged that there was additional evidence of misconduct by Judge Kent, including inappropriate behavior toward other judiciary employees.

The Judicial Council noted that the U.S. Department of Justice had subsequently initiated a criminal investigation, with which the Council was cooperating. The Council noted that the propriety of further judicial discipline, or a certification to the Judicial Conference of the United States, could not be fairly evaluated without adversarial proceedings in which the witnesses would be subjected to cross-examination. The Council further determined that conducting adversarial proceedings while a criminal investigation was underway could prejudice the judicial misconduct investigation. The Council deferred action on the complainant's motion for reconsideration in light of the ongoing criminal investigation. During the pendency of the criminal investigation, Judge Kent agreed not to handle any civil or criminal cases in which the United States was a party or in which sexual misconduct of any kind was alleged. See December 20, 2007 Order.

On August 28, 2008, a United States Grand Jury handed down a three count indictment charging Judge Kent with felonies for conduct which had been the subject of the misconduct investigation of the Special Committee and the sanctions imposed by the Council as a result of that misconduct. On January 6, 2009, the same Grand Jury issued a superseding indictment charging Judge Kent with committing additional misconduct beyond the misconduct the Special Committee and the Judicial Council had discovered or considered when issuing its earlier sanction.

Based on these developments, the Judicial Council granted the complainant's motion seeking reconsideration of the sanctions imposed against Judge Kent. The Judicial Council further determined that, following the trial of the criminal charges

pending against Judge Kent, (including Kent's obstruction of the Council's own investigation) the Council would investigate the additional charges of misconduct alleged in the superseding indictment and any supplemental investigation of the misconduct alleged in the original indictment. The Judicial Council would then consider potential further sanctions in light of the result of the investigation.

On May 27, 2009, the Judicial Council issued an order noting that Judge Kent "has pled guilty to obstruction of justice in violation of 18 U.S.C. § 1512I(2) and has thus by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution, and so certifies its determination to the Judicial Conference of the United States." The Judicial Council further determined that "the foregoing events and certification, together with the facts that Judge Kent has voluntarily moved out of his chambers and ceased handling cases, moot this Council's reopening of the disciplinary proceeding against Judge Samuel B. Kent."

*e. U.S. District Court Judge Richard Roberts on the U.S. District Court for the District of Columbia, accused of raping a 16 year-old witness while he was a prosecutor.*

Matter Investigated as to disability; found not to have committed misconduct as a judge; Judge retired on permanent disability. On March 14, 2016, and May 26, 2016, the Utah Attorney General's Office and Terry Mitchell filed judicial misconduct complaints against Judge Richard Roberts (D-DC). Terry Mitchell alleged in part that Judge Roberts, prior to his judicial appointment, "used his authority and status as a federal prosecutor to manipulate and coerce [then-]sixteen-year-old Terry Mitchell"—a witness in a 1981 trial—"into numerous sex acts before and throughout the trial." The Utah Attorney General made similar serious allegations.

Within a matter of days of the Utah Attorney General's judicial misconduct complaint, Judge Roberts retired based on a permanent disability. On March 18, 2016, the Acting Chief Judge of the DC Circuit dismissed the Utah Attorney General's complaint on the ground that Judge Roberts's recent retirement "render[ed] . . . the allegations moot or [made] remedial action impossible."

The Utah Attorney General filed a Petition for Review of the Acting Chief Judge's dismissal of its complaint. Upon request from the DC Circuit Judicial Council, the Chief Justice transferred to the Tenth Circuit the Utah Attorney General's complaint and any related matters (including the subsequent complaint filed by Terry Mitchell). Terry Mitchell's complaint also alleged that Judge Roberts dishonestly asserted a disability to retire and avoid the consequences of these

allegations.

The Tenth Circuit Judicial Council granted in part the Utah Attorney General's Petition for Review. Specifically, it vacated the dismissal order after determining that Judge Roberts's retirement "does not preclude him from coverage under the Judicial Conduct and Disability Act," and returned the complaint to the Chief Judge of the Tenth Circuit for further action. The Chief Judge of the Tenth Circuit consolidated the two complaints and appointed a Special Committee to determine whether the claims fell within the scope of the Judicial Conduct and Disability Act and, if so, to investigate the allegations and underlying facts.

Following the Special Committee's investigation and submission of its Report, the Tenth Circuit Judicial Council dismissed the Utah Attorney General's and Terry Mitchell's judicial misconduct complaints, concluding that Judge Roberts's pre-appointment conduct is not justiciable under the Judicial Conduct and Disability Act, and further that Judge Roberts did not dishonestly assert a disability.

Neither the Utah Attorney General nor Terry Mitchell filed a petition for review of those determinations. Judge Roberts, however, filed a Petition for Partial Review in which he objected to the Judicial Council's inclusion of the medical diagnosis underlying his disability retirement. On review, the JC&D Committee denied Judge Roberts's request to strike that specific medical diagnosis from the record on the basis that "Judge Roberts's medical diagnosis ha[d] been placed directly at issue due to the timing of his departure from judicial office, occurring within days of the filing of the Utah Attorney General's judicial misconduct complaint and Terry Mitchell's federal civil complaint." JC&D Order at 6.

On the Judicial Council's request, the JC&D Committee forwarded a copy of the Judicial Council's Order and its Decision denying Judge Roberts's Petition for Partial Review to the House Judiciary Committee, the House Oversight Committee, the Senate Judiciary Committee, and the Senate Finance Committee in recognition of "the importance of ensuring that governing bodies with clear jurisdiction [were] aware of the complaint."

*f. U.S. Circuit Court Judge Alex Kozinski on the Ninth Circuit accused of sexual harassment and misconduct by several women.*

Judge Alex Kozinski (9th Cir.): Retired immediately following referral for investigation. On December 14, 2017, the Chief Judge of the Ninth Circuit identified a misconduct complaint against then-Circuit Judge Kozinski "based on allegations contained in a December 8, 2017, Washington Post article entitled 'Prominent 9th Circuit Judge Accused of Sexual Misconduct' and any other

related articles.” On December 15, 2017, the Chief Justice transferred the proceeding to the Second Circuit Judicial Council.

Three days later, on December 18, 2017, then-Judge Kozinski relinquished his commission as a United States circuit judge by retiring, effective immediately, under 28 U.S.C. § 371(a).

On February 5, 2018, the Second Circuit Judicial Council concluded the proceeding on the basis of the aforementioned retirement, stating that “Because Alex Kozinski has resigned the office of circuit judge, and can no longer perform any judicial duties, he does not fall within the scope of persons who can be investigated under the Act.” Given the seriousness of the conduct alleged, however, the Judicial Council “acknowledge[d] the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint” and requested that “the Committee on Judicial Conduct and Disability . . . forward a copy of this order to any relevant Congressional committees for their information.”

*12. A CNN report reviewed 1,303 misconduct complaints filed in 2016. They concluded: “of those, only four were referred to special committee for the most serious level of investigation.” The report found a similar pattern in 2015.*

*a. Why were so few complaints fully investigated by the Judiciary?*

See answer to (b) below.

*b. Do these news reports accurately reflect the pervasiveness of sexual harassment and misconduct within the Judiciary?*

The media report you cite above is wildly misleading and I am pleased to have the opportunity to correct it. Any suggestion that the Judiciary does not take sexual misconduct complaints seriously is irresponsible and simply wrong.

Here are the facts: The Judicial Conduct and Disability Act and the Rules do not provide for review of case related judicial decisions. Of course, that authority resides in the courts of appeals. Nevertheless, the vast majority of the complaints we receive under the JC&D Act are complaints related to a judge’s decision. Our publicly reported data shows that of the 1,303 judicial “misconduct” complaints filed nationwide under the JC&D procedures in fiscal year 2016, cited in the media report you have referenced, over 1,200 of them were filed by dissatisfied litigants and prison inmates. No misconduct complaints were filed under these procedures by law clerks or Judiciary employees in 2016, the year cited in the

media report. Moreover, none of the four complaints in 2016 that were referred to a special committee for further investigation, as provided under the statute, involved sexual misconduct.

This has been true in most years. And it is a reason we have not created a separate category for sexual harassment in our annual published statistical report on JC&D complaints – in most years there simply have been no complaints relating to sexual harassment. Nonetheless, we will create a separate statistical category for sexual harassment complaints under the JC&D and report that data.

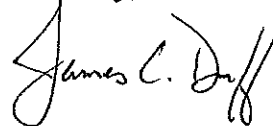
There are over 30,000 employees in the Federal Judiciary. The sad fact is that, just as in other public and private workplaces, sexual harassment issues are often not reported. Our Working Group is addressing this issue by removing barriers to filing complaints and educating employees about the options they have available.

*13. What, if any, statutory recommendations does the Judiciary have for improving the current statutes involving the Judiciary's complaint process, codified in 28 U.S.C. §§ 351-353?*

Our Working Group does not have any statutory recommendations concerning the Judiciary's complaint process to make to Congress at this time. We will continue to examine the statutory framework for judicial misconduct and disability complaints. We have preliminarily identified areas of potential modifications and clarifications to our codes of conduct guidelines, EDR processes, training and orientation programs to address the issues we have seen during our review.

We will continue to work on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "James C. Duff". The signature is fluid and cursive, with the first name "James" and last name "Duff" clearly legible.

James C. Duff  
Director

Enclosure



## **APPENDIX 5**

**Letter from James C. Duff, Director of the Administrative Office, to  
Chairman Charles E. Grassley and Ranking Member Dianne Feinstein  
(Mar. 8, 2018)**



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

JAMES C. DUFF  
Director

WASHINGTON, D.C. 20544

March 8, 2018

Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Grassley and Senator Feinstein:

This is a follow up to my letter to you of February 16, 2018, on actions by the Judiciary's Workplace Conduct Working Group (Working Group) in its examination of policies and procedures within the Judiciary to protect employees from inappropriate workplace conduct and develop enhancements to those protections.

Our Working Group held its second in-person meeting on March 1, 2018. Our meeting included productive sessions with representatives from current and former law clerks, as well as a cross section of other Judiciary employees. We will meet again in about three weeks.

The Working Group made progress on several initiatives. In addition to actions we already have taken to revise law clerk and employee guidelines and handbooks, seek online comments from current and former Judiciary employees, and refine our data collection relating to misconduct complaints, we resolved to work with the Judicial Conference of the United States to:

1. Improve law clerk and employee orientations with increased training on workplace conduct rights, responsibilities, and recourse that will be administered in addition to, as well as separately from, other materials given in orientations.
2. Provide "one click" website access to obtain information and reporting mechanisms for both Employment Dispute Resolution (EDR) and Judicial Conduct and Disability Act (JC&D) claims for misconduct.

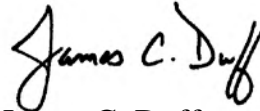
3. Create alternative and less formalized options for seeking assistance with concerns about workplace misconduct, both at the local level and in a national, centralized office at the Administrative Office of the U.S. Courts to enable employees to raise concerns more easily.
4. Provide a simplified flowchart of the processes available under the EDR and JC&D.
5. Create and encourage a process for court employee/law clerk exit interviews to determine if there are issues and suggestions to assist court units in identifying potential misconduct issues.
6. Establish a process for former law clerks and employees to communicate with and obtain advice from relevant offices and committees of the Judiciary.
7. Continue to examine and clarify the Codes of Conduct for judges and employees.
8. Improve communications with EDR and JC&D complainants during and after the procedures.
9. Revise the Model EDR Plan to provide greater clarity to employees about how to navigate the EDR process.
10. Establish qualifications and expand training for EDR Coordinators.
11. Lengthen the time allowed to file EDR complaints.
12. Integrate sexual harassment training into existing Judiciary programs on discrimination and courtroom practices.

We also have added instructive programs on our policies and procedures for the upcoming meetings of the chief district court judges at the Federal Judicial Center (FJC) on March 16, 2018, as well as at FJC workshops and upcoming circuit conferences of judges throughout the country this spring. There also will be judge training at the FJC national workshops for district judges this summer.

Honorable Charles E. Grassley and Honorable Dianne Feinstein  
Page 3

Following our March 1, 2018, Working Group meeting we were pleased to meet with your respective staff to summarize these developments. We were grateful both for their time and helpful suggestions for making further improvements in our policies and practices. We will continue to work closely with them and will keep you informed of our progress.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive, flowing style.

James C. Duff  
Director

cc: Judiciary Workplace Conduct Working Group

## **APPENDIX 6**

**Press Release, Judicial Conference Receives Status Report on  
Workplace Conduct Review (Mar. 13, 2018)**

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# Judicial Conference Receives Status Report on Workplace Conduct Review

*Published on March 13, 2018*

Nearly 20 reforms and improvements have been implemented or are under development to help address workplace conduct concerns in the federal judiciary, James C. Duff, Chair of the [Federal Judiciary Workplace Conduct Working Group \(/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed\)](/news/2018/01/12/federal-judiciary-workplace-conduct-working-group-formed), reported today at the biannual meeting of the Judicial Conference.

In introducing Duff before he delivered his report, Chief Justice John G. Roberts, Jr., who is the Conference's presiding officer, told the group, "I would like to reiterate what I stated in my year-end report. I have great confidence in the men and women who comprise the federal judiciary. I am sure that the overwhelming number have no tolerance for harassment and share the view that victims must have a clear and immediate recourse to effective remedies. The Work of this group will help our branch take the necessary steps to ensure an exemplary workplace for every court employee."

Duff, who is Director of the Administrative Office of the U.S. Courts, by statute also serves as the Secretary to the Judicial Conference.

"Any harassment in the judiciary is too much," Duff said in his report to the Conference. He told the Conference that the Working Group hopes to simplify and develop additional options, at both the national and local levels, for employees to seek assistance with workplace conduct matters.

Duff reported that the Working Group has held two meetings since its formation in January, and will meet again in early April. Representatives of current and former law clerks and a cross-section of current judiciary employees met with the Working Group at its most recent meeting and had what Duff described as "an informative and productive discussion."

The Working Group also is receiving input via a [mailbox \(/workplace-conduct-comment\)](/workplace-conduct-comment) on uscours.gov, through which current and former judiciary employees can submit comments relating to the policies and procedures for protecting all judiciary employees from inappropriate workplace conduct. Similarly, the Working Group has reached out to more than 250 current employees who serve on various groups and councils.

Duff wrote to Senators Charles Grassley, Chair, and Diane Feinstein, Ranking Member, of the Senate Judiciary Committee on [March 8, 2018 \(/file/24080/download\)](/file/24080/download), and [February 16, 2018 \(/file/24043/download\)](/file/24043/download), to provide them status reports on the Working Group and an in-depth explanation of the employee dispute and judicial conduct resolution procedures.

In addition, some circuits and districts have established similar initiatives, and the Working Group is coordinating closely with them.

All final recommendations will be made public. Some will be shared in the course of the Group's review. Others will be announced after the Judicial Conference considers and acts on them. It is anticipated that the Working Group will submit its report in May 2018.

The following either have been accomplished or are in progress:

- Provided a session on sexual harassment during the ethics training for newly appointed judges in February.
- Established an online mailbox and several other avenues and opportunities for current and former judiciary employees to comment on policies and procedures for protecting and reporting workplace misconduct.
- Added instructive in-person programs on judiciary workforce policies and procedures and workplace sexual harassment to the curricula at Federal Judicial Center programs for chief district and chief bankruptcy judges this spring and upcoming circuit judicial conferences throughout the country this spring and summer.
- Removed the model confidentiality statement from the judiciary's internal website to revise it to eliminate any ambiguous language that could unintentionally discourage law clerks or other employees from reporting sexual harassment or other workplace misconduct.
- Improve law clerk and employee orientations with increased training on workplace conduct rights, responsibilities, and recourse that will be administered in addition to, as well as separately from, other materials given in orientations.
- Provide "one click" website access to obtain information and reporting mechanisms for both Employment Dispute Resolution (EDR) and Judicial Conduct and Disability Act (JC&D) claims for misconduct.
- Create alternative and less formalized options for seeking assistance with concerns about workplace misconduct, both at the local level and in a national, centralized office at the Administrative Office of the U.S. Courts, to enable employees to raise concerns more easily.
- Provide a simplified flowchart of the processes available under the EDR and JC&D.
- Create and encourage a process for court employee/law clerk exit interviews to determine if there are issues and suggestions to assist court units in identifying potential misconduct issues.
- Establish a process for former law clerks and employees to communicate with and obtain advice from relevant offices and committees of the judiciary.
- Continue to examine and clarify the Codes of Conduct for judges and employees.
- Improve communications with EDR and JC&D complainants during and after the claims process.
- Revise the Model EDR Plan to provide greater clarity to employees about how to navigate the EDR process.

- Establish qualifications and expand training for EDR Coordinators.
- Lengthen the time allowed to file EDR complaints.
- Integrate sexual harassment training into existing judiciary programs on discrimination and courtroom practices.
- Review the confidentiality provisions in several employee/law clerk handbooks to revise them to clarify that nothing in the provisions prevents the filing of a complaint.
- Identify specifically the [data \(/statistics/table/s-22/judicial-business/2016/09/30\)](#) that the judiciary collects about judicial misconduct complaints to add a category for any complaints filed relating to sexual misconduct. The data shows that of the 1,303 misconduct complaints filed in fiscal year 2016, more than 1,200 were filed by dissatisfied litigants and prison inmates. No complaints were filed by law clerks or judiciary employees and no misconduct complaints related to sexual harassment.

The 26-member [Judicial Conference is the policy-making body \(/about-federal-courts/governance-judicial-conference/about-judicial-conference\)](#) for the federal court system. By statute, the Chief Justice of the United States serves as its presiding officer and its members are the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year to consider administrative and policy issues affecting the court system, and to make recommendations to Congress concerning legislation involving the Judicial Branch.



## **APPENDIX 7**

### **Summary of Judicial Conduct and Disability Act**

# **EXECUTIVE SUMMARY:**

## **JUDICIAL CONDUCT AND DISABILITY ACT**

### **Filing a Judicial Conduct or Disability Complaint Against a Federal Judge**

The Judicial Conduct and Disability Act of 1980 (“Act”), 28 U.S.C. §§ 351–364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (“Rules”) govern the complaint process.

### **Initiation of Complaint**

Under the Act and the Rules, any person may file a complaint alleging a federal judge has committed misconduct or has a disability that interferes with the performance of his or her judicial duties. 28 U.S.C. § 351(a). Alternately, a circuit chief judge may identify a complaint where the circuit chief judge finds probable cause to believe that misconduct has occurred or that a disability exists and no informal resolution is achieved or is feasible. *Id.* § 351(a); R. 5(a). A circuit chief judge must identify a complaint where the circuit chief judge finds clear and convincing evidence that misconduct has occurred or that a disability exists and no informal resolution is achieved or is feasible. *Id.*

### **Covered Judges**

A federal judge includes a judge of a United States district court, a judge of a United States court of appeals (including the Court of Appeals for the Federal Circuit), a judge of a United States bankruptcy court, United States magistrate judges, a judge of the Court of Federal Claims, and a judge of the Court of International Trade. 28 U.S.C. § 351(d)(1); R. 4.

### **Misconduct**

“Misconduct” is “conduct prejudicial to the effective and expeditious administration of the business of the courts.” 28 U.S.C. § 351(a); R. 3(h)(1). A “disability” is a temporary or permanent condition, either mental or physical, that makes the judge “unable to discharge all the duties” of the judicial office. *Id.* R. 3(e). Examples of judicial misconduct may include the following:

- using the judge’s office to obtain special treatment for friends or relatives;
- accepting bribes, gifts, or other personal favors related to the judicial office;
- having improper discussions with parties or counsel for one side in a case;
- treating litigants, attorneys, or others in a demonstrably egregious and hostile manner;

- engaging in partisan political activity or making inappropriately partisan statements;
- soliciting funds for organizations;
- retaliating against complainants, witnesses, or others for their participation in this process;  
or
- violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

R. 3(h)(1). This list does not include all the possible grounds for a complaint.

Judicial misconduct may also include actions taken by a judge outside his or her official role as a judge only if “the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.” R. 3(h)(2). Judicial misconduct does not include an allegation that is directly related to the merits of a decision or procedural ruling. R. 3(h)(3).

### **Circuit Chief Judge’s Review**

In most instances, the chief judge of the circuit where the complainant filed their complaint will consider the complaint. 28 U.S.C. § 352(a); R. 11. A circuit chief judge generally will not consider a complaint against him- or herself. R. 25(b). In determining what action to take, the circuit chief judge may conduct a limited inquiry into the facts alleged, which may include witness interviews and the review of additional information. 28 U.S.C. § 352(a); R. 11(b). After considering the complaint, the circuit chief judge will (a) dismiss or conclude the complaint, or (b) appoint a special committee of judges to investigate the complaint. 28 U.S.C. § 352(b); R. 11(c)–(f).

#### **(a) Circuit Chief Judge Dismissal or Conclusion of Complaint; Review by Judicial Council**

The circuit chief judge must dismiss a complaint where it alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office; is directly related to the merits of a decision or procedural ruling; is frivolous; is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists; is based on allegations that are incapable of being established through investigation; or has been filed in the wrong circuit. 28 U.S.C. § 352(b)(1); R. 11(c). There are other circumstances where a circuit chief judge may dismiss a complaint, as explained in the Rules and the Commentary on the Rules. *See* Rule 11(c). The circuit chief judge may conclude a complaint if the subject judge voluntarily takes corrective action or if intervening events have made further action unnecessary. 28 U.S.C. § 352(b)(2); R. 11(d)–(e).

If the circuit chief judge dismisses or concludes a complaint, the complainant may petition the judicial council of the circuit for review of that order. 28 U.S.C. § 352(c); R. 11(g)(3). A complainant must petition the judicial council within 42 days from the date of the circuit chief judge's order. R. 18(b). After considering a petition for review, the judicial council can affirm the circuit chief judge's dismissal or conclusion of the complaint, return the matter to the circuit chief judge for additional inquiry or for appointment of a special committee, or take other action, as discussed in the Rules. R. 19(b). If the judicial council unanimously affirms the circuit chief judge's dismissal or conclusion of a complaint, the complaint is terminated and the complainant has no right to further review. 28 U.S.C. § 352(c); R. 19(e). If one or more judicial council members dissents from the circuit chief judge's dismissal or conclusion of a complaint, the complainant may request review by the Committee on Judicial Conduct and Disability, as discussed in further detail below. R. 19(e).

#### **(b) Circuit Chief Judge Appointment of Special Committee; Review by Judicial Council and Committee on Judicial Conduct and Disability**

If the circuit chief judge refers a complaint to a special committee, that special committee will investigate the complaint and report on it to the circuit judicial council. 28 U.S.C. § 353(a); R. 11(g)(1); A special committee generally will consist of the circuit chief judge and an equal number of circuit and district judges. R. 12(a). A special committee conducts an investigation as extensive as it considers necessary, which may include interviews, hearings and oral arguments, and expeditiously files a comprehensive written report with the judicial council of the circuit, which presents both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council. 28 U.S.C. § 353(c); R. 13–17.

After the judicial council considers a special committee's report, it will generally issue an order on a complaint. 28 U.S.C. § 354(a); R. 20. The order may dismiss the complaint, or the order may conclude the complaint because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary. 28 U.S.C. § 354(a)(1)(B); R. 20(b)(1)(A)–(B). If the order does not dismiss or conclude a complaint, the order may sanction the judge by:

- censuring or reprimanding the judge, either by private communication or by public announcement;
- ordering that no new cases be assigned to the judge for a limited, fixed period;
- in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the judicial council, including the initiation of removal proceedings;
- in the case of a bankruptcy judge, removing the judge from office;
- in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived;

- in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge so that an additional judge may be appointed;
- in the case of a circuit chief judge or district chief judge, finding the judge temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge; and
- recommending corrective action.

28 U.S.C. § 354(a)(2); R. 20(b)(1)(D). The judicial council may take other action, such as requesting the special committee conduct an additional investigation. R. 20(c).

Federal judges appointed under Article III of the U.S. Constitution hold office for life pending good behavior. Only Congress can remove an Article III judge from office. 28 U.S.C. § 354(a)(3)(A). If the judicial council finds an Article III judge's conduct may warrant impeachment, it must refer that finding to the Judicial Conference. 28 U.S.C. § 354(b). On referral, the Judicial Conference will determine whether to certify the matter to Congress, which will then decide whether to initiate impeachment proceedings. 28 U.S.C. § 355(b).

When a judicial council issues an order after it considers a special committee's report, in most circumstances a complainant may petition the Committee on Judicial Conduct and Disability for review of that order. 28 U.S.C. § 357(a); R. 21(b)(1). A complainant must file that petition for review within 42 days from the date of the judicial council's order. R. 22(c). There is ordinarily no oral argument or personal appearance before the Committee on Judicial Conduct and Disability. R. 21(e). In its discretion, the Committee on Judicial Conduct and Disability may permit written submissions. *Id.* The Committee on Judicial Conduct and Disability will conduct further investigation only in extraordinary circumstances. R. 21(d). A complainant has no right to review of any order issued by the Committee on Judicial Conduct and Disability.

### **Confidentiality and Publication**

The complaint process is confidential, with limited exceptions. 28 U.S.C. § 360(a); R. 23. Generally, orders regarding a complaint will be made public only after final action on the complaint has been taken and the complainant has no additional right of review. *Id.* § 360(b); R. 24. Such orders will be made publicly available in the clerk's office of the relevant regional circuit and on that court's website. Any decision by the Committee on Judicial Conduct and Disability will be available on [www.uscourts.gov](http://www.uscourts.gov) and in the clerk's office of the relevant regional circuit. R. 24(b). Public orders usually will not disclose the name of the complainant and will disclose the name of the subject judge only where the complaint is finally disposed of by remedial action by the circuit judicial council (other than a private censure or reprimand), as described in the Act and the Rules. *See* R. 24(a).

## **APPENDIX 8**

### **Summary of Model Employment Dispute Resolution Plan**

# **EXECUTIVE SUMMARY: THE MODEL EMPLOYMENT DISPUTE RESOLUTION PLAN**

## **General**

The Model Employment Dispute Resolution (EDR) Plan sets forth the Judicial Conference's recommended policies and procedures for providing judiciary employees with rights, protections, and remedies similar to those provided under the Family Medical Leave Act of 1993 (FMLA), Uniformed Services Employment and Reemployment Rights Act (USERRA), Title VII of the Civil Rights Act of 1964 (Title VII), Age Discrimination in Employment Act of 1967, Americans with Disabilities Act (ADA)/Rehabilitation Act of 1973 (Rehab Act), Occupational Safety and Health Act of 1970 (OSHA), Worker Adjustment and Retraining Notification Act (WARN), and Employee Polygraph Protection Act of 1988 (EPPA).

Judicial Conference policy requires all courts to adopt and implement a plan based on the Model EDR Plan. Although courts are not required to adopt and implement the Model EDR Plan in its entirety, any modifications to the Model EDR Plan must be approved by the judicial council of its circuit.

## **Coverage**

The Model EDR Plan, or similarly adopted plans, are intended to be the Judicial Branch employees' exclusive remedy for alleged violations of the FMLA, USERRA, Title VII, ADEA, ADA/Rehab Act, OSHA, WARN, and EPPA. The Model EDR Plan applies to all:

- Article III judges and other judicial officers of the U.S. courts of appeals, district courts, bankruptcy courts, Court of Federal Claims and Court of International Trade, as well as to judges of any court created by an Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States;
- Employees of the U.S. courts of appeals, district courts, bankruptcy courts, Court of Federal Claims and Court of International Trade, as well as to judges of any court created by an Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States; and
- Staff of judges' chambers, court unit heads and their staffs, circuit executives and their staffs, federal public defenders and their staffs, and bankruptcy administrators and their staffs (including applicants and former employees).

The Model EDR Plan does not apply to interns or externs providing gratuitous service, or applicants for bankruptcy judge or magistrate judge positions.

## **EDR Process**

The Model EDR Plan sets forth the procedural stages<sup>1</sup> of the EDR process, which includes:

- Informal Dispute Resolution
  - o Counseling and/or
  - o Mediation
- Formal Complaint
- Hearing and Decision
  - o Conducted by the chief judge or a designated judicial officer (i.e. a judge appointed under Article III of the Constitution, a U.S. bankruptcy judge, a U.S. magistrate judge, a judge on the Court of Federal Claims, or a judge of any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the U.S.) including, where appropriate, a judicial officer from outside the court where the complaints arose or the parties are employed.
- Review of the Decision
  - o Review of the presiding judicial officer's decision
  - o Review by a judicial officer

## **Remedies**

Remedies may be provided to successful complainants. Remedies are tailored as closely as possible to the specific violation. Remedies include retrospective relief to correct a past violation; and/or prospective relief to ensure compliance with rights protected under the Model EDR Plan. Compensatory and punitive damages are prohibited under the Model EDR Plan. Payment of attorney's fees are also impermissible, except as authorized under the Back Pay Act.

## **EDR Coordinators**

EDR Coordinators are court employees who are designated by the court to serve as the EDR Coordinator for that court. EDR Coordinators are responsible for:

- Providing information to the court and its employees regarding the rights and protections afforded under their EDR Plan;
- Coordinating and shepherding the proper EDR complaint procedures;
- Maintaining the court's official files of claims and related matters initiated and processed under the court's EDR Plan;
- Coordinating employee counseling, and serving as a counselor, in the initial stage of the claims process. The EDR Coordinator's responsibilities during the counseling stage are:

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<sup>1</sup> The procedural rights set out in the Model EDR Plan correspond to those established under the administrative EEO process available to federal employees in the executive branch, and are similar to the counseling and mediation requirements imposed on legislative branch employees in its administrative hearing process under the Congressional Accountability Act of 1995 (CAA).



- Obtaining preliminary information from the aggrieved employee, including a written statement about the allegations, requested relief, and any jurisdictional matters;
- Advising the aggrieved employee of his/her rights and responsibilities under the EDR Plan;
- Explaining procedures available under the EDR Plan;
- Providing a copy of the request for counseling to the relevant unit executive and chief judge of the court;
- Obtaining pertinent information from the employing office or others as needed to evaluate the matter, consistent with the employee's right to confidentiality;
- Making an initial effort to reach a voluntary, mutually satisfactory resolution;
- Reducing to writing record of all contacts made by the EDR Coordinator during the counseling phase.
- Notifying the employee, in writing, of the end of counseling and of his/her right to continue to pursue a claim.
- Collecting, analyzing, and consolidating statistical data and other information relating to the court's EDR process.

### **Wrongful Conduct**

- Under the Model EDR Plan, employees are encouraged to report discrimination, harassment, and retaliation through the wrongful conduct process. Chief judges and unit executives are to assure that allegations of wrongful conduct are promptly investigated.

## **APPENDIX 9**

### **Federal Judicial Center Trainings Related to Fair Employment Practices and Workplace Civility**

The Federal Judicial Center has compiled the following resource list to aid court units in training and education related to prohibited discrimination, which includes workplace harassment. As we acquire or develop additional relevant resources, we will add them to the list.

The FJC offers several in-district training programs delivered by FJC-trained facilitators. Each of the in-district programs listed below addresses, in some way, either sexual harassment and other forms of prohibited discrimination or techniques to ensure that employees develop the skills to foster a respectful workplace. To schedule an in-district training program, contact Phyllis Drum at [pdrum@fjc.gov](mailto:pdrum@fjc.gov) or (202) 502-4134. The FJC covers the costs of participant materials and trainer travel and subsistence.

The list also includes training videos that can be used as local resources to hold discussions and conduct training on issues related to prohibited discrimination, including sexual harassment. In addition, we include a number of video resources that address topics such as overcoming bias, valuing diversity, facilitating teamwork, effective feedback, leadership in challenging situations, and strategies to enhance respectful communications. Efforts to incorporate these behaviors may also serve to foster an environment less tolerant of prohibited discrimination. To request a video from the list below, click on the hyperlinked title, which will take you to a page where you can read a more comprehensive description and place an order. A downloadable version of this list is available [here](#).

## **Sexual and Workplace Harassment**

### *In-District Programs*

#### **[Preventing Workplace Harassment](#)** (Employee Version, 4 hours)

This program focuses on employee awareness of workplace harassment. Participants learn what workplace harassment is and what it is not, the kinds of behavior that may be interpreted as workplace harassment, how a workplace can become a hostile environment, and how to minimize the occurrence of workplace harassment. Participants learn how to deal with harassment if it arises and what to do if they are involved in a workplace harassment investigation.

#### **[Preventing Workplace Harassment](#)** (Management Version, 4 hours)

This program emphasizes managers' responsibility to maintain an environment free of hostility, where courtesy and mutual respect are the basis for communication and conflict resolution. Participants learn what workplace harassment is and what it is not, the kinds of behavior that may be interpreted as workplace harassment, and how a workplace can become a hostile environment. Managers also learn how to minimize the occurrence of workplace harassment, how to handle an allegation or incident, what to do during an investigation, how to handle a false or spiteful claim of workplace harassment, and how organizations can minimize the occurrence of harassment.

### *Videos Available from FJC Current Collection*

**[Court Web: What You Do Not Know About Harassment Could Hurt You!](#)** (2017, 5523-V/17, 1 hour 12 mins.)

While covering behaviors that should always be avoided, this webcast focuses heavily on some of the gray areas where people without bad intent have offended others. The webcast also addresses how employees—including leaders—should respond to harassing or other unacceptable behavior.

**[It's Still Not Just About Sex Anymore: Harassment & Discrimination in the Workplace](#)** (2016, 5559-V/16, 21 mins.)

This program will educate employees about the many forms of workplace harassment and discrimination. It provides dramatizations of harassment behaviors, demonstrating how these behaviors can lead to formal charges and result in serious consequences for the individuals involved. The program also teaches what is and is not acceptable in today's workplace and what each individual's responsibilities are toward his or her colleagues.

**[Sexual Harassment: The "Takeaway" for Managers](#)** (2016, 5511-V/16, 12 mins.)

This program for managers defines sexual harassment according to the law and explains why it's important to take a proactive approach to this problem. The program includes short vignettes that illustrate and dramatize the material presented. This program focuses on four key learning points: the legal definition of sexual harassment; a proactive response; the importance of documentation; and the fear of retaliation.

*Videos Available from FJC Archives*

**[Harassment and Diversity: Respecting the Differences—Employee Version](#)** (2007, 5163-V/07, 16 mins.)

Harassment is not only about sex and gender. It can also involve various cultural differences, race, religion, age, disabilities, and other protected characteristics. The video focuses on employee sensitivity and awareness. It teaches why a harassment policy that emphasizes a respect for coworker differences is not only required by the law, but is also the right thing to do.

**[Harassment & Diversity: Respecting Differences—Manager Version](#)** (2005, 5164-V/05, 20 mins.)

Managing in a diverse workplace can be a challenge, but every manager has the responsibility to maintain a harassment-free workplace. Diversity in business should be celebrated, but our differences can carry the potential for harassment. Cultural backgrounds, age, religious beliefs, nationalities, and physical abilities are all targets for workplace discrimination, but they are also categories that are protected under law. The video shows an all-too-common situation, where friction between employees grows from "just kidding around" into illegal harassment, and explains that your company should have a zero-tolerance harassment policy that protects every employee.

**[Harassment Hurts: It's Personal](#)** (2009, 5100-V/09, 21 mins.)

*Harassment Hurts: It's Personal* explores the pain and cost of harassment, covering such topics as age, race, sexual orientation, political affiliation, pregnancy, ethnicity, and sexual harassment. This program explains harassment and uses personalized stories and detailed legal and policy definitions to cover all types of harassment in organizations and

workplaces. This program explores issues of harassment, their ramifications, and their remedies.

Also included is *Opening Lines: Exploring Sexual Harassment*, which can be used as a new-employee orientation tool or as a meeting opener or closer for any harassment, respect, or diversity training. You can use it as a quick and concise refresher course for your organization's anti-harassment policy or to just introduce the fundamental and important concepts of respect, diversity, and inclusion in the workplace.

**[In This Together: An Engaging Look at Harassment and Respect](#)** (2000, 5508-V/00, 18 mins.)

This video looks at harassment and respect in the workplace. Seven front-line employees from a variety of organizations speak directly to their peers as they discuss the issues of respect and harassment. The program features insightful looks at real situations that will help employees to make better choices.

**[It's UP to YOU: Stopping Sexual Harassment for Employees](#)** (2005, 5459-V/05, 23 mins.)

This program uses real-world situations to help employees understand and stop sexual harassment behavior.

**[It's UP to YOU: Stopping Sexual Harassment for Managers](#)** (2005, 5460-V/05, 27 mins.)

This program uses real-world situations to help managers understand and stop sexual harassment behavior.

**[Let's Get Honest: A Sexual Harassment Training Package](#)** (2006, 4992-V/06, 41 mins.)

*Program One: Let's Get Honest.* This video offers honest solutions to a variety of workplace issues, ranging from flirting and dating to clueless behavior and predatory harassment.

*Program Two: He Said, She Said.* In this video, seven scenarios challenge employees' beliefs and perceptions regarding sexual harassment and inappropriate behavior at work. As the stories unfold, employees explore the facts, read between the lines, and hear from witnesses and experts.

**[The Right Side of the Line: Creating a Respectful and Harassment-Free Workplace](#)** (2005, 4845-V/05, 22 mins.)

Everyone in an organization is responsible for creating a respectful and harassment-free workplace. This program addresses harassment in all its forms, giving employees the tools to resolve situations before they escalate. The program helps participants take a proactive approach to creating and maintaining respectful organizational cultures in order to remain legally compliant, to ensure adherence to organizational policies, and to thrive and prosper. The video contains six vignettes that address situations that are unprofessional, prohibited by policy, and unlawful. Through these vignettes, employees

learn what to do and how to respond if they are victims of, or witnesses to, any form of harassment or discrimination.

## **Respectful Workplaces**

### *In-District Programs*

#### **Code of Conduct (2.5 – 3 hours)**

This program helps court employees deal with a range of ethical issues. It is divided into two segments: a review of the Code of Conduct for Judicial Employees, and discussion of ethics scenarios.

#### **Dealing with Difficult Situations** (4 hours)

This program helps supervisors and managers decide how to promptly and appropriately respond to some difficult employee relations problems. Participants discuss the issues involved and evaluate possible responses to a number of situations, including accusations of discrimination; charges of sexual harassment; possible substance abuse on the job; personal problems that interfere with performance; and equitable allocation of resources.

#### **Meet on Common Ground: Speaking Up for Respect in the Workplace** (4 hours)

This program explores thorny workplace situations that involve disrespect. Participants learn a four-step approach to resolving differences and fostering a respectful and tolerant workplace: Make time to discuss the situation; Explore differences; Encourage respect; and Take responsibility.

#### **Personality Temperament Instrument Training** (4 hours)

In this program, participants complete an instrument that identifies four common personality types. Through individual and group exercises, participants explore the four personality types and examine ways the different types can communicate and interact effectively with each other in the workplace.

### *Videos Available from FJC Current Collection*

#### **Consciously Overcoming Unconscious Bias** (2014, 5512-V/14, 8 mins.)

This program shows how unconscious bias, micro-inequities, and micro-affirmations overlap in the workplace and helps participants to recognize their own biases and the micro-inequities that express them. The program shares helpful tips, like Listening, Including, Valuing, and Engaging, (or L-I-V-E) to improve participants' workplaces.

#### **Diversity 101: The Complete Series** (2016, 5560-V/16, 36 mins.)

This series, composed of eight short vignettes, teaches the core components of diversity, inclusion, and respect in the workplace. It covers issues such as unconscious/hidden bias, intolerance, crude jokes, and disrespectful comments, which can surface in any organization.

#### **Diversity: Respect at Work** (2013, 5297-V/13, 16 mins.)

This program helps employees understand, accept, and value differences. The program shows participants how to: realize that open-mindedness can benefit the bottom line; understand, identify, and manage biases; recognize that disrespect can happen even

without the offender knowing it; create a more inclusive workplace; adopt a “think before you speak” mindset; and resolve conflicts respectfully.

**[How To Be a Terrible Team Member](#)** (2015, 5507-V/15, 44 mins.)

Teamwork is defined as the combined actions of a group of people, especially when they are effective and efficient. Total harmony is not necessarily a defining trait of the most effective teams, as creative conflict about the work, when well managed and focused, has a decidedly positive effect on team efforts and outcomes. The trick is learning how to identify which traits and behaviors contribute to creative thinking, problem-solving, learning, and growth and which hinder those things. This program identifies nine damaging work styles that are barriers to effective teamwork.

**[Leadership Feedback: What employees want to tell you . . . but don't!](#)** (2014, 5457-V/14, 17 mins.)

This program is based on extensive interviews with actual employees who gave candid feedback about the leaders they worked for. Because the interviews were anonymous, employees were free to honestly discuss which leadership behaviors were motivating—or demotivating. Six key issues of leader–employee interaction emerged from this research and are illustrated in the video. For each issue, the video shows two scenarios—one with an ineffective leader, the other with an effective one.

**[Leading More with Less](#)** (2011, 5196-V/11, 17 mins.)

This program demonstrates six critical leadership skills that can inspire employees through difficult times. The video demonstrates both right and wrong leadership examples and the effect they have on employees.

**[Manager's Moments: How to Excel in Tricky Situations](#)** (2015, 5456-V/15, 34 mins.)

To keep teams motivated and running smoothly, managers need to recognize potentially troublesome employee situations and quickly take action. This program offers practical wisdom to busy professionals on everyday management challenges. The topics include: How to Curb Employee Gossip; How to Deal with Difficult Peers; How to Manage Upward; How to Manage Time Thieves; and How and When to Delegate.

**[Managing the Workplace Bully](#)** (2013, 5510-V/13, 19 mins.)

This video addresses the issue of abusive conduct at work, providing practical solutions that help managers put an end to bullying behavior in their subordinates—and also in themselves. Five realistic scenes in a range of workplaces show what to do when someone seeks help or there is repeated conflict among employees.

**[Ouch! Your Silence Hurts](#)** (2009, 5107-V/09, 10 mins.)

Many people say they want to speak up when they see others stereotyped, disrespected, or demeaned, but all too often they stand by silently because of discomfort or the fear of saying the wrong thing. This video motivates bystanders to use their voice to speak up for respect on behalf of someone else.

**Ready. Set. Change! Reacting Smarter. Adapting Faster. Engaging Together**

(2012, 5513-V/12, 29 mins.)

This program helps employees positively and productively navigate through change—big or small.

**The Respectful Communicator: The Part You Play** (2011, 5294-V/11, 15 mins.)

Effective communication is at the heart of organizational performance. In a diverse workplace, a number of things can undermine successful communication, including a perceived lack of respect or inclusion. This program shows how taking a few extra steps can keep misunderstandings to a minimum. The program includes how improved interpersonal communication can improve productivity and morale; provides practical learning on the sometimes abstract concepts of respect and inclusion; and illustrates how to communicate clearly (without demeaning, devaluing, or offending others)

**The Respectful Workplace: It Starts with You** (2011, 5295-V/11, 18 mins.)

This program explores respect in the workplace through four important skill points. Wrong-way scenes depict the negative impact of disrespect while right-way scenes inspire positive, respectful, inclusive behavior.

**What To Say When** (2012, 5387-V/12, 4–6 mins.)

Problems with workplace communication can lead to low productivity, high stress, and tension between coworkers. This four-DVD series includes thirty learning modules. Each module offers strategies that participants can use to better manage workplace relationship challenges.

*Videos Available from FJC Archives***Drop by Drop** (2008, 5102-V/08, 19 mins.)

This program demonstrates how small slights, subtle discriminations, and tiny injustices can add up to big problems in your workplace. Minor negative gestures are called “micro-inequities” and they occur in organizations every day. These small communications of disrespect, prejudice, and inequality aren’t overt, but they can be destructive. The video instructs how to show regard for all races, religions, cultures, and ages and how to be open to information about different cultures, customs, and perspectives.

**Generations and Work** (2010, 5458-V/10, 34 mins.)

This video addresses accepting people who are different and understanding how to interact with them in ways that increase satisfaction and productivity. It contains four interactive learning experiences: Working with Millennials; Engaging All the Generations; Succeeding with Younger Workers; and Connecting Across Differences. Using workplace and on-the-street interviews, vignettes, and expert commentaries, the program addresses such topics as, coaching, work processes, technology, feedback, change, productivity, and sales.

**Not Everyone Gets a Trophy** (2010, 5157-V/10, 29 mins.)

This video aims to equip managers with the knowledge and tools they need to effectively manage young, inexperienced employees. With humor and entertaining examples, the



program addresses the challenges of managing younger workers and defines what it means for managers, employees, and organizations when young workers join the team.

**[Ouch! That Stereotype Hurt](#)** (2007, 5034-V/07, 30 mins.)

Staying silent in the face of demeaning comments, stereotypes, or bias allows these attitudes and behaviors to thrive, undermining the ability to create an inclusive workplace where all employees are welcomed, treated with respect, and able to do their best work. This program teaches employees how to speak up.

## **APPENDIX 10**

**Letters from James C. Duff, Director of the Administrative Office, to  
Chairman Charles E. Grassley (Jan. 12, 2018; Jan. 22, 2018)**



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

JAMES C. DUFF  
Director

WASHINGTON, D.C. 20544

January 12, 2018

Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your letter of December 6, 2017, concerning allegations about the mechanisms for reporting fraud, waste, or abuse, and prohibited personnel practices at the Administrative Office of the United States Courts (AO). Judge Timothy Tymkovich, Chief Judge of the Tenth Circuit, and I also thank your staff, Mike Davis, Kasey O'Connor, and Steven Kenny, for meeting with us on November 17, 2017, prior to receiving your letter to discuss these and other matters, and again with them on December 12, 2017, along with Katherine Nikas, after I received your letter, to review the subjects of it. I also appreciate the additional time you allowed us over the holidays to prepare this response because of the volume of material we are providing. As we discussed with your staff, in addition to addressing your questions in this letter, we will submit in a separate letter a general discussion of the Judicial Branch's extensive and effective processes and safeguards that already provide, at significant taxpayer expense, the protections you propose in S. 2195, the Judicial Transparency and Ethics Enhancement Act of 2017.

At the outset, and as Judge Tymkovich and I raised with your staff in November, we appreciate that your interest in the Judiciary's practices has contributed to improvements we have made in our processes and procedures over the years, including in the past month since our meetings.

I. BACKGROUND OF OVERSIGHT OF JUDICIAL BRANCH PROCESSES

The Federal Judiciary puts very significant resources and effort into independent oversight and programs to prevent fraud, waste, or abuse of

government resources. The Judicial Branch has processes and procedures for individuals to raise claims of fraud, waste, or abuse; judicial misconduct; discrimination; harassment, or other wrongful conduct. Additionally, the Judicial Branch provides non-retaliation protections to its employees. In response to your staff's observations, as of December 20, 2017, the public website ([uscourts.gov](http://uscourts.gov)), and the Judiciary's internal webpages where fraud, waste, or abuse reporting is discussed have been updated. We also have published our policies on fraud, waste, or abuse reporting and fair employment practices on [uscourts.gov](http://uscourts.gov). We appreciate your observations and welcome any others.

## II. RESPONSES TO QUESTIONS

**1. Please provide a description of the current process for contractors and Pre-Act and Post-Act employees seeking to report waste, fraud, abuse, and prohibited personnel practices, including a description of current protections for employees who report; and copies of all policies, procedures, internal manuals or memoranda, and training guidance related to this process and protections. Please explain how conflicts of interest are accounted for.**

### Fraud, Waste, or Abuse

As the Director, I am responsible for the operations of the AO and its components, including the authority to investigate allegations of fraud, waste, or abuse. The policy (enclosure 1) provides for the investigation of allegations made by AO employees or contractors of fraud, waste, or abuse regarding AO staff and its activities. The Deputy Director of the AO provides initial oversight and resolution of AO allegations. As stated in the policy, I report the filing and action taken on fraud, waste, or abuse allegations made regarding the AO, courts, and federal public defender organizations (FPDO) to the Judicial Conference Committee on Audits and AO Accountability (AAOA Committee), thus allowing independent review of all such allegations reported to the AO. There are six federal judges from six different courts on the AAOA Committee who have no management role in the AO and therefore provide an independent oversight role.

The policy and our process do not distinguish between allegations made by AO employees, whether they are Pre- or Post-Act, or contractors. The status of an employee's employment rights has no bearing on fraud, waste, or abuse reporting or review. If any conflicts of interest arise, they are handled case by case. We have policy and mechanisms to delegate review responsibilities within the AO.

When investigating, the AO, pursuant to its policy, offers confidentiality to any complainant who reports fraud, waste, or abuse unless disclosure becomes unavoidable. If disclosure is unavoidable, the complainant would be notified prior to disclosure unless such notification would be contrary to law. Allegations can and have been reported anonymously. As described in our policy, we treat all allegations according to the same procedures regardless of source.

There is a page on the AO's intranet website informing any employee, or contractor working for the AO who has access to the Judiciary intranet, how to report allegations through an email address or online form. Allegations by an employee, contractor or the public can also be reported by using the email link found on the public [uscourts.gov](http://uscourts.gov) website. A copy of the webpages and the form used for reporting are in enclosure 2.

Annually, the Deputy Director of the AO sends a memorandum to employees reminding them of their responsibility to report fraud, waste, or abuse. The AO's Personnel Act also prohibits (whistleblower) retaliation against employees who report fraud, waste, or abuse.

#### Prohibited Personnel Practices

As reflected in the attached sections of the *AO Manual*, Volume 4, Chapter 3 (enclosure 3), individuals have several established, formal processes described through which to pursue their concerns. Where prohibited personnel practices include a discrimination allegation, employees may use the Fair Employment Practices Complaint Process (FEP-CP). The FEP-CP provides explicit, clear directions on how to report concerns and how to proceed once a claim is filed. In addition to providing sections of the *AO Manual* describing our process, I have attached a flow chart (enclosure 4) outlining the current process for filing a claim with the Fair Employment Practices (FEP) Office.

The FEP-CP allows for informal counseling, an opportunity to file a formal complaint, and an opportunity to request a hearing after an investigation. It is important to point out that the investigation is conducted by a trained neutral investigator from outside the AO and that the hearing officer, if the matter proceeds to a hearing, must be an independent, non-government attorney with specialized subject matter expertise and must also be a neutral party. Throughout the process, professionals are available in multiple AO offices if there are questions or concerns. No investigations are closed without thorough review and at any time in the process a claimant may be represented by counsel.

Although there are not different processes for Pre-Act and Post-Act employees seeking to report fraud, waste, or abuse, there are differences in the FEP appeal right procedures for Pre-Act employees. These differences are provided in the *AO Manual*, Volume 4, Chapter 3, § 330.60 (see enclosure 3).

### Training

The table below provides a list of recent and currently available trainings and guidance for AO employees seeking to report fraud, waste, or abuse, and prohibited personnel practices.

<b>Trainings and Guidance for Employees Seeking to Report Waste, Fraud, Abuse, and Prohibited Personnel Practices</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
In-Person; AO Staff	Fair Employment Practices Process Training	Prohibited Personnel Practices	This town hall focused on the Fair Employment Practices process, discrimination, harassment, and how to report violations.
In-Person; AO Staff	AO Harassment Training	Prohibited Personnel Practices	This training was provided to AO managers and covered sexual harassment in the workplace, the relevant guidelines, and responsibilities of AO managers.
Web-Based; AO Staff	Virtual Town Hall: Updated HR Volume of <i>AO Manual</i>	General Human Resources	The virtual town hall was held to address questions about the updated volume of the <i>AO Manual</i> . Updates to the HR volume included: prohibited personnel practices, merit principles, whistleblowing, and Fair Employment Practices procedures.
In-Person; AO Staff	Town Hall Question and Answer Session: <i>AO Manual</i> Fair Employment Practices Chapter	Fair Employment Practices	This town hall featured staff from the FEP Office and the Office of General Counsel to facilitate discussion and answer any questions on the draft Fair Employment Practices Chapter of the <i>AO Manual</i> .
Web-Based; AO Staff	Guidance on Sexual Harassment	Prohibited Personnel Practices	This training provides the applicable definitions, guidance, and employee responsibilities related to sexual harassment in the workplace.

<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
Web-Based; AO Staff and Contractors with Access to AO Web	Guidance on Fraud, Waste, and Abuse Reporting	Fraud, Waste, or Abuse	This guidance provides an outline of policies and procedures for reporting fraud, waste, or abuse and the AO's processes for responding to complaints, including prohibition against retaliation.
Web-Based; AO Staff	Annual Reporting Requirements	Fraud, Waste, or Abuse	Annual memorandum from the Deputy Director to all employees reminding them of their responsibility to report fraud, waste, or abuse with links to helpful instructions.

**2. What internal safeguards exist at the local, regional, and national levels to deter waste, fraud, and abuse of judicial resources? Please explain and provide all relevant policies or procedures governing the administration of these safeguards.**

The Judicial Branch has a wide range of policies and procedures at the local, regional, and national levels that deter fraud, waste, or abuse of judicial resources. They include broad, organization-wide strategies, national policies, and local procedures. These safeguards evolve and improve based on experience and ongoing assessment of risks. Informed by the results of past investigations, audits, program reviews, and industry and government best practices, we have made improvements to reduce the risk for fraud, waste, or abuse.

The core safeguards are listed below. The first section of the chart discusses specific policies and procedures. The second section discusses other, more general policies and procedures that also contribute to deterring fraud, waste, or abuse.

Reporting and Follow-up on Allegations and Other General Safeguards

<b>Safeguard</b>	<b>Description</b>
<b>Core Safeguards</b>	
Monitoring of Policies, Procedures, and Internal Controls	See responses to question #3 for details of Financial Audit Programs, and question #4 for details of reporting to AAOA Committee.
Codes of Conduct	The respective codes of conduct for judges, court staff, FPDO, and the AO speak to the integrity of the Judiciary, procurement integrity, and the use of government property among a number of other matters that emphasize accountability and good stewardship of Judiciary resources.
Fraud, Waste, or Abuse Policies	The Judiciary has policies for the courts, the federal public defenders, and the AO that address how to report allegations of fraud, waste, or abuse (enclosure 5).
Fraud, Waste, or Abuse Reporting Intranet Pages	The Judiciary intranet pages provide information regarding how to report fraud, waste, or abuse; points of contact for such reporting; and a form to submit concerns regarding fraud, waste, or abuse including an option to submit anonymously. Based on the concerns your staff raised, we have updated these pages to more clearly explain the reporting and investigative procedures.
Fraud, Waste, or Abuse Reporting Reminders	Annually, the chair of the AAOA Committee sends a memorandum to chief judges and all court unit executives asking them to remind their staff of the means to report fraud, waste, or abuse (enclosure 6). The Deputy Director of the AO annually sends a memorandum to all AO employees reminding them of their obligation to report fraud, waste, or abuse (enclosure 7).
Internal Control Policy	The Judiciary's internal control program requires that the AO and each unit have financial and administrative procedures. The executive is required to keep the procedures current and conduct a comprehensive review annually. The procedures are also reviewed by auditors during the organization's cyclical audit.
Internal Control Self Assessments	The Judiciary's internal control program requires an annual self-assessment of the organization's internal controls. The auditors review the completed assessments during the organization's cyclical audit.
Program Reviews	AO staff conduct voluntary and mandatory reviews of Judiciary programs (e.g., clerk's office, jury administration, probation office, human resources administration) and such reports serve to improve operations in the specific office, and may also identify best practices that are shared broadly. These are reported to the AAOA Committee and noted in question #4.



<b>Safeguard</b>	<b>Description</b>
Internal Control Tools	The AO has developed guidance systems and best practices to help executives and financial managers identify internal control risks.
Reporting & Follow-up on Allegations	As described in the response to question #4, the AO provides an extensive semi-annual report to the judges on the AAOA Committee, which has an independent role in monitoring and reviewing reports of fraud, waste, or abuse, as well as financial audits and special investigations. Their oversight and the judges' expectation that management at the AO and the courts will complete appropriate investigative activities is a deterrent. The AO also provides investigation reports and other information regarding the allegations to the Office of Audit so that the relevant internal controls and activities can be reviewed during a future audit to ensure that weaknesses in internal controls have been addressed.
Strategic Planning	The Judiciary's Strategic Plan emphasizes standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; and effective and efficient use of resources. The AO's Strategic Direction emphasizes strengthening AO accountability through improvements to internal control, audit, and risk management initiatives.
<b>General Safeguards</b>	
Financial Reporting Requirements	Financial reporting requirements are in place and designed to ensure accountability for funds, including managing, expending, and receipting funds. Monthly, quarterly, and annual reports are required to be filed by court units and FPDOs; reports are reviewed, and financial statements are audited in accordance with Judiciary policy.
Financial System Controls	Financial system controls are in place to ensure that only authorized persons can process transactions, which are safeguards that prevent unauthorized personnel from executing transactions outside their approvals. These safeguards also assist executives in ensuring the appropriate separations of duties.
Formal Delegations of Authority	Delegations are designed to ensure that persons with the appropriate training and knowledge carry out certain responsibilities. Judiciary delegations are defined for every administrative area, including certifying officers, contracting officers, and personnel actions.
Local Budget and Financial Management Policies and Procedures	The AO, courts, and FPDOs are required to establish local budget and financial management policies and procedures to ensure that funds are expended in accordance with local governance rules.

<b>Safeguard</b>	<b>Description</b>
Local Fraud, Waste, or Abuse Policies	Courts have implemented local fraud, waste, or abuse policies and procedures based on their local governance processes and procedures. The AO has posted examples of these policies and procedures on the Judiciary's intranet page for courts to reference.
Training	Training is provided regarding some of the specific safeguards above, some of which is mandatory for certain authorities such as certifying officer, contracting officer, etc. For a more extensive discussion of training, see response to question #5.

**3. Please provide a description of the financial audit processes – internal and external – for individual courts and the AOUSC, including the frequency of audits and details of the processes utilized.**

Judiciary Audit Program

The Director of the AO has the statutory responsibility under 28 U.S.C. § 604(a)(8) to disburse appropriations and other funds for the maintenance and operations of Judiciary organizations, as well as the responsibility under 28 U.S.C. § 604(a)(11) to audit accounts and vouchers of the courts. The Director of the AO has assigned the responsibility for administering the Judiciary's audit program to the AO's Office of Audit. This Office of Audit, along with the Office of Management, Planning and Assessment, was once called the "Office of Inspector General." The office titles have changed over time, but the important functions remain.

The Office of Audit is organized as an independent internal audit office as defined under the Government Accountability Office's Generally Accepted Government Auditing Standards (GAGAS). The AO's Office of Audit conducts financial-related performance audits and contracts with independent external audit firms to perform financial statement audits and other attest engagements that require a level of independence, as defined in professional auditing standards, which must be provided by independent certified public accounting (CPA) firms. Audits are conducted in accordance with GAGAS and Generally Accepted Auditing Standards.

The Judiciary is not only responsible for appropriated funds, but also for filing fee receipts and funds held in trust for retirees, crime victims, and parties involved in disputes. The Judiciary also makes statutory payments to bankruptcy trustees and the recipients of Criminal Justice Act grants. Judiciary responsibilities for these funds include the proper handling of transactions

involving these funds as well as the safeguarding of these assets while they are held.

The Judiciary's audit programs reflect its wide-ranging responsibilities for the handling of appropriated and non-appropriated funds at the national and local levels. The Judiciary produces a series of financial reports and statements reflecting these responsibilities, and it audits them on a regular basis. In many cases, expenditure transactions will be examined at multiple levels. For example, an expenditure may be reviewed at the national level in an appropriations audit and at the local level in a cyclical court audit, where the actual disbursement was initiated.

### **1. Cyclical Financial Audits**

Independent CPA firms conduct cyclical financial audits of court units and FPDOs with contractual oversight provided by the Office of Audit. The audit cycle is four years for smaller and lower-risk units, and two and one-half years for higher-risk units, including large courts. Audit reports include an auditor's opinion on financial statements and a report on internal controls over financial reporting and compliance with Judiciary policies and procedures for all offices. The audits also review certain administrative functions, including procurement, property management, financial systems access, and other areas.

### **2. Change-of-Court Unit Executive and Other Special Request Audits**

Staff from the AO's Office of Audit conduct financial-related performance audits to document the transfer of accountability when a court has a change in its court unit executive, or when there is an executive change such as a bankruptcy administrator. Courts may also request audits when there is a change in the financial administrator, to follow up on prior audit issues, or to examine a particular area or process where a court has identified potential risk.

### **3. National Financial Statement Audits**

The Office of Audit oversees the work of external auditors as they conduct financial statement audits, performance audits and other attest engagements of certain Judiciary appropriations, AO financial systems, and national programs.

Judiciary Appropriations. The Office of Audit contracts with an independent CPA firm to conduct financial audits for Judiciary

appropriation accounts, which fund the operations of the U.S. courts, defender programs, and the AO. The primary objectives of the audits are to: 1) determine whether the financial statements related to these appropriation accounts are presented fairly in all material aspects; 2) assess internal controls over financial reporting; and 3) assess compliance with significant and applicable laws and regulations. To assess internal controls, the CPA firm examines key financial reporting internal control policies and processes at the AO and at the court unit or federal public defender level, and reviews controls over information technology relevant to the preparation and presentation of financial statements. Appropriations audits are conducted on a two-year cycle.

Retirement Funds. The Office of Audit contracts with independent CPA firms to conduct annual financial statement audits of the Judiciary's four retirement funds: the Judicial Survivors' Annuities System, which provides death benefit coverage for survivors of participating justices and judges; the Judicial Officers' Retirement Fund, which provides retirement and disability benefits for participating federal bankruptcy and magistrate judges; the Court of Federal Claims Judges' Retirement System, which provides retirement benefits for participating United States Court of Federal Claims judges; and the Judicial Retirement System, which provides retirement benefits to participating Article III judges retiring under 28 U.S.C. §§ 371(a) and 372(a), and judges of the territories.

Registry Investments. Courts are required to deposit and invest registry funds safely until the resolution of a case, at which time the courts return the deposits, plus interest, to the appropriate parties. The Court Registry Investment System (CRIS) was established by a district court in 1988 to relieve individual courts from the risks and administrative burdens associated with investment of registry funds locally. This voluntary program was transferred to the AO in 2011 and the AO now manages registry funds for 166 district and bankruptcy courts. Financial statements for CRIS are audited annually by an independent CPA firm under contract with the Office of Audit.

Public Access to Court Electronic Records (PACER). The Office of Audit contracts with an independent CPA firm to perform annual financial audits of the PACER program receipts. PACER is an electronic public access service that allows registered users to obtain case and docket information online from federal appellate, district, and bankruptcy courts and the PACER Case Locator. As mandated by Congress, the Judiciary's

electronic public access program is funded entirely through user fees set by the Judicial Conference.

Central Violations Bureau (CVB). The Office of Audit contracts with an independent CPA firm to perform annual financial audits of CVB receipts. The CVB is a national center responsible for processing violation notices (tickets) issued and payments received for most petty offenses and some misdemeanor cases charged on a federal violation notice.

#### **4. Audit of AO Administrative Functions**

Contract Audits. The Office of Audit contracts with independent CPA firms to conduct performance audits of the AO's contract administration and reporting functions. The primary objectives of the reviews are to determine whether (1) operational safeguards and internal controls over the contracting process were adequate to ensure compliance with procurement and programmatic requirements of the contract, and (2) costs charged to the contract were allowable and supported. A selection of contracts are audited in most years.

Other Administrative Functions. Office of Audit staff or independent CPA firms may conduct audits of other AO administrative functions, such as procurement or property management.

#### **5. Audits of Community Defender Organization Grantees**

An independent CPA firm under contract with the Office of Audit conducts financial audits of Criminal Justice Act (CJA) grants to the 17 community defender organizations (CDOs). Each CDO is audited annually. The objectives of the audits are to:

- evaluate internal accounting controls;
- evaluate grant activity for compliance with grant agreements, Judiciary policy, and other relevant policies;
- assure that personnel are authorized and paid at authorized levels;
- review property inventory and procurements;
- review reporting to the AO's Defender Services Office;
- review budgetary restrictions; and
- review the return of unused funds.

## **6. Audits of Chapter 7 Bankruptcy Trustees**

The Office of Audit also contracts with an independent CPA firm to conduct performance audits of Chapter 7 bankruptcy trustees. The audits are performed with oversight provided by the Office of Audit in support of the bankruptcy administrators located only in the states of North Carolina and Alabama, which are under the Judicial Branch. This audit program began in fiscal year 1994 and is similar to the Department of Justice's program for audits of Chapter 7 trustees in the other 48 states which are under the United States Trustee Program. The audits are conducted on a three-year cycle. The primary objectives are to evaluate whether the trustees have a system of internal controls to protect estate funds and assets, adhere to specific case administration and financial compliance requirements, and present financial information in accordance with Judicial Conference policy.

## **7. Audits of Chapter 13 Bankruptcy Trustees**

Financial audits and agreed-upon procedures (AUP) engagements of Chapter 13 bankruptcy trustees are conducted by another independent CPA firm under contract with the Office of Audit in support of the bankruptcy administrators in North Carolina and Alabama. The audits evaluate whether the trustee's annual report fairly presents the position of the trusteeship during the audit period. Chapter 13 bankruptcy trustees are audited annually. The audit reports include the auditor's opinion on the trustee's annual report, and a report on internal controls and compliance with relevant laws, regulations, and Judiciary policy. This centrally managed audit process is similar to the Department of Justice's program for audits of Chapter 13 trustees in the other 48 states.

Chapter 13 bankruptcy trustees also undergo AUP engagements each year. The AUP engagements are an other attest engagement provided by independent public accounting firms, and a separate report is issued for these engagements. AUPs report on various prescribed procedures as developed by management to assess the Chapter 13 trustee's compliance with relevant program policy and requirements. AUPs have a lesser scope than an audit, because they provide no assurance on the processes or items under review.

## **8. Debtor Audit Program**

The Office of Audit contracts with an independent CPA firm to conduct debtor audits of Chapter 7 and Chapter 13 bankruptcy filings by individuals in the states of North Carolina and Alabama. Some filings selected for audit are randomly selected from filings, while others are selected from cases with debtors who have high incomes or high expenses, compared to the statistical norm in the district. A filing may also be targeted for audit by a bankruptcy administrator if it exhibits characteristics that may be associated with fraud or undisclosed assets.

## **9. Previous Audits or Attestation Engagement Follow-Up Activities**

As outlined in the GAGAS standards, auditors should evaluate and determine whether audited entities have taken appropriate corrective actions to address prior findings. The Office of Audit tracks and follows up on implementing corrective actions in court units, defender organizations, and the AO to ensure that audit findings are addressed. Findings identified in final audit reports are tracked and listed as “open” until documentation is submitted that describes actions implemented to address the issue. The tracking system also includes the audit recommendations associated with each finding. One finding may have multiple recommendations. The Office of Audit marks the item as “closed” if the implemented actions as described address all of the related recommendations and would resolve the condition.

## **4. Please provide all financial audits, program reviews, and special investigations reported by the AOUSC to the Judicial Conference Committee on Audits and Administrative Office Accountability from FY 2013 – FY 2017.**

The AAOA Committee meets twice per year to oversee and review the AO’s audit, review, and investigative assistance activities. At each meeting, the AO reports on all audits, program reviews, and investigative activities for the period ending March 31 (for the Committee’s June meetings) or September 30 (for the Committee’s January meetings). Attached are ten summaries of the reports that have been provided to the AAOA Committee for its January 2013 meeting through its June 2017 meeting (enclosure 8).

**5. Please provide a description of all in-person or web-based training for chief judges and unit executives offered by the Federal Judicial Center (FJC) and the AOUSC on their management and oversight responsibilities.**

The AO and the FJC regularly provide a broad range of training and educational programs to Federal Judiciary staff on judicial administration, court administration, and organizational leadership and management topics.

The AO delivers online and in-person training programs on topics pertaining to the administrative responsibilities of judges, court unit executives (CUEs), and other Judiciary staff. Staff at the AO also appear at forums of private, affiliated organizations such as the Federal Court Clerks Association and the National Conference of Bankruptcy Clerks to discuss court administration topics. Because the AO develops and administers new procedures pertaining to court administration, it is primarily responsible for training in the management and oversight responsibilities requested in your letter. Typical training topics include budget management, internal controls, information technology and security, procurement, and human resources management.

The FJC was established in 1967 with the mandate to provide orientation and continuing education programs on judicial administration, specialized areas of the law, and organizational leadership and management skills. The FJC regularly provides online and in-person orientation and continuing education programs to judges and employees of the federal courts. FJC programs cover certain judicial administration topics (e.g., criminal litigation and procedure, complex litigation, case management, alternative dispute resolution, and juries), court management and leadership topics (e.g., court administration, change leadership, and organizational culture), and specialized areas of the law (e.g., national security, law and technology, and the environment). The FJC also coordinates educational programs for federal public defenders and probation and pretrial services officers.

The following table is a list of in-person and web-based trainings offered by the AO and the FJC in 2016 and 2017 for chief judges and court unit executives in their management and oversight responsibilities. As described above, “management” training is offered in many forms, but in responding to this question, we focused on training that emphasized “management and oversight” in administrative responsibilities and accountability.



<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
In-Person; Court Unit Executive	Court Unit Executives and Chief Deputies Training	General Court Management	This four-day training convened CUEs and chief deputies for a biennial conference. Topics included records management, court reporting, public access to court electronic records, audit issues and top audit findings, maintaining a robust internal control environment, travel policy, procurement and contract management, property management, budget execution, human resources and employee relations, work measurement, and information technology topics.
In-Person; Court Unit Executive	New Court Unit Executive and Chief Deputy Orientation	General Court Management	This orientation is held annually to familiarize new CUEs and chief deputies with the AO and the FJC, and the myriad of services provided. Participants have the opportunity to meet directly with AO staff and attend topic-specific breakout sessions with AO subject matter experts. Topics included finance and budget, human resources, internal control and audit, and the court review program.

<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
In- Person; Court Unit Executive	Internal Control Self- Assessment Tool Training	Internal Controls	The Internal Control Evaluation (ICE) System is a software application that helps court unit executives and federal public defenders evaluate compliance with specific internal control requirements. In-person training on this system takes 1.5 days and is designed to introduce the system to new staff and instruct them on how the tool can be used to support a sound internal control environment.
In- Person; Court Unit Executive	Financial Forum	Budget Management, Internal Controls	The Financial Forum is a recurring event, hosted by the AO, that provides training to financial personnel, unit executives, and staff in the areas of financial management, accounting and software programs used within the Judiciary, and fosters working relationships between AO and court staff. Recent topics have included: applying internal controls in a court environment; audit basics and lessons learned; and protecting your customers' credit card information.

<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
In-Person; Court Unit Executive	District and Bankruptcy Operational Practices Forum	Internal Controls	AO staff delivered a presentation at this forum on internal controls, the self-assessment tool developed by the AO, and the roles of judges and unit executives in the maintaining effective internal controls.
In-Person; Court Unit Executive	New Federal Defender and Administrative Officer Orientation	General Court Management; Internal Controls	This multi-day training includes management, human resources, budget and accounting, audit issues and top audit findings, internal controls, travel, procurement and contract management, property management, human resources and employee relations, work measurement, code of conduct, and information technology topics. It includes meetings with each offices assigned budget analyst and other AO staff.
In-Person; Court Unit Executive	Resources, Budget, and Finance Educational Workshop	Internal Controls	AO staff delivered a presentation on audit processes, internal control policy, and internal control tools to a joint conference of the Federal Court Clerks Association and the National Conference of Bankruptcy Clerks in Washington DC.

<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
In-Person; Court Unit Executive	Federal Defender Conference	General Court Management; Internal Controls	The annual three-day federal defender conference includes sessions on management and internal controls. Previous agendas have included sessions on audit compliance, employee disputes resolution, developing FPDO internal policy manuals, Community Defender Organization (CDO) employment law, fair employment practices, and managing FPDO budgets.
In-Person; Court Unit Executive	Human Resource Leadership-Employee Relations	Prohibited Personnel Practices	This in-person course uses workplace scenarios to reinforce concepts and principles related to managing employee relations and human resources policies and best practices.
Web-based; Court Unit Executive	Appropriations Law for US Courts	Procurement	This course introduces the basic principles of appropriations law and Judiciary policy for spending appropriated funds.
Web-based; Court Unit Executive	Judiciary Executive Procurement Oversight Seminar	Procurement	This course provides an overview of procurement in the Judiciary. Topics include key procurement policies, procedures, guidance, tools, and minimum internal control requirements.

<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
Web-based; Court Unit Executive	Internal Control Self- Assessment Tool Training	Internal Controls	The ICE System is a software application that helps court unit executives and FPDOs evaluate compliance with specific internal control requirements. In addition to in-person training on this system, there are four electronic learning modules that guide the participant through exercises using key system functionality and measures user comprehension after each module.
Web-Based; Court Unit Executive	Court Registry Investment System	Financial Management	The CRIS is a national investment program managed by the AO for Registry Funds. CRIS is designed to manage risks to the clerks of court charged with investing and protecting the funds. The AO makes available resources and tutorials on managing these funds.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
Web-based; Court Unit Executive	Managing Employee Dispute Resolution Issues in the Judiciary	Prohibited Personnel Practices	Employment Dispute Resolution (EDR) coordinators perform an important role in the courts. They serve as the conduit for reporting, processing, and conducting investigations for some types of employee disputes. Unlike standard human resource procedures, the EDR coordinator handles claims where bias, retaliation, harassment, and other fair employment practices become involved. This course addresses the nine laws covered by the EDR Plan, provides resources for an EDR coordinator, including a checklist of duties, and provides real-life case scenarios with follow-up question and answers.

<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
Web- Based; Court Staff	Individualized Guidance on Prohibited Personnel Practices	Prohibited Personnel Practices	The FEP Office prepares individualized guidance to courts on a weekly basis on topics related to equal employment opportunity, EDR claim processing, implicit bias, court demographics, and related topics. This was accomplished in direct court –to-FEP Office consultations with legal staff; judicial orientation sessions for new chief judges and judicial nominees; and in-person and videoconference training sessions for court personnel.

<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
In- Person; Chief Judge	New Chief Judge Orientation	General Court Management	The AO sponsors a 1.5 day New Chief Judge Orientation Program that addresses the administrative, management, and governance responsibilities of a chief judge and introduces the chief judge to the AO and FJC staff and resources available to assist them. During the program, the FEP Office reviews the court's employee dispute resolution plan and the Office of Audit reviews the court's last audit report. Staff from the Budget, Accounting, and Procurement Office, and the Human Resources Office also provide briefings. Court unit executives are invited to attend the program with their chief judge.
In- Person; Chief Judge	Chief Judge Education Program	General Court Management	The FJC's chief judge education programs emphasize the leadership and management roles of chief judges, as well as topics that relate to specific administrative responsibilities, including internal controls.

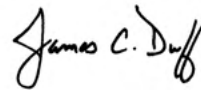


<b>Core Management and Oversight Trainings</b>			
<b>Format; Target Audience</b>	<b>Title</b>	<b>Topic(s)</b>	<b>Description</b>
In-Person; Chief Judge	Conference for Chief Judges of the U.S. District Courts	General Court Management	This two-day FJC conference examined the leadership and management roles of chief district judges. The conference also gave the chief judges the opportunity to learn about best practices from their peers and distinguished speakers. The conference agenda was developed in collaboration with a planning committee of current and former chief judges.
In-Person; Chief Judge	Conference for Chief Judges of the U.S. Bankruptcy Courts	General Court Management	The FJC held this two-day program for chief judges of bankruptcy courts to equip bankruptcy judges to best lead their courts now and in the future through competency in key management areas.
In-Person; Chief Judge	Leadership Seminar for New Chief Judges	Ethics; General Court Management	This FJC program is a four-day leadership seminar held biannually for chief judges who have held that position for less than two years. It covers leadership and management topics, including court leadership, strategic planning, and organizational culture.

Core Management and Oversight Trainings			
Format; Target Audience	Title	Topic(s)	Description
In- Person; Judge	New Judge Nominee Orientation	Ethics, General Court Management, Prohibited Personnel Practices	The AO sponsors a one day Article III Judge Nominee Orientation Program that addresses the administrative, management, and governance responsibilities of a judge and introduces the judge to the AO and FJC staff and resources available to assist them. During the program, the FEP Office reviews the court's employee dispute resolution plan.

Thank you for the opportunity to set forth our oversight processes and procedures both at the AO and throughout the Judicial Branch as a whole to expose and prevent fraud, waste, or abuse and prohibited personnel practices. We will be pleased to meet with you and your staff to answer further questions or respond to suggestions for improvements you may have as we have done in the past.

Sincerely,



James C. Duff  
Director

Enclosures

cc: Honorable Dianne Feinstein  
Honorable John G. Roberts, Jr.  
Honorable Timothy M. Tymkovich



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

JAMES C. DUFF  
Director

WASHINGTON, D.C. 20544

January 22, 2018

Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Grassley:

During productive meetings Chief Judge Timothy Tymkovich and I had with your staff in November and December, we were encouraged to write to you to address generally the Judicial Branch's opposition both to S. 2195, the Judicial Transparency and Ethics Enhancement Act of 2017 (IG bill), which was introduced on December 6, 2017, and to previous whistleblower proposals that would allow aggrieved employees to file lawsuits directly into federal district courts to address retaliation.

At the outset, I want to thank you for your and the Judiciary Committee's attention to the management of the Judicial Branch. Your observations and questions over the years have contributed to improvements we have made within the Judicial Branch. For example, and as described in more detail below, after meetings with your staff in 2015, the Judicial Branch ensured that all 94 districts and all 13 of its circuits now include whistleblower protection in their Employment Dispute Resolution (EDR) Plans that prohibit any retaliatory action against employees who report violations of laws or regulations, waste, or gross mismanagement. These improvements, along with existing practices and procedures, are among the many reasons – in addition to our Constitutional concerns – why we believe an Inspector General (IG) over the Judicial Branch and yet additional whistleblower litigation options are not only unnecessary, but would themselves constitute an unwarranted and unjustifiable expense of public funds.

As set forth in detail in my separate letter to you of January 12, 2018, the Judicial Branch devotes tremendous resources and effort each year to provide for external, independent auditing of its finances and to provide mechanisms for exposing fraud, waste, or abuse. Given that the extensive internal controls are already in place in the Judicial Branch, any other approach would not improve oversight and would only create

substantial additional public expense. In short, we have the same goals as you do and we already have in place effective and cost efficient methods of achieving those goals.

I. THE ADMINISTRATIVE OFFICE PERFORMS CORE FUNCTIONS OF AN INSPECTOR GENERAL WITH INDEPENDENT OVERSIGHT.

Some historical perspective of financial oversight mechanisms within the Judicial Branch may be helpful. Prior to the Administrative Office's (AO) creation, the Department of Justice handled administrative matters and legislative issues before Congress on behalf of the Judicial Branch. As the federal Judiciary grew, the inherent conflicts of interests between the branches in administering the courts became more evident and problematic. When Congress created the AO in 1939, it provided the framework for independent management oversight of the Judicial Branch. Since the creation of the AO, the administrative management and legislative interface for the Judicial Branch has been handled within the Judicial Branch, in coordination with the Judicial Conference of the United States and its committees of judges. In December 1984, Chief Justice Warren E. Burger and AO Director William E. Foley designated what had been the "Office of Management Review" in the AO as the "Office of Inspector General." In October 1985, the office was again renamed to the Office of Audit and Review. The oversight functions of that office have largely remained in place ever since and are now performed by the AO's Office of Audit, Office of the Deputy Director and other offices within the AO.

The Director of the AO has the statutory responsibility under 28 U.S.C. § 604(a)(8) to disburse appropriations and other funds for the maintenance and operations of Judiciary organizations, as well as the responsibility under 28 U.S.C. § 604(a)(11) to audit accounts and vouchers of the courts. As Director of the AO, I have assigned the responsibility for administering the Judiciary's audit program to the AO's Office of Audit. Additionally, the Audits and Administrative Office Accountability (AAOA) Committee of the Judicial Conference of the United States provides independent oversight of the AO's Office of Audit and the Judiciary's auditing.

Specifically, the Office of Audit is organized as an independent internal audit office as defined under the Government Accountability Office's Generally Accepted Government Auditing Standards (GAGAS). The AO's Office of Audit conducts financial-related performance audits and contracts with independent external audit firms to perform financial statement audits and other attest engagements that require a level of independence, as defined in professional auditing standards, which must be provided by independent certified public accounting (CPA) firms. Audits are conducted in accordance with GAGAS and Generally Accepted Auditing Standards.

The Judiciary's audit programs reflect its wide-ranging responsibilities for the handling of appropriated and non-appropriated funds at the national and local levels. The Judiciary produces a series of financial reports and statements reflecting these responsibilities, and it audits them on a regular basis. In many cases, expenditure transactions will be examined at multiple levels. For example, an expenditure may be reviewed at the national level in an appropriations audit and at the local level in a cyclical court audit where the actual disbursement was initiated.

My letter of January 12, 2018, provides not only details of specific types of audits performed, but also details of our program reviews, special investigations, fraud, waste, or abuse procedures and our fair employment practices, procedures and protections. As also stated in that letter, after conversations with your staff, we have made improvements in publicizing those procedures on our website, at [uscourts.gov](http://uscourts.gov). There is no need to create another IG over the already existing functions performed at the AO with independent outside auditors and, as explained below, by the Judicial Conference committees.

## II. THE JUDICIARY HAS IMPLEMENTED WIDESPREAD WHISTLEBLOWER PROTECTION FOR ITS EMPLOYEES.

In 2012, the Judicial Conference of the United States adopted changes to its Model Employment Dispute Resolution Plan to include specific protections against whistleblower retaliation. Every judicial district and judicial circuit has now adopted whistleblower protections, and similar whistleblower protections are also in place for employees of the AO and Federal Judicial Center (FJC). These provisions allow for employees who allege whistleblower retaliation to obtain review and employment remedies (such as reinstatement and back pay) through an administrative process within the Judicial Branch, generally culminating in review by the chief judge of the court in which the retaliation is alleged to have occurred, with review of that ruling by the Circuit Judicial Council. These protections are parallel to those provided to Executive Branch employees, whose sole remedy is also administrative (through the Merit Systems Protection Board (MSPB) and then the appellate courts). Thus, court employees who believe they have been retaliated against for whistleblowing may seek redress under the EDR Plans through a process that entitles court employees to a hearing before an Article III judicial officer.

In addition to providing a forum for relief for employees alleging retaliatory action, the establishment of this formal process also allows us to better assess the scale of perceived whistleblower retaliation in our branch. As we expected, that scale is small: since the model whistleblower protection plan was promulgated in 2013, only two whistleblower complaints have been asserted under EDR and in neither case was there a finding that retaliatory action was taken against a whistleblower.

Therefore, we are concerned that the IG bill contains a provision which would create a private civil cause of action for Judicial Branch personnel who assert that they suffered employment retaliation as a result of having been a “whistleblower” (whistleblower litigation option)<sup>1</sup>. This proposal would be unprecedented. It is not consistent with the treatment of whistleblowers in either of the other branches of government, and it may disrupt Judicial Branch operations. A separate, simultaneous path of litigation could lead to conflicting, wasteful, and duplicative proceedings.

A. THE PROPOSAL IS UNNECESSARY: THERE ARE EXISTING EDR WHISTLEBLOWER PROTECTIONS.

When you first introduced this provision years ago, many court employees lacked whistleblower protection equivalent to that provided in the Executive Branch through the Merit Systems Protection Board. A statutory whistleblower provision is now duplicative, and thus unnecessary, because Judicial Branch employees already have whistleblower protection with all of the due process and procedural protections available in a civil action, including the right to have their claim heard by an Article III judicial officer. Substantively, the Judicial Branch modeled its EDR whistleblower protection provision directly on the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8) (WPA) covering Executive Branch employees.<sup>2</sup> The EDR provision prohibits retaliation against

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<sup>1</sup> The proposed language in a succession of prior legislation, reads:

Whistleblower protection. –

(1) IN GENERAL. –

No officer, employee, agent, contractor, or subcontractor of the judicial branch may discharge, demote, threaten, suspend, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any possible violation of Federal law or regulation, or misconduct, by a judge, justice, or any other employee in the judicial branch, which may assist in the investigation of the possible violation or misconduct.

(2) CIVIL ACTION. –

An employee injured by a violation of paragraph (1) may seek appropriate relief in a civil action.

Similar language is proposed in S. 2195, the Judicial Transparency and Ethics Enhancement Act and its iterations in prior Congresses.

<sup>2</sup> The Judicial branch EDR provision reads:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or threaten to take an adverse employment action with respect an employee (excluding applicants for employment) because of any disclosure of information to (A) the appropriate federal law enforcement authority, or (B) a supervisory or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts, by the latter employee, which that employee reasonably and in good faith believes evidences a violation of any law, rule or regulation, or other conduct that constitutes gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety, provided that such disclosure of information (1) is not specifically prohibited by law, (2) does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in Guide to Judiciary Policy, Vol. 20, Ch. 8), and (3) does not reveal information that would endanger the security of any federal judicial officer.

an employee who reports violations of law, gross mismanagement or waste of funds, or health and safety violations. It does require that the employee appropriately report the misconduct to an appropriate authority: law enforcement, the Administrative Office, a judicial officer, or a supervisor. The EDR provision does not protect an employee who wrongfully discloses judicial deliberations, case-sensitive information, or sealed material. This is a crucial omission in the proposed whistleblower litigation option.

Procedurally, the EDR claims process is modeled directly on the Congressional Accountability Act. An aggrieved employee is entitled to conduct discovery, to have a transcribed hearing before an Article III judicial officer, and to seek appellate review by the Article III judicial officers of the Circuit's Judicial Council. Employees may seek to disqualify the presiding judicial officer if they have any concerns about a potential conflict of interest. To ensure impartiality and that potential misconduct is investigated, any EDR allegation against a judicial officer must be handled by the circuit Judicial Council. Providing a statutory right to bring a civil action simply replicates these rights and protections already afforded Judicial Branch employees – without any obvious benefit to either party.

Our objections to the whistleblower litigation option are focused on this duplication as well as the need to protect the independence of the Judicial Branch. The language in the provision covering Judicial Branch employees fails to provide the Judicial Branch with the following protections necessary to its essential functions (though these same protections are afforded to the Executive Branch in the WPA).

**B. THE PROPOSAL FAILS TO REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES.**

The whistleblower litigation option fails to require Judicial Branch employees first to exhaust their EDR administrative remedies, though all federal courts have EDR whistleblower protection and claim procedures. The Judicial Branch is a co-equal branch of government and is entitled to mutual recognition and congressional respect of its internal administration and employment procedures. The Executive Branch has been afforded such respect: In contrast to the whistleblower litigation option, the WPA covering the Executive Branch requires employees to exhaust administrative procedures by first bringing whistleblowing claims to the Office of Special Counsel. 5 U.S.C. § 1214(a)(3). Principles of comity require that the Judicial Branch be entitled to the same respect.

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C. THE PROPOSAL FAILS TO REQUIRE GOOD FAITH OR REASONABLE BELIEF.

The whistleblower litigation option lacks any requirement that the employee act in good faith or possess a reasonable belief they are reporting illegality or misconduct. The WPA requires that the whistleblower “reasonably believes” his or her disclosure evidences a violation of law or misconduct. 5 U.S.C. § 2302(b)(8)(A). Indeed, we are aware of no federal whistleblower protection provision that does not include a requirement that the employee have a good faith or reasonable belief they are disclosing a violation of law or misconduct. Yet the whistleblower litigation option for the Judicial Branch contains no similar protection for the Judicial Branch.

In sum, we oppose the proposed statutory whistleblower litigation option because it is unnecessarily superfluous to the existing Judicial Branch EDR whistleblower protection, it fails to require exhaustion of administration remedies, and it does not require the employee to have any good faith or reasonable belief the disclosure evidences wrong-doing.

III. CIRCUIT COUNCILS AND JUDICIAL CONFERENCE COMMITTEES CAREFULLY ADMINISTER LEGAL PROCESS WITH STATUTORY GUIDELINES FOR ADDRESSING JUDGES’ MISCONDUCT.

With regard to the oversight of judicial conduct matters, the Judicial Conference’s Judicial Conduct and Disability Committee operates under a statutory structure created in the Judicial Conduct and Disability Act of 1980. The structure functions efficiently and effectively as witnessed in recent incidents involving allegations of judicial misconduct. The structure provides for an investigatory process that protects privacy interests while the alleged wrong-doing is investigated. It also provides for several stages of review by up to four separate bodies of judges, which protects against the possibility of any politically motivated charges or outcomes.

Under the Judicial Conduct and Disability Act, any person may file a misconduct complaint with the Chief Judge of a circuit, who in turn may appoint an investigatory committee of judges to examine the allegations and make a recommendation for independent consideration by the Circuit’s Judicial Council. In matters involving an investigation, the complainant may then seek review by the Judicial Conference’s Judicial Conduct and Disability Committee, which may then refer the matter to the entire Judicial Conference for a determination of whether the matter needs to be referred to the Congress for consideration of impeachment. The Chief Justice of the United States can resolve any potential conflicts by transferring complaints to different circuits. There are numerous examples of how complaints under the Judicial Conduct and Disability Act are addressed thoroughly and expeditiously.

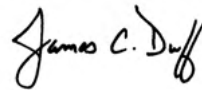


The imposition of an Inspector General's investigatory powers and procedures overlapping the Judicial Branch's already functioning process is unnecessary and would only add procedural and constitutional attacks in collateral litigation by investigated judicial officers.

\* \* \* \*

We would be pleased to talk with you, your staff, and the Committee to answer any questions you may have or to clarify further these policies and practices within the Judicial Branch. We have found that increased dialogue with your staff about these issues has been productive and helpful. We all have the same interests in providing the best, most efficient services to the American people and, in doing so, protecting both the employees of the Judicial Branch and the independence of the Judicial Branch.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive, flowing style.

James C. Duff  
Director

cc: Honorable Dianne Feinstein  
Honorable Timothy M. Tymkovich

# **Guide to Judiciary Policy**

Vol. 2: Ethics and Judicial Conduct

Pt. E: Judicial Conduct and Disability Act and Related Materials

## **Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings**

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## **§ 310 Overview**

Section 320 of this chapter reproduces the Rules for Judicial-Conduct and Judicial-Disability Proceedings. They were adopted on March 11, 2008, and took effect on April 10, 2008. They were amended on September 17, 2015, and again on March 12, 2019.

## **§ 320 Rules for Judicial-Conduct and Judicial-Disability Proceedings**

### **Preface**

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to [28 U.S.C. §§ 331](#) and [358](#), to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges under the Judicial Conduct and Disability Act, [28 U.S.C. §§ 351–364](#).

## ARTICLE I. GENERAL PROVISIONS

### 1. Scope and Covered Judges

- (a) **Scope.** These Rules govern proceedings under the Judicial Conduct and Disability Act (Act), [28 U.S.C. §§ 351–364](#), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.
- (b) **Covered Judge.** A covered judge is defined under the Act and is limited to judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in [28 U.S.C. § 363](#).

#### COMMENTARY ON RULE 1

In September 2006, the Judicial Conduct and Disability Act Study Committee (“Breyer Committee”), appointed in 2004 by Chief Justice Rehnquist, presented a report (“Breyer Committee Report”), 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364. The Breyer Committee had been formed in response to criticism from the public and Congress regarding the effectiveness of the Act’s implementation. The Executive Committee of the Judicial Conference directed its Committee on Judicial Conduct and Disability to consider the Breyer Committee’s recommendations and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. *Id.* at 212–15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the “Illustrative Rules Governing Complaints of Judicial Misconduct and Disability,” discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. *Id.* at 238.

Based on the Breyer Committee’s findings, the Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies that must exercise responsibility under the Act. To that end, the Committee on Judicial Conduct and Disability proposed rules based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the Judicial Conference promulgated the present Rules on March 11, 2008. They were amended on September 17, 2015, and again on March 12, 2019.

The definition of a covered judge tracks the Judicial Conduct and Disability Act. See 28 U.S.C. § 351(d)(1) (defining the term “judge” as “a circuit judge, district judge, bankruptcy judge, or magistrate judge”). As long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a).

Rules 8(c) and (d) address the procedures for processing a complaint involving allegations against a person *not* covered by the Act, such as other court personnel, or against both a covered judge and a noncovered person. Court employees seeking to report, or file a claim related to, misconduct or the denial of rights granted under their Employment Dispute Resolution (EDR) plan by other court personnel may wish to consult the Model EDR Plan and the EDR plan for the relevant court, among other resources. See Guide to Judiciary Policy, vol. 12, appx. 2B.

## 2. Construction and Effect

- (a) **Generally.** These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.
- (b) **Exception.** A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Committee on Judicial Conduct and Disability, or the Judicial Conference expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

### COMMENTARY ON RULE 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to

promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

### **3. General Definitions**

**The following general definitions apply to these Rules. Cognizable misconduct and disability are defined in Rule 4.**

- (a) Chief Judge. “Chief judge” means the chief judge of a United States court of appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.**
- (b) Circuit Clerk. “Circuit clerk” means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.**
- (c) Complaint. A “complaint” is:**
  - (1) a document that, in accordance with Rule 6, is filed by, or on behalf of, any person, including a document filed by an organization; or**
  - (2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 1(b), has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.**
- (d) Court of Appeals, District Court, and District Judge. “Court of appeals,” “district court,” and “district judge,” where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.**
- (e) Judicial Council and Circuit. “Judicial council” and “circuit,” where appropriate, include any courts designated in [28 U.S.C. § 363](#).**
- (f) Judicial Employee. “Judicial Employee” includes judicial assistants, law clerks, and other court employees, including unpaid staff, such as interns, externs, and other volunteer employees.**

- (g) **Magistrate Judge.** “Magistrate judge,” where appropriate, includes a special master appointed by the Court of Federal Claims under [42 U.S.C. § 300aa-12\(c\)](#).
- (h) **Subject Judge.** “Subject judge” means a covered judge, as described in Rule 1(b), who is the subject of a complaint.

### COMMENTARY ON RULE 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term “complaint” is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by a complainant under Rule 6.

Under the Act, a “complaint” may be filed by “any person” or “identified” by a chief judge. See 28 U.S.C. § 351(a), (b). Under Rule 3(c)(1), a complaint may be submitted by, or on behalf of, any person, including a document filed by an organization. Traditional standing requirements do not apply. Individuals or organizations may file a complaint even if they have not been directly injured or aggrieved.

Generally, the word “complaint” brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint filed by a complainant under Rule 6, chief judges are expected in some circumstances to trigger the process — “identify a complaint,” see 28 U.S.C. § 351(b) and Rule 5 — and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Where the complainant reveals information of misconduct or disability but does not claim it as such, the chief judge is not limited to the “four corners of the complaint” and should proceed under Rule 5 to determine whether identification of a complaint is appropriate. See Breyer Committee Report, 239 F.R.D. at 183–84.

An allegation of misconduct or disability filed under Rule 6 is a “complaint,” and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term “identify” suggest that the word “complaint” covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. “Identifying” a “complaint,” therefore, is best understood as the chief judge’s concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be, an accusation. This definition is codified in subsection (c)(2).

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules.

## **ARTICLE II. MISCONDUCT AND DISABILITY**

### **4. Misconduct and Disability Definitions**

- (a) Misconduct Generally.** Cognizable Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Cognizable misconduct includes, but is not limited to, the following:

  - (1) Violation of Specific Standards of Judicial Conduct.** Cognizable misconduct includes:

    - (A)** using the judge's office to obtain special treatment for friends or relatives;
    - (B)** accepting bribes, gifts, or other personal favors related to the judicial office;
    - (C)** engaging in improper ex parte communications with parties or counsel for one side in a case;
    - (D)** engaging in partisan political activity or making inappropriately partisan statements;
    - (E)** soliciting funds for organizations; or
    - (F)** violating rules or standards pertaining to restrictions on outside income or knowingly violating requirements for financial disclosure.
  - (2) Abusive or Harassing Behavior.** 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.



- (3) Discrimination.** Cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability;
- (4) Retaliation.** Cognizable misconduct includes retaliating against complainants, witnesses, judicial employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability;
- (5) Interference or Failure to Comply with the Complaint Process.** Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules; or
- (6) Failure to Report or Disclose.** 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.

Reliable information reasonably likely to constitute judicial misconduct or disability related to a chief circuit judge should be called to the attention of the next most-senior active circuit judge. Such information related to a chief district judge should be called to the attention of the chief circuit judge.

- (7) Conduct Outside the Performance of Official Duties.** Cognizable misconduct includes conduct occurring outside

**the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.**

**(b) Conduct Not Constituting Cognizable Misconduct.**

- (1) Allegations Related to the Merits of a Decision or Procedural Ruling.** Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse.

**If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision.**

- (2) Allegations About Delay.** Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

- (c) Disability.** Disability is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.

**COMMENTARY ON RULE 4**

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (a) therefore provides some specific examples. 28 U.S.C. § 351(a). The Code of Conduct for United States Judges sets forth behavioral guidelines for judges. While the Code's Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act and these Rules, as interpreted and applied by judicial councils, subject to review and limitations prescribed by the Act and these Rules. See *also* Rule 24 (Public Availability of Decisions).

Even where specific, mandatory rules exist — for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations — the

distinction between the misconduct statute and these specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

Rule 4(a)(2)(A) provides expressly that unwanted, offensive, or abusive sexual conduct by a judge, including sexual harassment or assault, constitutes cognizable misconduct. The Rule recognizes that anyone can be a victim of unwanted, offensive, or abusive sexual conduct, regardless of their sex and of the sex of the judge engaging in the misconduct.

Under Rule 4(a)(4), a judge's efforts to retaliate against any person for reporting or disclosing misconduct, or otherwise participating in the complaint process constitute cognizable misconduct. The Rule makes the prohibition against retaliation explicit in the interest of promoting public confidence in the complaint process.

Rules 4(a)(2), (3), and (4) reflect the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, and retaliation. See Code of Conduct for United States Judges, Canon 3A(3) cmt. ("The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.").

Rule 4(a)(5) provides that a judge's refusal, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules constitutes cognizable misconduct. While the exercise of rights under the Fifth Amendment to the Constitution would constitute good cause under Rule 4(a)(5), given the fact-specific nature of the inquiry, it is not possible to otherwise anticipate all circumstances that might also constitute good cause. The Commentary on Rule 13 provides additional discussion regarding Rule 4(a)(5). The Rules contemplate that judicial councils will not consider commencing proceedings under Rule 4(a)(5) except as necessary after other means to acquire the information or enforce a decision have been tried or have proven futile.

All judges have a duty to bring to the attention of the relevant chief district judge or chief circuit judge reliable information reasonably likely to constitute judicial misconduct or disability. See Rule 4(a)(6). This duty is included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate action as necessary. 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. See Code of Conduct for United States Judges,

Canon 3B(6) & cmt. These Rules incorporate those principles while allowing for appropriate, expeditious, fair, and effective resolutions of all such complaints.

The formal procedures outlined in these Rules are intended to address serious issues of judicial misconduct and disability. By statute and rule, the chief circuit judge administers the misconduct and disability complaint process, including the authority to investigate an allegation and, if warranted, to identify a formal complaint. See Rule 5. Disclosures made to or otherwise brought to the attention of the appropriate chief district judge of 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 warrant communication to and consultation with the chief circuit judge in light of the chief circuit judge's statutory responsibility for overseeing any required final action.

In practice, however, not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action. In such cases, allegations may initially be addressed to the chief district judge or the chief circuit judge to determine whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.

A person who seeks to report information of misconduct or disability on a confidential or anonymous basis may proceed through various alternative avenues within the judiciary, including the Office of Judicial Integrity and/or comparable offices within the circuits.

Rule 4(a)(7) reflects that an allegation can meet the statutory standard for misconduct even though the judge's alleged conduct did not occur in the course of the performance of official duties. Furthermore, some conduct specified in Rule 4(a)(1) through 4(a)(6), or not specified within these Rules, might constitute misconduct occurring outside the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct under the Act and these Rules. For example, allegations that a judge solicited funds for a charity or other organization or participated in a partisan political event are cognizable under the Act even though they did not occur in the course of the performance of the judge's official duties.

Rule 4(b)(1) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling. Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or

controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint — even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it “relates” to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — “the merits” — of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper *ex parte* communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by the chief judge until the appellate proceedings are concluded to avoid inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand — for example, a statement that a claim is legally or factually “frivolous” — then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11(b) is necessary.

With regard to Rule 4(b)(2), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, *i.e.*, assigning a low priority to deciding the particular case. But, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an improper motive, is not merits-related.

Rule 4(c) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available. A mental disability could involve cognitive impairment or any psychiatric or psychological condition that renders the judge unable to discharge the duties of office. Such duties may include those that are administrative. If, for example, the judge is a chief judge, the judicial council, fulfilling its obligation under 28 U.S.C. § 332(d)(1) to make “necessary and appropriate orders for the effective and expeditious administration of justice,” may find, under 28 U.S.C. § 45(d) or § 136(e), that the judge is “temporarily unable to perform” his or her chief-judge duties. In that event, an appropriate remedy could involve, under Rule 20(b)(1)(D)(vii), temporary reassignment of chief-judge duties to the next judge statutorily eligible to perform them.

Confidentiality as referenced elsewhere in these Rules is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules. Nothing in these Rules concerning the confidentiality of the complaint process or the Code of Conduct for Judicial Employees concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct or disability. See Rule 23(c).

## **ARTICLE III. INITIATION OF COMPLAINT**

### **5. Identification of Complaint**

- (a) Identification.** When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the

**allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.**

- (b) Submission Not Fully Complying with Rule 6. A legible submission in substantial but not full compliance with Rule 6 must be considered as possible grounds for the identification of a complaint under Rule 5(a).**

## COMMENTARY ON RULE 5

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245–46.

The Act authorizes a chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, see Rule 11(d), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a chief judge identifies a complaint, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once a chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for a chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 4(b)(1), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

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).

## 6. Filing of Complaint

- (a) **Form.** A complainant may use the [form reproduced in the Appendix to these Rules](#) or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).
- (b) **Brief Statement of Facts.** A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:
  - (1) what happened;
  - (2) when and where the relevant events happened;



- (3) any information that would help an investigator check the facts; and
  - (4) for an allegation of disability, any additional facts that form the basis of that allegation.
- (c) **Legibility.** A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.
- (d) **Complainant's Address and Signature; Verification.** The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the submission will be accepted, but it will be reviewed under only Rule 5(b).
- (e) **Number of Copies; Envelope Marking.** The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

#### COMMENTARY ON RULE 6

The Rule is adapted from the Illustrative Rules and is largely self-explanatory. As discussed in the Commentary on Rule 4 and in Rule 23(c), confidentiality as referenced elsewhere in these Rules does not prevent judicial employees from reporting or disclosing misconduct or disability.

### 7. Where to Initiate Complaint

- (a) **Where to File.** Except as provided in (b),
  - (1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.
  - (2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

- (3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.**
- (b) Misconduct in Another Circuit; Transfer.** If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under [28 U.S.C. §§ 291–293 and 294\(d\)](#), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge’s home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge’s home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

#### COMMENTARY ON RULE 7

Title 28 U.S.C. § 351 states that complaints are to be filed with “the clerk of the court of appeals for the circuit.” However, in many circuits, this role is filled by circuit executives. Accordingly, the term “circuit clerk,” as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term “the circuit” in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the filing or identification of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act’s emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge’s future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar — ex parte contact between an attorney and a judge, for example — it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

#### 8. Action by Circuit Clerk

- (a) Receipt of Complaint.** Upon receiving a complaint against a judge filed under Rule 6 or identified under Rule 5, the circuit clerk must

**open a file, assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.**

- (b) Distribution of Copies.** The circuit clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or, where the chief judge is disqualified from considering a complaint, to the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 6 or identified under Rule 5 to each subject judge. The circuit clerk must retain the original complaint. Any further distribution should be as provided by local rule.
- (c) Complaint Against Noncovered Person.** If the circuit clerk receives a complaint about a person not holding an office described in Rule 1(b), the clerk must not accept the complaint under these Rules.
- (d) Complaint Against Judge and Another Noncovered Person.** If the circuit clerk receives a complaint about a judge described in Rule 1(b) and a person not holding an office described in Rule 1(b), the clerk must accept the complaint under these Rules only with regard to the judge and must so inform the complainant.

#### COMMENTARY ON RULE 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

#### **9. Time for Filing or Identifying Complaint**

**A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impracticable, the complaint must be dismissed under Rule 11(c)(1)(E).**

#### COMMENTARY ON RULE 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

## 10. Abuse of Complaint Procedure

- (a) **Abusive Complaints.** A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, the judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.
- (b) **Orchestrated Complaints.** When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept additional complaints. The circuit clerk must send a copy of any such order to anyone whose complaint was not accepted.

### COMMENTARY ON RULE 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these

complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

## **ARTICLE IV. REVIEW OF COMPLAINT BY CHIEF JUDGE**

### **11. Chief Judge's Review**

- (a) Purpose of Chief Judge's Review.** When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25, in which case the most-senior active circuit judge not disqualified will review the complaint. If a complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing a complaint, the chief judge must determine whether it should be:

  - (1) dismissed;**
  - (2) concluded on the ground that voluntary corrective action has been taken;**
  - (3) concluded because intervening events have made action on the complaint no longer necessary; or**
  - (4) referred to a special committee.**
- (b) Chief Judge's Inquiry.** In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report.
- (c) Dismissal.**

  - (1) Permissible grounds.** A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

- (A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office;
  - (B) is directly related to the merits of a decision or procedural ruling;
  - (C) is frivolous;
  - (D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;
  - (E) is based on allegations that are incapable of being established through investigation;
  - (F) has been filed in the wrong circuit under Rule 7; or
  - (G) is otherwise not appropriate for consideration under the Act.
- (2) Impermissible grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.
- (d) Corrective Action. The chief judge may conclude a complaint proceeding in whole or in part if:
  - (1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6; or
  - (2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.
- (e) Intervening Events. The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge.

- (f) Appointment of Special Committee.** If some or all of a complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.
- (g) Notice of Chief Judge's Action; Petition for Review.**

  - (1)** When chief judge appoints special committee. If the chief judge appoints a special committee, the chief judge must notify the complainant and the subject judge that the matter has been referred to a committee, notify the complainant of a complainant's rights under Rule 16, and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Committee on Judicial Conduct and Disability.
  - (2)** When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. Except as authorized by [28 U.S.C. § 360](#), the memorandum must not include the name of the complainant or of the subject judge. The order and memoranda incorporated by reference in the order must be promptly sent to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.
  - (3)** Right to petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and the subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If the chief judge so disposes of a complaint that was identified under Rule 5 or filed by its subject judge, the chief judge must transmit the order and memoranda incorporated by reference in the order to the judicial council for review in accordance with Rule 19. In the event of such a transmission, the subject judge may make a written submission to the

**judicial council but will have no further right of review except as allowed under Rule 21(b)(1)(B). When a disposition is to be reviewed by the judicial council, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the council.**

- (h) Public Availability of Chief Judge's Decision. The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.**

#### COMMENTARY ON RULE 11

This Rule describes complaint-review actions available either to the chief judge or, where that judge is the subject judge or is otherwise disqualified under Rule 25, such as where the complaint is filed against the chief judge, to the judge designated under Rule 25(f) to perform the chief judge's duties under these Rules. Subsection (a) of this Rule provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. The chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a complaint regarding disability. A formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243–45. The Act states that dismissal is appropriate “when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence.” 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that “[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.” These two statutory standards should be read together so that a matter is not “reasonably” in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to the judicial council and its special committee. An allegation of fact is ordinarily not “refuted” simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's—in other words, there is simply no other significant evidence of what happened or of the



complainant's unreliability — then there must be a special-committee investigation. Such a credibility issue is a matter “reasonably in dispute” within the meaning of the Act.

However, dismissal following a limited inquiry may occur when a complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. *Id.* The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. *Id.* In this example, the matter remains reasonably in dispute. If all five witnesses say the subject judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. *Id.*

Similarly, under subsection (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under subsection (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that “might affect the outcome of the suit under the governing law,” and a dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239–45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 4 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 4 and its accompanying Commentary.

Subsections (c)(1)(C)–(E) implement the statute by allowing dismissal of complaints that are “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation.” 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as “frivolous” under Rule 11(c)(1)(C) will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The subject judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge’s proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer’s statement that he or she had an improper ex parte contact with a judge, the lawyer’s denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the subject judge did X. *Id.* The subject judge denies it. The chief judge requests that the complainant (who does not purport to have observed the subject judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness’s account. *Id.* The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. *Id.* at 243–44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. *Id.*

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant’s allegations are facially incredible or so lacking indicia of reliability as to warrant dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should not be undertaken, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. at 244–45. The Act authorizes the chief judge to conclude the complaint proceedings if “appropriate corrective action has been taken.” 28 U.S.C. § 352(b)(2). Under the Rule, action taken after a complaint is filed is “appropriate” when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. *Id.* Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability may be preferable to sanctions. *Id.* The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. *Id.* Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on identical conduct.

“Corrective action” must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge’s subsequent agreement to such action does not constitute the requisite voluntary corrective action. *Id.* Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). *Id.* Compliance with a previous judicial-council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. *Id.*

Where a subject judge’s conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. *Id.* While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. *Id.* In some cases, corrective action may not be “appropriate” to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge’s order, in a direct communication from the subject judge, or otherwise. *Id.*

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in a complaint. The form of corrective action should also be proportionate to any sanctions that the judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244–45. In other words, minor corrective action will not suffice to dispose of a serious matter. *Id.*

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to “conclude the proceeding,” if “action on the complaint is no longer necessary because of intervening events,” such as a resignation from judicial office. Ordinarily, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a).

Concluding a complaint proceeding, by either the judicial council of the subject judge or the judicial council to which a complaint proceeding has been transferred, precludes remedial action under the Act and these Rules as to the subject judge. But the Judicial Conference and the judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote “the expeditious conduct of court business,” 28 U.S.C. § 331, and to “make all necessary and appropriate orders for the effective administration of justice within [each] circuit.” *Id.* at § 332(d)(1). Such an assessment might include an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence. The judicial council may request that the Committee on Judicial Conduct and Disability transmit its order to relevant Congressional entities.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding a proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the

names of the complainant or the subject judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When a complaint is disposed of by the chief judge, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See *a/so* Commentary on Rule 24 (dealing with public availability).

Rule 11(g) provides that the complainant and the subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. Because an identified complaint has no “complainant” to petition for review, the chief judge’s dispositive order on such a complaint will be transmitted to the judicial council for review. The same will apply where a complaint was filed by its subject judge. A copy of the chief judge’s order, and memoranda incorporated by reference in the order, disposing of a complaint must be sent by the circuit clerk to the Committee on Judicial Conduct and Disability.

## **ARTICLE V. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE**

### **12. Special Committee’s Composition**

- (a) **Membership.** Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. For the courts named in [28 U.S.C. § 363](#), the special committee must be selected from the judges serving on the subject judge's court.
- (b) **Presiding Officer.** When appointing the special committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.
- (c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the special committee’s appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under [42 U.S.C. § 300aa-12\(c\)](#), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate

**judge. The adviser cannot vote but has the other privileges of a special-committee member.**

- (d) Provision of Documents.** The chief judge must certify to each other member of the special committee and to any adviser copies of the complaint and statement of facts, in whole or relevant part, and any other relevant documents on file.
- (e) Continuing Qualification of Special-Committee Member.** A member of a special committee may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under [28 U.S.C. § 171](#).
- (f) Inability of Special-Committee Member to Complete Service.** If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.
- (g) Voting.** All actions by a special committee must be by vote of a majority of all members of the committee.

#### COMMENTARY ON RULE 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question the size of a special committee is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so. Rule 12(a) acknowledges the common practice of including senior judges in the membership of a special committee.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another member of the special committee as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge. Subsection (c) also provides that the adviser will have all the

privileges of a member of the special committee except a vote. The adviser, therefore, may participate in all deliberations of the special committee, question witnesses at hearings, and write a separate statement to accompany the committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a special committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the special committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a special committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the special-committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the members of a special committee should participate in committee decisions. In that circumstance, it seems reasonable to require that special-committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

### **13. Conduct of Special-Committee Investigation**

- (a) Extent and Methods of Special-Committee Investigation.** A special committee should determine the appropriate extent and methods of its investigation in light of the allegations in the complaint and the committee's preliminary inquiry. In investigating the alleged misconduct or disability, the special committee should take steps to determine the full scope of the potential misconduct or disability, including whether a pattern of misconduct or a broader disability exists. The investigation may include use of appropriate experts or other professionals. If, in the course of the investigation, the special committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the specific pending complaint, the committee must refer the new matter to the

**chief judge for a determination of whether action under Rule 5 or Rule 11 is necessary before the committee's investigation is expanded to include the new matter.**

- (b) Criminal Conduct.** If the special committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The special committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.
- (c) Staff.** The special committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judiciary or may hire special staff through the Director of the Administrative Office of the United States Courts.
- (d) Delegation of Subpoena Power; Contempt.** The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under [28 U.S.C. § 332\(d\)](#) against anyone who fails to comply with a subpoena.

#### COMMENTARY ON RULE 13

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which the special committee carries out its mission. They reflect the view that the special committee has two roles that are separated in ordinary litigation. First, the special committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. *Id.* Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

Rule 13(a) includes a provision making clear that the special committee may choose to consult appropriate experts or other professionals if it determines that such a consultation is warranted. If, for example, the special committee has cause to believe that the subject judge may be unable to discharge all of the duties of office by reason of mental or physical disability, the committee could ask the subject judge to respond to inquiries and, if necessary, request the judge to undergo a medical or psychological examination. In advance of any such examination, the special committee may enter into an agreement with the subject judge as to the scope and use that may be made of



the examination results. In addition or in the alternative, the special committee may ask to review existing records, including medical records.

The extent of the subject judge's cooperation in the investigation may be taken into account in the consideration of the underlying complaint. If, for example, the subject judge impedes reasonable efforts to confirm or disconfirm the presence of a disability, the special committee may still consider whether the conduct alleged in the complaint and confirmed in the investigation constitutes disability. The same would be true of a complaint alleging misconduct.

The special committee may also consider whether such a judge might be in violation of his or her duty to cooperate in an investigation under these Rules, a duty rooted not only in the Act's definition of misconduct but also in the Code of Conduct for United States Judges, which emphasizes the need to maintain public confidence in the judiciary, see Canon 2(A) and Canon 1 cmt., and requires judges to "facilitate the performance of the administrative responsibilities of other judges and court personnel," Canon 3(B)(1). If the special committee finds a breach of the duty to cooperate and believes that the breach may amount to misconduct under Rule 4(a)(5), it should determine, under the final sentence of Rule 13(a), whether that possibility should be referred to the chief judge for consideration of action under Rule 5 or Rule 11. See *also* Commentary on Rule 4.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of a judicial council by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of the special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. See Rule 12(g).

#### **14. Conduct of Special-Committee Hearings**

- (a) Purpose of Hearings.** The special committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the special committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

- (b) Special-Committee Evidence.** Subject to Rule 15, the special committee must obtain material, nonredundant evidence in the form it considers appropriate. In the special committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.
- (c) Counsel for Witnesses.** The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.
- (d) Witness Fees.** Witness fees must be paid as provided in [28 U.S.C. § 1821](#).
- (e) Oath.** All testimony taken at a hearing must be given under oath or affirmation.
- (f) Rules of Evidence.** The Federal Rules of Evidence do not apply to special-committee hearings.
- (g) Record and Transcript.** A record and transcript must be made of all hearings.

#### COMMENTARY ON RULE 14

This Rule is adapted from the Act, 28 U.S.C. § 353, and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, special-committee members should not regard themselves as prosecutors one day and judges the next. Their duty — and that of their staff — is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the special committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a special-committee witness. Cases may arise in which the subject judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes

the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

## **15. Subject Judge's Rights**

### **(a) Notice.**

#### **(1) Generally. The subject judge must receive written notice of:**

- (A) the appointment of a special committee under Rule 11(f);**
- (B) the expansion of the scope of an investigation under Rule 13(a);**
- (C) any hearing under Rule 14, including its purposes, the names of any witnesses the special committee intends to call, and the text of any statements that have been taken from those witnesses.**

#### **(2) Suggestion of additional witnesses. The subject judge may suggest additional witnesses to the special committee.**

- (b) Special-Committee Report. The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.**
- (c) Presentation of Evidence. At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under [28 U.S.C. § 332\(d\)\(1\)](#). The subject judge must be given the opportunity to cross-examine special-committee witnesses, in person or by counsel.**
- (d) Presentation of Argument. The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.**
- (e) Attendance at Hearings. The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the special committee.**

- (f) Representation by Counsel.** The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

## COMMENTARY ON RULE 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that “the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.” 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the subject judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings — for example, meetings at which the special committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

## 16. Complainant’s Rights in Investigation

- (a) Notice.** The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee’s report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.
- (b) Opportunity to Provide Evidence.** If the complainant knows of relevant evidence not already before the special committee, the complainant may briefly explain in writing the basis of that knowledge and the nature of that evidence. If the special committee determines that the complainant has information not already known to the committee that would assist in the committee’s investigation, a representative of the committee must interview the complainant.
- (c) Presentation of Argument.** The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

- (d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.**

#### COMMENTARY ON RULE 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) gives the complainant the prerogative to make a brief written submission showing that he or she is aware of relevant evidence not already known to the special committee. (Such a submission may precede any written or oral argument the complainant provides under Rule 16(c), or it may accompany that argument.) If the special committee determines, independently or from the complainant's submission, that the complainant has information that would assist the committee in its investigation, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the special committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

#### **17. Special-Committee Report**

**The special committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of special-committee members, and the record of any hearings held under Rule 14. In addition to being sent to the subject judge under Rule 15(b), a copy of the report and any accompanying statements and documents must be sent to the Committee on Judicial Conduct and Disability.**

#### COMMENTARY ON RULE 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statements and documents to the Committee on Judicial Conduct and Disability was new at the time the Judicial Conference promulgated the Rules for Judicial-Conduct and Judicial-Disability Proceedings in 2008.

## **ARTICLE VI. REVIEW BY JUDICIAL COUNCIL**

### **18. Petition for Review of Chief-Judge Disposition Under Rule 11(c), (d), or (e)**

- (a) Petition for Review.** After the chief judge issues an order under Rule 11(c), (d), or (e), the complainant or the subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under [28 U.S.C. § 358](#), the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.
- (b) When to File; Form; Where to File.** A petition for review must be filed in the office of the circuit clerk within 42 days after the date of the chief judge's order. The petition for review should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The petition for review should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . ." and state the reasons why the petition should be granted. It must be signed.
- (c) Receipt and Distribution of Petition.** A circuit clerk who receives a petition for review filed in accordance with this Rule must:

  - (1)** acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;
  - (2)** promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

    - (A)** copies of the complaint;
    - (B)** all materials obtained by the chief judge in connection with the inquiry;
    - (C)** the chief judge's order disposing of the complaint;

- (D) any memorandum in support of the chief judge's order;
  - (E) the petition for review; and
  - (F) an appropriate ballot; and
- (3) send the petition for review to the Committee on Judicial Conduct and Disability. Unless the Committee on Judicial Conduct and Disability requests them, the circuit clerk will not send copies of the materials obtained by the chief judge.
- (d) **Untimely Petition.** The circuit clerk must refuse to accept a petition that is received after the time allowed in (b).
- (e) **Timely Petition Not in Proper Form.** When the circuit clerk receives a petition for review filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the circuit clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within the original time allowed for filing the petition or within 21 days after the date on which a notice of the deficiencies was sent to the complainant, whichever is later. If the deficiencies are corrected within the time allowed, the circuit clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the circuit clerk must reject the petition.

#### COMMENTARY ON RULE 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits the subject judge, as well as the complainant, to petition for review of the chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, the chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of 42 days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in

order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. See Fed. R. App. P. 25(a)(2)(A), (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

### **19. Judicial-Council Disposition of Petition for Review**

- (a) Rights of Subject Judge.** At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The circuit clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual judicial-council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.
- (b) Judicial-Council Action.** After considering a petition for review and the materials before it, the judicial council may:

  - (1)** affirm the chief judge's disposition by denying the petition;
  - (2)** return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;
  - (3)** return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or
  - (4)** in exceptional circumstances, take other appropriate action.
- (c) Notice of Judicial-Council Decision.** Copies of the judicial council's order, together with memoranda incorporated by reference in the order and separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.



- (d) Memorandum of Judicial-Council Decision.** If the judicial council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a judicial-council order must not include the name of the complainant or the subject judge.
- (e) Review of Judicial-Council Decision.** If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented, the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b).
- (f) Public Availability of Judicial-Council Decision.** Materials related to the judicial council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

#### COMMENTARY ON RULE 19

This Rule is adapted largely from the Act and is self-explanatory.

The judicial council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition for review by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

Under Rule 19(b), after considering a petition for review and the materials before it, a judicial council may return a matter to the chief judge to take various actions, including conducting further inquiry under Rule 11(b), identifying a complaint under Rule 5, or appointing a special committee under Rule 11(f).

A petition for review of a judicial council's decision under this Rule may be filed in any matter in which one or more members of the council dissented from the order. See Rule 21(b).

#### **20. Judicial-Council Action Following Appointment of Special Committee**

- (a) Subject Judge's Rights.** Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The subject judge must also be given an opportunity to present argument, personally or through counsel, written or oral, as determined by the judicial council. The subject judge must not otherwise communicate with judicial-council members about the matter.

**(b) Judicial-Council Action.**

**(1) Discretionary actions. Subject to the subject judge's rights set forth in subsection (a), the judicial council may:**

**(A) dismiss the complaint because:**

- (i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;**
- (ii) the complaint is directly related to the merits of a decision or procedural ruling;**
- (iii) the facts on which the complaint is based have not been established; or**
- (iv) the complaint is otherwise not appropriate for consideration under [28 U.S.C. §§ 351–364](#).**

**(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.**

**(C) refer the complaint to the Judicial Conference with the judicial council's recommendations for action.**

**(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:**

- (i) censuring or reprimanding the subject judge, either by private communication or by public announcement;**
- (ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;**
- (iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under [28 U.S.C. § 631\(i\)](#) or [42 U.S.C. § 300aa-12\(c\)\(2\)](#);**

- (iv) in the case of a bankruptcy judge, removing the judge from office under [28 U.S.C. § 152\(e\)](#);
    - (v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived;
    - (vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under [28 U.S.C. § 372\(b\)](#) so that an additional judge may be appointed; and
    - (vii) in the case of a circuit chief judge or district chief judge, finding that the judge is temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge in accordance with [28 U.S.C. § 45\(d\)](#) or [§ 136\(e\)](#).
  - (E) take any combination of actions described in (b)(1)(A)–(D) of this Rule that is within its power.
- (2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:
- (A) might constitute ground for impeachment; or
  - (B) in the interest of justice, is not amenable to resolution by the judicial council.
- (c) **Inadequate Basis for Decision.** If the judicial council finds that a special committee’s report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council’s conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.
- (d) **Judicial-Council Vote.** Judicial-council action must be taken by a majority of those members of the council who are not disqualified. A

**decision to remove a bankruptcy judge from office requires a majority vote of all the members of the judicial council.**

- (e) Recommendation for Fee Reimbursement.** If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office use funds appropriated to the judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).
- (f) Judicial-Council Order.** Judicial-council action must be by written order. Unless the judicial council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. Such a memorandum may incorporate all or part of any underlying special-committee report. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. The order and memoranda incorporated by reference in the order must be provided to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b). If the complaint was identified under Rule 5 or filed by its subject judge, the judicial council must transmit the order and memoranda incorporated by reference in the order to the Committee on Judicial Conduct and Disability for review in accordance with Rule 21. In the event of such a transmission, the subject judge may make a written submission to the Committee on Judicial Conduct and Disability but will have no further right of review.

#### COMMENTARY ON RULE 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within 21 days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present argument to the judicial council, personally or through counsel, or both, at the direction of the council. Whether that argument is written or oral would be for the judicial council

to determine. The subject judge may not otherwise communicate with judicial-council members about the matter.

Rule 20(b)(1)(B) allows a judicial council to conclude a proceeding where appropriate corrective action has been taken or intervening events have made the proceeding unnecessary. This provision tracks Rules 11(d) and (e), which provide for similar action by the chief judge. As with Rule 11(d), appropriate corrective action must acknowledge and remedy the problem raised by the complaint. See Breyer Committee Report, 239 F.R.D. at 244. And similar to Rule 11(e), although “action on the complaint is no longer necessary because of intervening events,” the Judicial Conference and the judicial council of the subject judge may nonetheless be able to take action on potential institutional issues related to the complaint (such as an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence). 28 U.S.C. § 352(b)(2).

Rule 20(b)(1)(D) recites the remedial actions enumerated in 28 U.S.C. § 354(a)(2) while making clear that this list is not exhaustive. A judicial council may consider lesser remedies. Some remedies may be unique to senior judges, whose caseloads can be modified by agreement or through statutory designation and certification processes.

Under 28 U.S.C. §§ 45(d) and 136(e), which provide for succession where “a chief judge is temporarily unable to perform his duties as such,” the determination whether such an inability exists is not expressly reserved to the chief judge. Nor, indeed, is it assigned to any particular judge or court-governance body. Clearly, however, a chief judge’s inability to function as chief could implicate “the effective and expeditious administration of justice,” which the judicial council of the circuit must, under 28 U.S.C. § 332(d)(1), “make all necessary and appropriate orders” to secure. For this reason, such reassignment is among a judicial council’s remedial options, as subsection (b)(1)(D)(vii) makes clear. Consistent with 28 U.S.C. §§ 45(d) and 136(e), however, any reassignment of chief-judge duties must not outlast the subject judge’s inability to perform them. Nor can such reassignment result in any extension of the subject judge’s term as chief judge.

Rule 20(c) provides that a judicial council may return a matter to a special committee to augment its findings and report of its investigation to include additional areas of inquiry and investigation to allow the judicial council to reach a complete and fully informed judgment. Rule 20(c) also provides that if the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the judicial council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that judicial-council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the judicial council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office that the subject judge be reimbursed for reasonable expenses incurred, including attorneys' fees. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1)(A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that judicial-council action be by order and, normally, that it be supported with a memorandum of factual determinations and reasons. Notice of the action must be given to the complainant and the subject judge, and must include notice of any right to petition for review of the judicial council's decision under Rule 21(b). Because an identified complaint has no "complainant" to petition for review, a judicial council's dispositive order on an identified complaint on which a special committee has been appointed must be transmitted to the Committee on Judicial Conduct and Disability for review. The same will apply where a complaint was filed by its subject judge.

## **ARTICLE VII. REVIEW BY COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY**

### **21. Committee on Judicial Conduct and Disability**

- (a) Committee Review.** The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its review of judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion. Its disposition of petitions for review is ordinarily final. The Judicial Conference may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.
- (b) Reviewable Matters.**

- (1) Upon petition.** A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

  - (A)** Rule 20(b)(1)(A), (B), (D), or (E); or
  - (B)** Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order.
- (2) Upon Committee's initiative.** At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.
- (c) Committee Vote.** Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review related to that subject judge. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. Those members hearing the petition for review should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only six members are qualified to consider a petition for review, the Chief Justice shall select an additional judge to join the qualified members to consider the petition. If four or fewer members are qualified to consider a petition for review, the Chief Justice shall select a panel of five judges, including the qualified Committee members, to consider it.
- (d) Additional Investigation.** Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under [28 U.S.C. § 331](#).

- (e) Oral Argument; Personal Appearance.** There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions.
- (f) Committee Decision.** A Committee decision under this Rule must be transmitted promptly to the Judicial Conference. Other distribution will be by the Administrative Office at the direction of the Committee chair.
- (g) Finality.** All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

#### COMMENTARY ON RULE 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Committee on Judicial Conduct and Disability to dispose of petitions for review does not preclude review of such dispositions by the Judicial Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of a dismissal or a conclusion of a complaint under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented, the complainant or the subject judge has the right to petition for review by the Committee. Under Rule 21(b)(2), the Committee may review such a dismissal or conclusion in its sole discretion, whether or not a dissent occurred, and only as to the appointment of a special committee. Any review under Rule 21(b)(2) will be conducted as soon as practicable after the dismissal or conclusion at issue. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. The Rule provides that every petition for review must be considered and voted on by at least five, and if possible by seven, qualified Committee members to avoid the possibility of tie votes. If six, or four or fewer, members are qualified, the Chief Justice shall appoint other judges to join the qualified members to consider the petition for review. To the extent possible, the judges whom the Chief Justice selects to join the qualified members should be drawn from among former members of the Committee.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.



## **22. Procedures for Review**

- (a) **Filing Petition for Review.** A petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), may be filed by sending a brief written statement to the Committee on Judicial Conduct and Disability at [JCD\\_PetitionforReview@ao.uscourts.gov](mailto:JCD_PetitionforReview@ao.uscourts.gov) or to:

Judicial Conference Committee on Judicial Conduct and Disability  
Attn: Office of the General Counsel  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, D.C. 20544

The Administrative Office will send a copy of the petition for review to the complainant or the subject judge, as the case may be.

- (b) **Form and Contents of Petition.** No particular form is required. The petition for review must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition for review should not normally exceed 20 pages plus necessary attachments. A petition for review must be signed by the petitioner or his or her attorney.
- (c) **Time.** A petition for review must be submitted within 42 days after the date of the order for which review is sought.
- (d) **Action on Receipt of Petition.** When a petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), is submitted in accordance with this Rule, the Administrative Office shall acknowledge its receipt, notify the chair of the Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

### **COMMENTARY ON RULE 22**

Rule 22 is self-explanatory.

## **ARTICLE VIII. MISCELLANEOUS RULES**

### **23. Confidentiality**

- (a) Confidentiality Generally.** Confidentiality under these Rules is intended to protect the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules.
- (b) Confidentiality in the Complaint Process.**

  - (1) General Rule.** The consideration of a complaint by a chief judge, a special committee, a judicial council, or the Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be publicly disclosed by any judge or judicial employee, or by any person who records or transcribes testimony except as allowed by these Rules. A chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability.
  - (2) Files.** All files related to a complaint must be separately maintained with appropriate security precautions to ensure confidentiality.
  - (3) Disclosure in Decisions.** Except as otherwise provided in Rule 24, written decisions of a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of a council or the Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.
  - (4) Availability to Judicial Conference.** On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee on Judicial Conduct and Disability to records of proceedings under the Act at the site where the records are kept.

- (5) Availability to District Court.** If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.
- (6) Impeachment Proceedings.** If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.
- (7) Subject Judge's Consent.** If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted under these Rules, not be revealed.
- (8) Disclosure in Special Circumstances.** The Judicial Conference, its Committee on Judicial Conduct and Disability, a judicial council, or a chief judge may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. For example, disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.
- (9) Disclosure of Identity by Subject Judge.** Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

- (10) Assistance and Consultation.** Nothing in this Rule prohibits a chief judge, a special committee, a judicial council, or the Judicial Conference or its Committee on Judicial Conduct and Disability, in the performance of any function authorized under the Act or these Rules, from seeking the help of qualified staff or experts or from consulting other judges who may be helpful regarding the performance of that function.
- (c) Disclosure of Misconduct and Disability.** Nothing in these Rules and Commentary concerning the confidentiality of the complaint process, or in the Code of Conduct for Judicial Employees concerning the use or disclosure of confidential information received in the course of official duties, prevents a judicial employee from reporting or disclosing misconduct or disability.

#### COMMENTARY ON RULE 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to “papers, documents, and records of proceedings related to investigations conducted under this chapter” and states that they may not be disclosed “by any person in any proceeding,” with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(b)(1) provides that judges, employees of the judiciary, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(b)(9).

With regard to the second question, Rule 23(b)(1) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, a judicial council, the Judicial Conference, and the Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(b)(5) so provides.

In extraordinary circumstances, a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the judiciary is capable of redressing judicial misconduct or

disability. Moreover, the confidentiality requirement does not prevent a chief judge from “communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter,” as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act’s confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(b)(3) makes it explicit that written decisions, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (b)(3) is subject to Rule 24(a), which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative branch. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of a proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(b)(6) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(b)(7) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(b)(8) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit prosecution for perjury based on testimony given before a special committee, where a special committee discovers evidence of a judge’s criminal conduct, to permit disciplinary action by a bar association or other licensing body, or in other appropriate circumstances.

Under subsection (b)(8), where a complainant or other person has publicly released information regarding the existence of a complaint proceeding, the Judicial Conference, the Committee on Judicial Conduct and Disability, a judicial council, or a chief judge may authorize the disclosure of information about the consideration of the complaint, including orders and other materials related to the complaint proceeding, in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.

Subsection (b)(8) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of a complaint proceeding to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results. In authorizing disclosure, a judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or when those materials constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(b)(10), any of the specified judges or entities performing a function authorized under these Rules may seek expert or staff assistance or may consult with other judges who may be helpful regarding performance of that function; the confidentiality requirement does not preclude this. A chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, a chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

Rule 23(c) provides that confidentiality as referenced in these Rules and Commentary is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules. Nothing in these Rules concerning the confidentiality of the complaint process or the Code of Conduct for Judicial Employees concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct or disability.

Judges should bring such matters to the attention of the relevant chief district judge or chief circuit judge in accordance with Rule 4(a)(6). Judges should be mindful of Canon 3(B)(6) of the Code of Conduct for United States Judges, which provides in part that a judge “should take appropriate action upon receipt of reliable information indicating the likelihood that a judge’s conduct contravened the Code.”

## **24. Public Availability of Decisions**

- (a) General Rule; Specific Cases.** When final action has been taken on a complaint and it is no longer subject to review as of right, all orders entered by the chief judge and judicial council, including memoranda incorporated by reference in those orders and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

  - (1)** if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials generally should not disclose the name of the subject judge without his or her consent.
  - (2)** if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.
  - (3)** if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.
  - (4)** if the complaint is finally disposed of under Rule 20(b)(1)(D) by any remedial action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.
  - (5)** the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge or the judicial council orders disclosure.
- (b) Manner of Making Public.** The orders described in (a) must be made public by placing the orders on the court's public website and by placing them in a publicly accessible file in the office of the circuit clerk. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Committee on Judicial Conduct and Disability will make available on the judiciary's website, [www.uscourts.gov](http://www.uscourts.gov), selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

- (c) Orders of Committee on Judicial Conduct and Disability.** Orders of the Committee on Judicial Conduct and Disability constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the circuit clerk of the relevant court of appeals. The Committee on Judicial Conduct and Disability will also make such orders available on the judiciary's website, [www.uscourts.gov](http://www.uscourts.gov). When authorized by the Committee on Judicial Conduct and Disability, other orders related to complaint proceedings will similarly be made available.
- (d) Complaints Referred to Judicial Conference.** If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

#### COMMENTARY ON RULE 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference “urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act.” Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits “to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services.” Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that “[p]osting such orders on the judicial branch’s public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders.” Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of a chief judge, a judicial council, and the Committee on Judicial Conduct and Disability, as well as the texts of memoranda incorporated by reference in those orders, together with any dissenting opinions or separate statements by members of the judicial council. No memoranda other than those incorporated by reference in those orders shall be disclosed.



However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the subject judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject judge generally should not be disclosed, except where the complainant or another person has disclosed the existence of a complaint proceeding to the public. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest — particularly if a judicial officer resigns in the course of an investigation — to make the identity of the subject judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full judicial council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

Rule 24(b) makes clear that circuits must post on their external websites all orders required to be made public under Rule 24(a). The judiciary will seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.

Matters involving orders issued following a special-committee investigation often involve highly sensitive situations, and it is important that judicial councils have every opportunity to reach a correct and just outcome. This would include the ability to reach informal resolution before a subject judge's identity must be released. But there must also come a point of procedural finality. The date of finality — and thus the time at which other safeguards and rules such as the publication requirement are triggered —

is the date on which the judicial council issues a Final Order. See *In re Complaint of Judicial Misconduct*, 751 F.3d 611, 617 (2014) (requiring publication of a judicial council order “[e]ven though the period for review had not yet elapsed” and concluding that “the order was a final decision because the Council had adjudicated the matter on the merits after having received a report from a special investigating committee”). As determined in the cited case, modifications of this kind to a final order are subject to review by the Committee on Judicial Conduct and Disability.

## **25. Disqualification**

- (a) General Rule.** Any judge is disqualified from participating in any proceeding under these Rules if the judge concludes that circumstances warrant disqualification. If a complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant’s participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.
- (b) Subject Judge.** A subject judge, including a chief judge, is disqualified from considering a complaint except to the extent that these Rules provide for participation by a subject judge.
- (c) Chief Judge Disqualified from Considering Petition for Review of Chief Judge’s Order.** If a petition for review of the chief judge’s order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council’s consideration of the petition.
- (d) Member of Special Committee Not Disqualified.** A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee’s report.
- (e) Subject Judge’s Disqualification After Appointment of Special Committee.** Upon appointment of a special committee, the subject judge is disqualified from participating in the identification or consideration of any complaint, related or unrelated to the pending matter, under the Act or these Rules. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.
- (f) Substitute for Disqualified Chief Judge.** If the chief judge is disqualified from performing duties that the Act and these Rules assign to a chief judge (including where a complaint is filed against a

chief judge), those duties must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council.

- (g) **Judicial-Council Action When Multiple Judges Disqualified.** Notwithstanding any other provision in these Rules to the contrary,
- (1) a member of the judicial council who is a subject judge may participate in its disposition if:
- (A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;
  - (B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or those judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 4(b); and
  - (C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.
- (2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).
- (h) **Disqualification of Members of Committee on Judicial Conduct and Disability.** No member of the Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

#### COMMENTARY ON RULE 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules. For example, the subject judge cannot initiate complaints by identification, conduct limited inquiries, or choose between dismissal and special-committee investigation as the threshold disposition of a complaint. Likewise, the subject judge cannot participate in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference, or the Committee on Judicial Conduct and Disability. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings. Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "duties that the Act and these Rules assign to a chief judge" does not apply to determine the acting presiding member of the council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., *In re Complaint of Doe*, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); *In re Complaint of Judicial Misconduct*, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of the chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the judicial council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition for review is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Committee on Judicial Conduct and Disability contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

## **26. Transfer to Another Judicial Council**

**In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.**

### **COMMENTARY ON RULE 26**

Rule 26 implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214–15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original judicial council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a judicial council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee judicial council shall determine the proper stage at which to begin consideration of the complaint — for example, reference to the transferee chief judge, appointment of a special committee, etc.

## **27. Withdrawal of Complaint or Petition for Review**

- (a) Complaint Pending Before Chief Judge. With the chief judge's consent, the complainant may withdraw a complaint that is before**

**the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent the chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.**

- (b) Complaint Pending Before Special Committee or Judicial Council. After a complaint has been referred to the special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.**
- (c) Petition for Review. A petition for review addressed to the judicial council under Rule 18, or the Committee on Judicial Conduct and Disability under Rule 22, may be withdrawn if no action on the petition has been taken.**

#### COMMENTARY ON RULE 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection (a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

## **28. Availability of Rules and Forms**

**These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the circuit clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules, the complaint form, and complaint-filing instructions available on the court's website, or provide an Internet link to these items on the appropriate court of appeals website or on [www.uscourts.gov](http://www.uscourts.gov).**

## **29. Effective Date**

**These Rules will become effective after promulgation by the Judicial Conference of the United States.**

**Appendix to the Rules: [Form AO 310 \(Complaint of Judicial Misconduct or Disability\)](#)**



# WORKSHOP

4A

## Coaching for Professional Development

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**Joel DiGirolamo** is the director of coaching science for the International Coach Federation (ICF), where he leads the organization's efforts to develop, curate and disseminate information around the science of coaching. He has more than 30 years of staff and management experience in *Fortune* 500 companies and is the author of two books, *Leading Team Alpha* and *Yoga in No Time at All*. Joel holds a master's degree in industrial and organizational psychology from Kansas State University, an MBA from Xavier University and a bachelor's degree in electrical engineering from Purdue University. He is a member of the Society for Industrial and Organizational Psychology (SIOP), the Society of Consulting Psychology (SCP), the American Psychological Association (APA) and the Society for Human Resource Management (SHRM).

## ABSTRACT

Coaching can be an effective and integral component of leadership development programs. Popular among human resource professionals and clients, coaching facilitates leaders' professional growth and helps to build a powerful team—from executives to first-line managers and team leaders. Coaching has a proven track record of success, and many studies have shown how coaching enhances decision-making skills, improves interpersonal effectiveness and increases confidence. The maturing workforce necessitates thoughtful succession planning, and coaching is often a strategic element of this effort. Integrating coaching into an organization's culture will ensure the longevity and sustained value of the program.

## What Is Coaching?

Coaching is a unique endeavor. Coaches partner with clients in a transformative process that empowers and inspires them to reach their maximum potential. The

coaching process is about moving

forward, working with the client to

stretch and reach goals he or she

desires. Figure 1 illustrates this concept.

The coach provides a stable reference

while supporting the client in his or her

journey from place or attitude A to B.

Fundamentally, it is about facilitating a

change or transformation within the

client. Coaching is frequently used to assist individuals as they prepare for or move into

new assignments, improve work habits, adapt to a changing environment or overcome

specific obstacles.

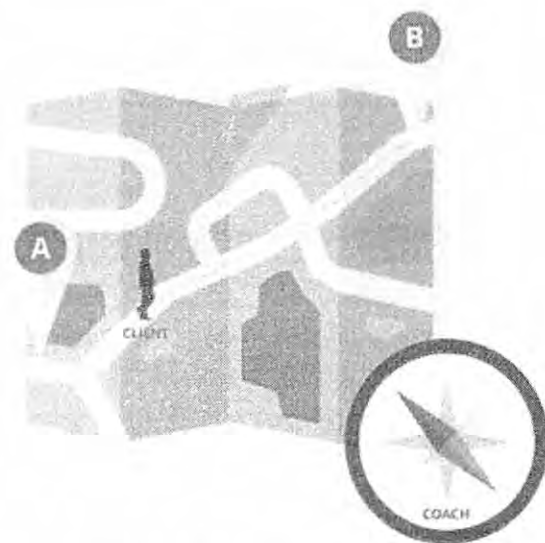


Figure 1. Client Journey

Coaching is often confused with other personal or organizational support modalities, such as mentoring, consulting and psychotherapy. In a mentoring relationship, an expert provides advice and counsel based on his or her wisdom or experience. A consultant gives advice (usually of a business or technical nature), diagnoses problems and designs solutions. Psychotherapy involves healing pain, dysfunction and conflict, often with a focus on resolving past difficulties or healing old wounds.

### **Making the Case for Coaching**

Academic research and organizational evaluations have demonstrated the effectiveness of professional coaching. A meta-analysis of 18 quantitative studies of organizational coaching showed that coaching has a significant effect on performance, skills, well-being, coping, attitudes and self-regulation (Theeboom, Beersma, & van Vianen, 2013). Meanwhile, managers and leaders at organizations where coaching is used have reported a host of positive effects, including improved team functioning, increased engagement, improved employee relation and increased commitment (Human Capital Institute & International Coach Federation, 2014).

Decisions on how to measure coaching effectiveness are sometimes contentious and often difficult. Return on investment (ROI) calculations are sometimes used to achieve a hard number illustrating money saved through measures such as increased productivity and reduced turnover. In a 2009 global study commissioned by the International Coach Federation (ICF), of 2,165 respondents 40% indicated that their

organization had experienced financial changes as a result of coaching. Based upon a sample of respondents who provided detailed results, it is likely that more than half of these changes were positive (International Coach Federation, 2009).

Usually, 360-degree surveys administered before coaching begins and again several months after the coaching engagement ends provide a clear picture of the progress made. These assessments, however, can be tedious to arrange and expensive to administer.

Measuring the nonmonetary benefits of coaching is even more difficult. Many organizations use return on expectations (ROE) measurements to quantify these benefits. An organization might measure ROE by assessing changes in clients' self-reported ability to achieve their goals. Examples of goals might include increasing self-confidence, improving interpersonal relationships or enhancing work performance. Some organizations prefer even simpler measures, such as asking clients if they felt the coaching was worth their time, whether it made a positive change and if they would recommend it to a colleague. Depending on the need, such simple measures may be sufficient justification to continue a coaching program.

The coaching process is about moving forward, working with the client to stretch and reach goals he or she desires.

## Elements of Coaching

Coaching is generally considered a recent phenomenon in the business realm; however, as Figure 2 illustrates, it can trace its roots to many fields, including the Human Potential Movement (HPM) of the 1960s, philosophy, business and humanistic psychology, among other traditions (Stein, 2003; Brock, 2008). The HPM and associated Large Group Awareness Training (LGAT) programs attempt to enhance individual self-awareness, facilitate growth and inspire individuals to seek their full potential (Finkelstein, Wenegrat, & Yalom, 1982). The HPM and, subsequently, coaching were influenced by humanistic psychology pioneers, including Carl Rogers and Abraham Maslow (DeCarvalho, 1991; Brock, 2008) and influential business writers such as Dale Carnegie and Napoleon Hill (Brock, 2008).

Carl Rogers was one of the founders of the field of humanistic psychology. He emphasized the need to focus on and maintain a presence with the client (Rogers, 1957). Albert Bandura, a social psychologist, provided a significant contribution to



Figure 2. Influences on Coaching

coaching with his theory that behavioral change may be a result of conscious, or cognitive, thought rather than an immediate reaction to present circumstances (Bandura, 1982). The self-motivation to change and develop a life that fulfills and brings happiness to the individual was theorized by Abraham Maslow (Maslow, 1943) and heavily influenced the HPM (Brock, 2008).

More recently, the field of positive psychology has moved away from the focus on mentally unhealthy behaviors to mentally healthy behaviors. This field, promoted by Martin Seligman and others, concentrates on happiness and how to flourish in life, bringing greater satisfaction to individuals in all aspects of their lives (Seligman & Csíkszentmihályi, 2000).

Self-improvement professionals Dale Carnegie and Napoleon Hill promoted behavioral changes in order to achieve success in both business and personal aspects of life (Carnegie, 1936; Hill, 1937). The essence of the books and programs by Carnegie and Hill—that one can be successful by envisioning and persisting toward goals—was adopted by the HPM and coaching in general (Brock, 2008).

Philosophy has also played a role in the development of coaching. Eastern philosophy promotes the need to look at the big picture and search for balance and harmony; Western philosophy seeks to understand contradictions, reality and ways to master it (Brock, 2008). Many of these philosophical approaches have influenced or become integral to different types of coaching.



Theories or models of human behavior frequently provide frameworks within which coaches can engage with clients. Diving deeper into the engagements, coaching tools and techniques can be observed (Herd & Russell, 2011).

Coaches will frequently use one of these frameworks or models. Experienced coaches often have many frameworks and models at their disposal and either choose one or integrate elements from multiple frameworks to provide an effective structure for each specific engagement. Coaches may also use tools such as objective assessments and techniques such as role-playing and journaling within their chosen framework.

### ***Frameworks***

The framework or conceptual model a coach uses can be a guide for discussions and may lead to specific activities. A framework provides structure and focus for the coaching engagement.

The client-centered, or people-centered, approach is one of the earliest and most significant approaches. Pioneered in the 1940s and 1950s by psychologist Carl Rogers, the approach is based on the belief that all people have the ability and tendency toward growth and optimal function. Rogers wrote that it was necessary for the individual assisting the client to fully understand the client's situation from an emotionally centered place and communicate this back to the client for him or her to process and develop (1957). A client-centered approach to coaching entails supporting clients to develop goals they are passionate about and continually guiding the dialog and process

toward meeting those goals. Client-centered coaching engages the internal drive or motivation of the client, which is almost always more powerful and long-lasting than external motivation (Deci, Koestner, & Ryan, 1999; Bénabou & Tirole, 2003).

The strengths-based approach began in the field of management thanks to business guru Peter Drucker (1966) and subsequently Donald Clifton of Gallup (Clifton & Nelson, 1992). This framework emphasizes the identification and use of

psychological strengths. Drucker believed that building on strengths is one of the five essential practices of an effective executive. Clifton's idea was to create a classification for strengths and positive behaviors, rather than for psychological issues as described in the *Diagnostic and*

No matter what framework or model is used, it is important that coaches are allowed flexibility to adapt to whatever comes up in coaching sessions.

*Statistical Manual of Mental Disorders*. Building on strengths feels intuitive, promotes confidence and enhances the idea of continuously moving forward. A few key strengths can overcome a plethora of weaknesses. The inherent difficulty in this approach becomes evident when the strengths are insufficient to be effective or when the weaknesses overwhelm the strengths. Objective assessments such as the Values-in-Action (VIA) Strengths Finder ([www.viacharacter.org](http://www.viacharacter.org)) are useful in identifying strengths. In addition, a proficient coach will be able to detect strengths through overt client statements and actions as well as nuances in emotion and body language.

The GROW model was popularized in the coaching industry by Sir John Whitmore in his 1992 book *Coaching for Performance: GROWing Human Potential and Purpose*.

Several versions of the GROW model exist; however, Whitmore's acronym stands for:

- Goals.
- Reality, or current reality.
- Options.
- Way forward, or what you will do.

The GROW model is popular in organizations because it standardizes the coaching framework while allowing leeway for creativity and exploration. Research has shown that development of appropriate goals can significantly enhance job performance (Locke & Latham, 1990). This model may prove effective in a goal-oriented organizational setting but may not be helpful in situations when discovery or exploration is required.

No matter what framework or model is used, it is important that coaches are allowed flexibility to adapt to whatever comes up in coaching sessions. Upon noticing that the current model or technique is not working, an effective coach will internally reflect, evaluate, allow for silence and openly explore new or alternate paths forward.

### ***Tools and Techniques***

Coaches frequently use tools such as assessments to bring a measure of objectivity and structure to the coaching engagement. A 360-degree survey is a popular

assessment to accompany coaching. These surveys gather input on the client from superiors, subordinates, peers, and sometimes customers, suppliers and family members. Because 360-degree surveys provide a wide variety of perceptions, they generally offer many angles from which to approach the work. Given that the surveys report opinions and perceptions but not facts, they can also bring out the ramifications of a client's behaviors—the effects he or she has on others.

Personality assessments provide insight into factors promoting an individual's behaviors. Well-validated instruments based upon the Five-Factor Model (McCrae & Costa, 1987) are especially detailed. A personality report combined with a 360-degree report can provide a significant amount of analytic data to guide the dialog in pursuit of the client's goals.

Goal Attainment Scaling (GAS) (Spence, 2007) is a method in which goals are developed with rating scales for each goal to enhance motivation and provide a measure of progress. Other tools coaches use frequently include emotional intelligence assessments and leadership inventories.

It is important to ensure that the person interpreting an assessment report is properly trained and also to determine to what extent assessment results will be shared with the client's management team and human resources department.

Academic research and organizational evaluations have demonstrated the effectiveness of professional coaching.


Coaches will often use techniques such as role-playing, simulations, case studies or journaling. These techniques promote awareness or provide skill practice in a specific area. Role-playing and simulations can provide good practice and may help a client in a new position or prepare a client for a future role. Case studies are also effective methods of practicing for scenarios that may play out in the future. Journaling can help clients gain awareness of emotions and behaviors, observe events throughout the day, and track progress toward goals.

### **Coaching Within Organizations**

Just as each coaching relationship is unique, no two organizational coaching initiatives look alike. Table 1, which summarizes key findings from HCI and ICF's 2014 research on coaching within organizations, illustrates some of the factors affecting an organization's decision to employ external coach practitioners, internal coach practitioners, managers or leaders who use coaching skills in interactions with their subordinates and peers, or some combination thereof.

Organizations use coaching primarily as a component of their leadership development strategy. They also use coaching to improve communication skills and teamwork, and to increase employee engagement and productivity.


Coaching sessions with an external coach tend to be less frequent, usually once a month. External coach practitioners are perceived to have a higher level of training and experience than internal coaches, a more objective view of circumstances, and a better



ability to coach executives and maintain confidentiality. External coach practitioners are also seen as having a higher price tag than internal coaches.

Coaching sessions with an internal coach tend to be more frequent than those with an external coach. Internal coaches are perceived to be more familiar with the organizational culture and operations, have more access to corporate resources, and be more able to enhance the development of a coaching culture.


Occasionally coaching will be encouraged for an individual struggling with low performance. In these instances, all parties involved—the client, his or her supervisor and HR—must have a clear understanding of what information will be shared amongst them. This should be described in the written coaching agreement between the client and the coach.



Team leaders and first-line managers use coaching skills as frequently as daily. Although their primary role is that of a leader or a manager, they must possess sufficient coaching skills to be successful in developing their subordinates professionally to help them achieve maximum potential.

Teaching managers and leaders effective coaching skills can go a long way toward improving the overall performance of an entire organization. Because these individuals have a more intimate working relationship with their clients, they may use coaching skills on a more informal basis than a professional coach practitioner would.

Team leaders, managers and those higher up the corporate ladder will often engage with a professional external or internal coach practitioner to focus on specific goal



areas, such as overall job performance, communication skills, interpersonal relationships or engagement.

**Table 1. Coaching Modalities**

Type of Coach	% of Organizations That Offer	Top Three Reasons for Using	Top Three Perceived Advantages	Top Three Perceived Disadvantages
<b>External Coach Practitioner</b>	53%	<ul style="list-style-type: none"> <li>• Leadership development strategy</li> <li>• Improve communication skills</li> <li>• Improve teamwork</li> </ul>	<ul style="list-style-type: none"> <li>• Level of coach training or experience</li> <li>• Ability to coach executives</li> <li>• Maintaining confidentiality</li> </ul>	<ul style="list-style-type: none"> <li>• Cost</li> <li>• Knowledge of company culture</li> <li>• Knowledge of company politics</li> </ul>
<b>Internal Coach Practitioner</b>	50%	<ul style="list-style-type: none"> <li>• Leadership development strategy</li> <li>• Increase employee engagement</li> <li>• Improve teamwork</li> </ul>	<ul style="list-style-type: none"> <li>• Knowledge of company culture</li> <li>• Accessible resource to the organization</li> <li>• Development of coaching culture</li> </ul>	<ul style="list-style-type: none"> <li>• Level of coach training or experience</li> <li>• Role clarity</li> <li>• Maintaining confidentiality</li> </ul>
<b>Managers or Leaders Using Coaching Skills</b>	82%	<ul style="list-style-type: none"> <li>• Leadership development strategy</li> <li>• Increase employee engagement</li> <li>• Increase productivity</li> </ul>	<ul style="list-style-type: none"> <li>• Knowledge of company culture</li> <li>• Development of company culture</li> <li>• Knowledge of company personnel and operations</li> </ul>	<ul style="list-style-type: none"> <li>• Level of coach training or experience</li> <li>• Maintaining confidentiality</li> <li>• Role clarity</li> </ul>

Note. Adapted from *Building a Coaching Culture* by Human Capital Institute & International Coach Federation, 2014, p. 8, 9, 12. Copyright 2014 by the Human Capital Institute.

## Coaching Competencies

Many coaching organizations, including the European Mentoring and Coaching Council (EMCC) and the ICF, have developed coaching competency models. Applying

these competencies ensures effective coaching on a basic level. While the models differ in detail, they frequently contain the following core components:

- Ethics.
- Developing a coaching agreement.
- Creating a relationship.
- Presence, effective communication and questioning skills.
- Setting goals.
- Promoting growth.
- Action.

A set of competencies provides a structure for learning how to become an effective coach and is also useful in developing assessments. Some coaches set goals to earn credentials from coaching organizations, and defined competencies aid in creating valid reliable assessments. For example, ICF has developed a set of markers based upon its set of competencies that is used to assess coach performance (International Coach Federation, 2014).

### ***Ethics***

A coach should understand the ethical issues related to the coaching profession and vow to follow a comprehensive set of ethical standards. Organizations using coaching should remain steadfast in their quest for all parties to maintain those high ethical



standards. A lapse in ethics by a coach can not only harm the coach and the client, but also sully the reputation of the coaching industry.

While ethics in the coaching field certainly includes maintaining confidentiality and a professional relationship with the client, on a broader scale, it is also important for a coach to represent the function and himself or herself accurately and honestly. As in any field, disparaging fellow professionals is ill-advised.

### ***Coaching Agreement***

It is very important for coaches and clients to have a common understanding of the coaching engagement and to document this in a written agreement. These agreements frequently include the following elements:

- Confidentiality.
- Involvement of others, such as HR and superiors.
- Goals.
- Engagement duration.
- Session duration, times and dates.
- Medium of communication.
- Client's recognition of need to change and commitment to change.

Because the coaching relationship is an intimate partnership, it is essential that clients understand which aspects of the engagement will remain confidential to the partnership. It is best to write out which, if any, aspects of the engagement will be

shared with other individuals in the organization. Such agreements may also touch on legal and ethical grounds for a breach in confidentiality, such as a court order or threat to harm oneself or others.

Typically, the organization will be paying for the coaching, and organizational decision-makers will thus feel entitled to at least a superficial level of understanding of what is taking place in the coaching engagement. A commissioning HR generalist or superior will often request a report from the coach once or twice during an engagement. It is essential that the agreement detail the elements of the discussions that will be reported to ensure that everyone is on the same page.

Describing the goals of the coaching engagement in the agreement serves two purposes: it provides visual, concrete goals and assists in communicating the goals with others in the organization if the agreement is shared.

Coaching engagements may stretch from one session to many years. It may be difficult to tell how long the engagement will take, but it is best to indicate at least a range of time in order to set common expectations regarding the investment of time and money.

### Coaching Agreements

- Understanding of what will be confidential and what will not.
- How involved others will be, such as HR and superiors.
- High-level coaching engagement goals.
- Estimated duration of the coaching engagement.
- Session times and means of meeting.
- An understanding of the client's view of the need to change and commitment to change.

A coaching agreement should also include information about when, where and via what medium (telephone, videoconference, face to face) coaching will take place. The client should be comfortable with the medium and the location. For example, a client may wish to keep the fact that he or she is being coached confidential and prefer to meet in a private setting. A general, upfront agreement on the logistics of the engagement can go a long way toward building trust and rapport.

Because coaching is a client-driven process, a client's view and attitude will determine the success of the engagement. If a client views his or her need to change as high and commitment to change as high, it is more likely that the engagement will be a success. An upfront discussion of these factors—and their incorporation into the coaching agreement itself—can help build a foundation for success.

### ***Creating a Relationship***

The coach-client relationship between the coach and the client is one of the most significant factors in a successful coaching engagement (Baron & Morin, 2009). A strong coaching relationship will facilitate growth and inspire the client. The client should feel supported by the coach as well as safe in the knowledge that their conversations will be private and free of judgment.

In the organizational coaching context, this process begins with the decision-maker charged with pairing coaches and clients. It is crucial for this decision-maker to give each client the right to select or at least refuse a specific coach.

It may take many sessions for a coach-client relationship to develop. An effective coach understands that the effort to build a relationship is as important as undertaking tasks.

### ***Presence, Communication and Questioning***


When a coach is present with the client, his or her focus will remain solely on the task at hand, looking the client in the eye and remaining open to whatever arrives in the sessions. A coach must be adaptable in order to respond most appropriately and with whatever will be most helpful to the client in that moment. An effective coach is confident in his or her abilities and can convey that confidence in a humble and assuring manner.

The client should feel supported by the coach as well as safe in the knowledge that their conversations will be private and free of judgment.

Communication is at the heart of the coaching relationship, whether it be communication through words, body language or intonation. An effective coach uses all of these elements to convey a genuine interest in partnering with the client to facilitate growth. Active listening skills and inquisitive inquiry are valued elements of a successful coaching engagement. Questions that reveal beneficial information to the coach and the client are powerful tools in the coaching process.

### ***Goals and Growth***


Goals that stretch the client are powerful motivators (Locke & Latham, 1990). Easy-to-reach goals are not helpful because the client will readily vault low hurdles. On the



other end of the spectrum, goals that are unobtainable will lead to frustration and resignation, and may affect the way coaching is perceived by the client and the organization. Deep and open discussions will facilitate the creation of goals that promote growth within the client and provide the greatest value for all parties involved.

It is important for the goals to be generated by the client. A proficient coach will support the client in developing meaningful, succinct goals. Many clients find so-called SMART (specific, measurable, actionable or achievable, realistic or relevant, and time-bound) goals useful.


### ***Action***



Without action, coaching may be viewed as a series of nice, deep conversations. Supporting the client in developing an action and accountability plan will greatly enhance the chance of long-term success and value.

As actions are completed, they build a sense of accomplishment in the client that can lead to a willingness to take on and achieve more difficult goals. In addition, as actions are carried out, new ideas and values are sometimes uncovered that bring further insight into issues relevant to the coaching engagement.

### **Training and Credentials**



Coaches can obtain training through many channels. As summarized in Table 2, each type of training comes with its own advantages and disadvantages. Large organizations will frequently prepare their own training in order to reduce cost or to customize the training to their values, culture and industry. In order to take advantage

of coaching expertise, many organizations contract with coaches or coach-training programs to assist with curriculum development and/or delivery.

Third-party accredited training programs such as those accredited by ICF and EMCC are beneficial because the developers are steeped in the competencies required for effective coaching and are held to a standard necessary to ensure the coaches will be well prepared. Accredited training also prepares coaches to pursue credentials, should they desire to do so.

At the university level, many training programs will award coaching students with a certificate or a degree upon completion. Programs in the Graduate School Alliance for Education in Coaching (GSAEC) have committed to a high standard of education for their students.

**Table 2. Advantages and Disadvantages of Types of Training Programs**

Type of Training	Advantages	Disadvantages
<b>In-house developed training</b>	Low cost, control of curriculum	Does not take advantage of coach training experts, more difficult for coaches to earn credentials
<b>In-house developed training in consultation with coach trainers</b>	Low cost	More difficult for coaches to earn credentials
<b>Third-party accredited training</b>	Comprehensive, easier for coaches to earn credentials	Higher cost, less control of curriculum
<b>Graduate school programs</b>	Depends upon the program	High cost

In addition to education, many coaches set a personal goal to earn credentials from a coaching organization. A credential often brings personal satisfaction to the coach

through the recognition of some level of mastery and affirms to clients and organizations that the coach takes this role seriously, has acquired knowledge in the field and has demonstrated proficiency at some level.

## **The Role of Coaching in Succession Planning**

Successful organizations are intentional in ensuring the long-term viability of their leadership team. Identifying and developing employees who can fill significant roles in the future is a key element in this strategy. Because coaching is an individualized intervention providing one-on-one feedback that can quickly be implemented, practiced and honed, it is well-suited to succession planning and leadership development.

Coaching future leaders can help them build confidence and skills they might not otherwise develop. Individualized attention in coaching will bring a laser-sharp focus on unique strengths and growth opportunities.

As individuals move into new roles, coaching can support their transition. Coaching also helps keep leaders active and engaged in their own professional and personal development.

### **Where to Learn More**

- Association for Coaching:  
[www.associationforcoaching.com](http://www.associationforcoaching.com)
- European Mentoring & Coaching Council (EMCC): [emccuk.org](http://emccuk.org)
- International Coach Federation (ICF):  
[coachfederation.org](http://coachfederation.org)

The more that coaching is embedded into the culture of an organization, the more thoughtful and mature it grows. Coaching philosophy, standards and policies may be developed after reflective dialog on the role of coaching in the organization (Riddle & Pothier, 2011).



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# The Science of Workplace Instruction: Learning and Development Applied to Work

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## Keywords

training and development, learning, instruction, training effectiveness, instructional principles

## Abstract

Learning is the engagement in mental processes resulting in the acquisition and retention of knowledge, skills, and/or affect over time and applied when needed. Building on this definition, we integrate the science of training and the science of learning to propose a new science of workplace instruction, linking the design of instructional events to instructional outcomes such as transfer and job performance through the mediating effects of learner events and learning outcomes. We propose three foundational elements: the learner, instructional principles, and training delivery (methods and media). Understanding and applying instructional principles are the primary methods for enhancing training effectiveness; thus, we detail 15 empirically supported principles. We then discuss the erroneous pursuit of aptitude-by-treatment interactions under the guise of learner styles and age-specific instruction. Finally, we offer suggestions for future research that draw on the foundation of instructional principles to optimize self-directed learning and learning in synthetic learning environments.

## INTRODUCTION

Workplace training is a systematic approach to learning and development to improve individual, team, and organizational effectiveness. Industrial and organizational (I-O) psychologists have played various roles relevant to improving the quality and effectiveness of training, including research on learning and transfer, development of training evaluation measures, enhancement of methods for training design and delivery, and the positioning of the training function within organizations. Research has focused on theoretical perspectives of what is meant by learning (Kraiger et al. 1993) and transfer (Baldwin & Ford 1988) as well as investigating factors that affect learning and the transfer of training to the job (Ford & Kraiger 1995).

Training research as a reflection of existing training practices and a stimulus for innovation has undergone three major cycles in the past century (Bell et al. 2017). First, between approximately 1920 and 1950, research tested and developed theories of learning and skill acquisition. Second, research between approximately 1950 and 1980 focused on training methods and institutionalizing training events within a larger organizational context, e.g., development of methods for needs assessment to determine training needs and evaluation practices to demonstrate training impact (Kraiger & Ford 2007). As such, the research at that time was described as “nonempirical, non-theoretical, poorly written, and dull” as well as “fadish (sic) to an extreme” (Campbell 1971). With regard to the third cycle, researchers went both narrower and broader in focus: The application of cognitive science to understand changes in the learner (e.g., Ford & Kraiger 1995, Kraiger et al. 1993) and broader systems perspectives to understand organizational influences on training effectiveness (e.g., Colquitt et al. 2000) fueled several decades of interest and activity. At the individual level, Kraiger et al. (1993) clarified that learning occurs not only when trainees can do something they were not able to do before, but also when there are changes in affective and cognitive states as well. This significantly impacted how training researchers have evaluated training (Aguinis & Kraiger 2009, Salas et al. 2012). At a systems level, Colquitt et al. (2000) and others tested models of training effectiveness identifying how individual and system-level influences affect the extent to which knowledge and skills are learned, retained, and transferred to appropriate situations. Salas & Cannon-Bowers (2001) dubbed the term the science of training, characterizing it as an “exciting and dynamic field,” and challenged the field to find new ways to influence practice via theory and best practice—oriented research.

Twenty years after that declaration—anecdotally and based on observations of manuscripts we (the authors) review, conferences we attend, as well as the content of scientific and practitioner journals—there has been a diminishing interest in learning and development within I-O psychology. At the same time, basic research on learning in cognitive science and educational psychology continues to evolve (e.g., Cotton 1976, Glaser & Bassok 1989) and has expanded rapidly over the past twenty years (e.g., Mayer 2019). Although training research has benefited greatly from individual (learning) and organizational (systems) perspectives, training as an applied science is in danger of drifting from both its roots in learning theory and its potential for impacting the building up of human capital in organizations.

Just as there was value in clarifying what is learned (Kraiger et al. 1993), there is value today in focusing on how we learn and applying this knowledge to optimize learning. The purpose of this article is to direct attention to how individuals learn in order to organize what we know and need to know about maximizing training effectiveness. We link the science of learning to the science of training to identify and more fully understand the factors affecting learning outcomes. In particular, the science of workplace instruction is the application of evidence-based principles that have been found to help individuals learn knowledge, skills, and attitudes that impact job performance and organizational effectiveness. We extend the “science of instruction” found in

educational contexts (e.g., Mayer 2011a, 2019) to the workplace to account for the complexities introduced by different training content (e.g., greater focus on skills and task completion) and greater variability in learning contexts (e.g., easy versus difficult sales clients).

The article is organized into three parts. In the first section, we provide a framework of possible areas of inquiry with respect to learning and training. In the second section, we describe the core elements of the science of workplace instruction, emphasizing instructional principles, as mechanisms for improving training practice and stimulating training research. In the third section, we explore the advancement of the science of workplace instruction by examining the intersection of instructional principles with training delivery and discussing two emerging trends in training—self-directed learning and synthetic learning environments.

## A TRAINING SYSTEMS FRAMEWORK

To understand how effective instruction promotes learning in participants, we first must be clear on what we mean by learning. Ford (2021) recently presented and compared many popular definitions of learning from both the cognitive science and training domains. There were three common characteristics across most definitions: (a) change in knowledge, skill, and/or affect; (b) relative permanency of the change; and (c) that it is inferred from observed changes in the learner. These core characteristics highlight that learning in an organizational context must be at some level intentional and lasting.

So, what is learning? One helpful definition is from Quinn (2018), who defined learning as the retention (of knowledge, skills, and affect) over time until needed and transferred to appropriate situations. The elaboration in parentheses is ours and reflects the views of educational scholars (e.g., Anderson et al. 2001) and the current authors (see also Kraiger 2002, Kraiger et al. 1993) that learning is multidimensional. Building from this, we define learning as engagement in mental processes—learning events—that result in the acquisition and retention of knowledge, skills, and/or affect over time and until needed, along with the capacity to identify conditions of performance and respond appropriately. More colloquially, learning is an increased capacity to do the right thing at the right time.

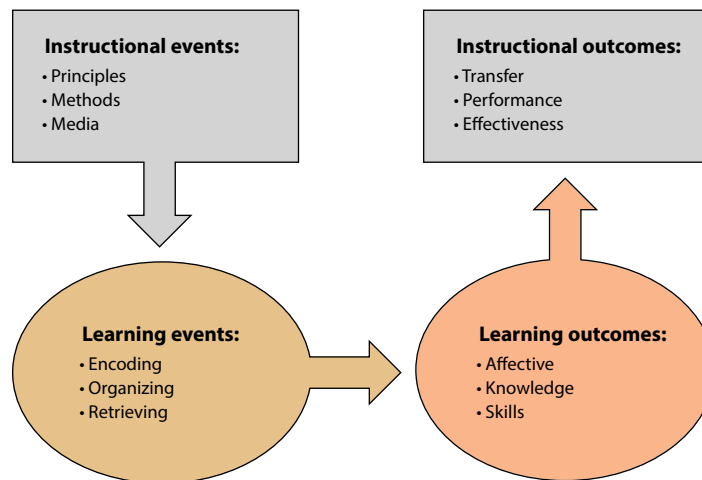
### Instructional Outcomes

**Figure 1** presents an organizing framework to guide our discussion of training system components relevant to learning. Instructional (or training) outcomes are observable and measurable criteria that occur as a result of learning. These outcomes are the foci of most training reviews over the past 50 years. Prior reviews have concentrated on whether, when, and why training transfers to the job (Ford et al. 2018), individual performance improves (Aguinis & Kraiger 2009, Salas et al. 2012), and organizational effectiveness increases (Aguinis & Kraiger 2009). The main question addressed in these reviews is whether (or which) instructional events lead to instructional outcomes of value to learners or the organization.

### System Components

The lower half of **Figure 1** shows dynamic changes in the learner as a result of instructional events. Learning events and learning outcomes mediate the relationship between instructional events and instructional outcomes but receive only sporadic attention from training researchers.

**Learning outcomes.** Learning outcomes are constructs that change as a result of learning events. Kraiger et al. (1993) examined learning taxonomies from educational and cognitive science



**Figure 1**

Organizing framework linking instructional events and learning events to learner outcomes and instructional outcomes.

disciplines (e.g., Bloom 1994) and developed a conceptually based classification scheme of learning outcomes that included three major learning outcome categories: cognitive, skill-based, and affective. Cognitive learning outcomes included verbal knowledge, knowledge organization, and cognitive strategies. Skill-based outcomes included issues of compilation and automaticity. Affective outcomes included issues of attitude change and motivational shifts in terms of mastery goals, self-efficacy, and goal direction. Although not addressed in this article, training evaluation is the practice of assessing the achievement of learning outcomes (Kraiger 2002) and using those data to drive decisions that improve the learner and the training system (Surface & Kraiger 2018).

**Instructional events.** Figure 1 distinguishes between instructional events and learning events but links the two. Instructional events are observable and typically initiated by the organization to trigger learning events within individuals. These events include training strategies to build individual capabilities from novice to expert, develop team members to enhance team effectiveness by developing team knowledge and skills, and facilitate the progression of leadership excellence. There are a variety of other forms of instruction that take place outside of formal training, such as informal field-based learning (Wolfson et al. 2018), self-directed learning (Clardy 2000), mentoring (Kraiger et al. 2019), and coaching (Griffiths & Campbell 2009). We focus primarily on formal instructional events but recognize that the same components of instructional events that drive learning in formal, structured environments will be effective in these less structured environments as well.

**Learning events.** Learning events refer to individual actions of encoding, organizing, and retrieving new content presented from instructional events. Learning is what we do when presented situations and content that are outside our current states of affect, knowledge, and skill capacities. Learning can be incidental but largely results from instructional events. Multiple theories of learning center on the processes by which learners capture environmental stimuli, act upon it, then store it in ways that make it accessible for later application. Mayer's (2008) cognitive theory of multimedia learning describes how learners actively coordinate and monitor the processes

of selecting relevant words and images from a multimedia message, building connections among them to create coherent personally meaningful models, and then integrating those models with prior knowledge to facilitate storage and recall. More generally, learning from instruction requires cognitive processes of encoding, organizing, and retrieving, as well as the importance of building connections in an active, intentional way among these processes.

Encoding is the process by which learners select content into working memory. We are constantly encoding and making conscious and unconscious decisions of what to attend to and what to let pass. Organizing occurs during consolidation and is the process by which learners build personally meaningful representations of training content. Examples include building task sequences—the steps necessary to generate a budget report online—and if-then responses—such as “if my direct report gets defensive when I am giving feedback, then I respond by \_\_\_\_.” Finally, retrieval is the act of successfully recalling and applying acquired knowledge, skill, and affect when needed. Retrieval also helps strengthen the connections in memory around what has been learned.

## Advancing Training Research and Practice

The science of training has largely focused on how effective training is and the individual and organizational factors that predict or moderate training effectiveness (see **Figure 1**, upper right). The science of learning focuses principally on the upper left corner: What are the most effective instructional events given what we know about how people learn? The proposed science of workplace instruction considers this framework as a whole—linking instructional events to meaningful outcomes through an understanding of learning events in people and desired learning outcomes of organizations.

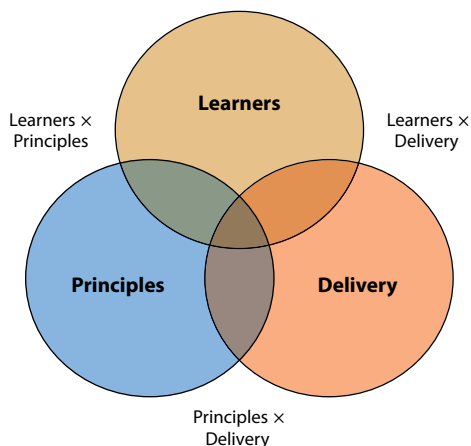
To advance the science of workplace instruction and reinvigorate training research, we need a better understanding of how instructional events affect outcomes through learning events. To advance training practice, we need greater guidance on implementing instructional events in ways that affect learning events, improve learning outcomes, and lead to lasting positive instructional outcomes.

## How Effective Instruction Works

Referring to educational contexts, Herb Simon stated, “Learning results from what the student does and thinks and only from what the student does and thinks. The teacher can advance learning only by influencing what the student does to learn” (quoted in Ambrose et al. 2010). This statement highlights the appropriate focus on what a learner does to learn and how to build effective workplace instruction to better facilitate the process of learning.

In general, effective workplace instruction facilitates encoding by improving learner engagement, directing attention to key material, and drawing connections between new content and what the learners already know or need to know to perform their jobs. It facilitates organization by providing an overarching structure to the content, providing sufficient time for organization and consolidation to occur, and helping learners understand connections between content elements and between those elements and the work context. Retrieval processes occur during and after training. In particular, effective instruction facilitates retention and retrieval by having learners practice retrieval during learning, ensuring that the content is well ingrained (overlearning), incorporating physical, functional, psychological, and social fidelity between training and performance environments, and preparing learners to generalize or adapt newly acquired knowledge or skills to novel contexts. In the next section, we describe steps toward building a science of workplace instruction around instructional events and learning events.





**Figure 2**

Primary elements of the science of workplace instruction: learners, instructional principles, and delivery.

## ELEMENTS OF THE SCIENCE OF WORKPLACE INSTRUCTION

**Figure 2** shows the three primary elements of the science of workplace instruction: the learner, instructional principles, and instructional delivery. As the goal of instruction is to facilitate change in the learner, research and practice should be considered from this perspective. In this section, we clarify the role of the learner, present core instructional principles for workplace instruction, and differentiate delivery methods and media from principles. This discussion sets the standard for understanding the intersections among learners, principles, and delivery—intersections we believe should be at the forefront of future training research.

### The Learner

Learning occurs when individuals retain new knowledge, skills, and affect over time and apply these changes to appropriate situations. Learners are directly referenced as a foundational element of the science of workplace instruction in **Figure 2** and are implicit in **Figure 1** within learning events (how change occurs) and learning outcomes (what change looks like). Because the science of workplace instruction builds on both the science of learning and the science of training, it is instructive to understand how individuals—and the concept of individual variability—are treated in these paradigms.

With its roots in experimental psychology, the science of learning progresses by ignoring or controlling for individual differences. Individual variability contributes to within-cell variability, such that main effects for, say, an instructional principle can be assumed to generalize across learners. In other words, empirically supported instructional principles are effective for most learners. With its roots in applied psychology, the science of training seeks to identify individual difference variables, e.g., motivation to learn or goal orientation, that are predictors or moderators of the learning during training or transfer after it. This paradigm leads to empirically supported conclusions about the relative importance of these individual factors but provides little guidance as to how to use this knowledge to build better training.

To the extent that knowledge of individual variability matters in applied contexts, it must trigger the design of interventions to reduce pretraining variability among learners. For example, the effects of how training is framed can influence trainee attitudes (e.g., Hicks & Klimoski 1987)

by maintaining the status quo in learners who already have positive attitudes about training and improving attitudes (e.g., motivation-to-learn) in trainees with initially lower attitudinal levels (e.g., Cox & Beier 2009).

By designating the learner as a primary element in the science of workplace instruction, we not only establish the learner as the point of instruction but also highlight the importance of examining how variability among learners (during learner events) interacts with instructional principles and methods. Although there will be variance in cognitive ability, job knowledge, and trainee motivation, the science of learning reveals that learning events are relatively intransient across learners and are facilitated by the same set of empirically supported instructional principles.

## Instructional Principles

The science of workplace instruction is the application of evidence-based principles that have been found to help individuals learn knowledge, skills, and attitudes related to job performance and organizational effectiveness. Instructional principles are empirically supported propositions that guide the design and delivery of effective training. Instructional principles can affect both instructional events (how training is structured and designed) and learning events (how learners interact with material) and lead to learning particular outcomes. The search for generalizable principles of learning has a long history in psychology; for example, Thorndike & Woodworth (1901) advocated for the use of identical elements to improve transfer of learning. I-O psychologists and instructional psychologists were instrumental in developing foundational instructional principles in the 1950s and 1960s, typically in the quest to improve efficiency in and transfer of military training. These principles included recommendations for increasing task difficulty (e.g., Briggs & Naylor 1962), stimulus variability (e.g., Ellis 1965), and distributed practice (e.g., Briggs & Naylor 1962). More recently, the identification and validation of instructional principles have been conducted primarily by cognitive scientists and educational psychologists with the intent of improving formal education (e.g., Dunlosky et al. 2013, Halpern et al. 2007, Mayer 2008, National Research Council 2012), with minimal attention to workplace training (but see Plott et al. 2014).

Not all empirically supported principles are useful for the science of workplace instruction. A useful principle must be actionable, resulting in instructional design or learning events that result in knowledge/acquisition and retention. Statements (offered as principles) such as “prior knowledge can help or hinder learning” may be true but are not prescriptive. Other principles may be too narrowly focused on primary or secondary education. Because we believe instructional principles are the bedrock of effective workplace instruction, we provide a brief summary of those that are both actionable and the most relevant to adult learners and workplace training. We return to these principles later in the article when we talk about their relationship to learners and training design.

**Core instructional principles.** Table 1 shows five core instructional principles, each with three specific principles or instructional strategies. A core principle is an empirically supported approach to facilitating learning that can be accomplished in multiple ways, including the specific principles nested under each. To conserve space, those principles are defined in the table along with examples and citations to key explanatory texts and/or reviews providing empirical evidence on effectiveness.

For each specific principle or instructional strategy, Table 1 provides the following: a definition, one or more examples (with citations when helpful), references of primary sources for more in-depth understanding, and one or more key findings. A definitive review of each principle or strategy is beyond the scope of this review. However, the table directs researchers or training

**Table 1** Empirically supported instructional principles

Principles	Characteristics	Examples	Sources	Key findings
<b>1. Organize content</b>				
a. Coherence	Ensure there is a well-connected representation of the essential ideas to be learned.	Delete interesting but nonessential facts. Design course materials such that main points are prominent and easy to discern.	Halpern et al. 2007, Moreno 2006	Mayer & Fiorella (2014) found a median effect size of 0.86 across 23 studies for concise presentation of material.
b. Contiguity	Present knowledge, principles, and ideas that are closely associated in space and time.	Explain a learning event close in time to when it is depicted. Place onscreen text near corresponding graphics (e.g., illustrations placed next to the paragraph describing it) and put words from the paragraph in the illustration.	Halpern et al. 2007, Mayer 2019	A meta-analysis of 29 studies showed a mean $d = 0.80$ for effects of contiguity, with a similar effect for spatial and temporal contiguity (Ginn 2006). Mayer & Fiorella (2014) found a median effect size of 1.10 across 22 studies.
c. Advanced organizer	Present introductory (pretraining) material that provides the learner with a structure, schema, or example of what is to be covered in training.	Short pretraining video demonstrating behavior to be trained. Cues in the form of outlines, diagrams, and concept maps. Mnemonics.	Mayer 1979, Moore et al. 2017	Preiss & Gayle (2006) reported a mean $d = 0.46$ ( $K = 20$ , $N = 1,937$ ) for providing advanced organizers. Stone (1983) reported a mean $d = 0.66$ ( $K = 112$ ), with larger effect sizes for written or illustrated advanced organizers and with advanced organizers that bridge with material to be learned.
<b>2. Optimize sequencing of material</b>				
a. Scaffolding	Provide learner assistance in the early phases of instruction to help focus attention; start with the simple aspects of the task and then build in task complexity.	Expert advice and support that fades over time. Design into the plan of instruction appropriate support mechanisms by anticipating learner needs.	Metcalfe & Kornell 2005, Reiser 2004	Meta-analytic results showed a large (60%) benefit for scaffolding ( $TR = 1.58$ , $g = 0.46$ ) (Plott et al. 2014). Another meta-analysis revealed mean effects of $g = 0.46$ , 0.54, and 0.63 for concept, principles, and application outcomes, respectively (Belland et al. 2015).

(Continued)

Table 1 (Continued)

Principles	Characteristics	Examples	Sources	Key findings
b. Adaptive difficulty	Allocate the optimal time for mastery and increase the level of task difficulty over the time of the instruction based on mastery of earlier phases.	Trainee performance below expectations leads to reducing task difficulty, whereas performance above expectations leads to increasing task difficulty.	McDermott et al. 2013, Metzler-Baddeley & Baddeley 2009	Meta-analytic results show that increasing difficulty adaptively for the learner led to greater learning ( $7R = 1.36$ , $K = 21$ , $g = 0.75$ , $K = 7$ ) than fixed increasing in difficulty and constant difficulty control conditions (Wickens et al. 2013). In a meta-analysis of simulation-based medical training, variation in task difficulty or complexity produced a mean $d = 0.68$ ( $K = 20$ ) (Cook et al. 2013).
c. Interleaving	Implement a practice schedule that mixes different kinds of problems or training content.	Alternating practicing long shots and short shots at the driving range. Having customer service representatives alternate practice with technical and interpersonal problems	Bjork & Bjork 1992, Dunlosky et al. 2013	A meta-analysis revealed an overall significant effect $g = 0.42$ ( $K = 59$ , $238$ effect sizes) for interleaving (Brunnair & Richter 2019).
3. Engage learner in own learning				
a. Generative effects	Help learners integrate and elaborate on new knowledge by making personal connections between the new knowledge and the existing knowledge base of the learner.	After lecture, prompt learners to generate an original example or apply the concept to a real-world situation (Gingerich et al. 2014). Have learners explain or demonstrate a concept to others.	Fiorella & Mayer 2016, Gingerich et al. 2014	A meta-analysis showed an overall significant effect ( $g = 0.55$ , $K = 69$ , $N = 5,917$ ) for prompting or directing learners to self-explain content (Bisra et al. 2018). Each of eight unique generative learning strategies yielded median effect sizes of $d = 0.40$ or higher across studies (Fiorella & Mayer 2016).
b. Prompts/metacognition	Facilitate the self-regulation of learning by the learner through questioning of learning strategies.	Have learners provide self-explanations that connect the material to what they already know.	Azevedo & Cromley 2004, Kruger & Dunning 1999	"The benefits on learning of meta-cognitive prompts in <i>younger learners</i> is consistent (across) a large number of . . . studies" (Kraiger et al. 2020, p. 49).
c. Retrieval (aka the testing effect)	Have learners recall information that is now consolidated in long-term memory.	Frequent repeated testing on concepts while in training.	Dunlosky et al. 2013, Roediger & Karpicke 2006	Retrieval practice has been found to be a powerful mnemonic enhancer producing large gains in long-term retention relative to repeated studying (Roediger & Butler 2011). In a review of 120 studies, testing effects have been demonstrated across a large range of practice-test formats and material (Dunlosky et al. 2013).

(Continued)

Table 1 (Continued)

Principles	Characteristics	Examples	Sources	Key findings
<b>4. Conduct effective practice</b>				
a. Variability of practice	Ensure learners have opportunities to apply skills across different tasks, people, and job-relevant situations.	Change the software programs used to address the same task, or change the functions available for use. Randomly assign tasks to be learned.	Shea & Wulf 2005, Wulf & Shea 2002	“There is strong evidence that such variability of practice is important for achieving transfer of learning—both for relatively simple tasks . . . and highly complex real-life tasks” (Kirschner & Van Merriënboer 2008). For a meta-analysis of simulation-based medical training, clinical variation produced a mean $d = 0.20$ ( $K = 16$ ) (Cook et al. 2013).  A meta-analysis revealed an overall mean weighted effect size of 0.46 ( $K = 112$ ) for effectiveness of spaced practice (Donovan & Radosevich 1999). For a meta-analysis of simulation-based medical training, distributed practice produced a mean $d = 0.66$ ( $K = 6$ ) (Cook et al. 2013).
b. Spaced practice	The implementation of a training or practice schedule in which learning events are spread over time as opposed to setting schedules with practice sessions close in time.	Medical residents are given one day of training to learn four procedures—2 h per procedure—or given 2 h of training each week for four weeks (Moulton et al. 2006).	Dunlosky et al. 2013, Moulton et al. 2006	
c. Identical elements	Have learners produce responses within an accurate representation of the operational system, equipment, and environmental context.	Job-relevant tasks with events unfolding in a realistic manner. Place learner in situations that incorporate what it feels like (time pressures, challenges) when completing the task on the job. Mirror the collaborative nature for tasks on the job.	Baldwin & Ford 1988, Marlow et al. 2017	Issenberg et al. (2005) reviewed 109 published studies in medical journals and found it “clear that high-fidelity medical simulations facilitate learning among trainees when used under conditions . . . [that include] . . . curriculum integration . . . and simulator validity” (p. 24). In a meta-analysis of simulation-based nursing education, high- and moderate-fidelity simulations resulted in greater learning than did low-fidelity simulations (Kim et al. 2016).

(Continued)

Table 1 (Continued)

Principles	Characteristics	Examples	Sources	Key findings
<b>5. Develop past initial mastery</b>				
a. Knowledge of results	Whether a response is correct or incorrect [knowledge of results (KR)]; what the correct response is [knowledge of correct response (KCR)].	A learner is only able to go forward in a language app if they provide the correct answer.	Shute 2008, Vander Kleij et al. 2015	In a meta-analysis of computer-based instruction (Van der Kleij et al. 2015), KR produced an effect size of 0.05 and KCR produced an effect size of 0.33.
b. Feedback and feedforward	Information communicated to the learner that is intended to modify his or her thinking or behavior for the purpose of improving learning (Shute 2008).	Identify and possibly correct inaccurate skills, misconceptions (errors of commission), and missing information (errors of omission).	Kluger & DeNisi 1996, Shute 2008	In a meta-analysis of 53 studies of computer-based instruction, elaborative feedback produced an effect size of 0.49 (Van der Kleij et al. 2015). van de Ridder et al. (2015) conducted a meta-review of 22 meta-analyses and 24 narrative reviews on feedback. She concluded the following: "The main effect of the provision of feedback is that feedback is effective and improves performance such as in safety-related performance, work productivity, judgement abilities, learners' goal-setting abilities, and clinicians' and physicians' performance. The impact of feedback is often small to moderate" (p. 664).
c. Overlearning	Continued practice on a task after some criterion of mastery on that task has been achieved.	Repeated practice. Refresher training.	Driskell et al. 1992, Wang et al. 2013	A meta-analysis showed a mean $d = 0.63$ ( $K = 88$ ), with stronger effects for cognitive than physical tasks. Furthermore, the greater the overlearning, the stronger the effect (Driskell et al. 1992).

Variables:  $d$ , the difference between a treatment and comparison group in standard units;  $g$ , Hedges' effect size estimate;  $K$ , number of studies or number of effect sizes if larger;  $N$ , total number of participants across studies;  $TR$ , ratio of the performance of the treatment group to the control group (e.g.,  $TR = 1.4$  means treatment group performed 40% higher on the outcome measure).

professionals who want to learn more about each one. Examining the table is beneficial, as the remainder of the article references many of these specific principles and strategies.

The Key Findings column of **Table 1** warrants clarification. When there are meta-analytic findings of studies relevant to workplace instruction, we provide a summary effect size. When there are no meta-analyses but there are widely recognized narrative reviews (e.g., the testing effect), we provide a summary statement. When there is no narrative review (e.g., prompts/meta-cognition), we provide a recent quote summarizing the extant research. These findings are provided to assure the reader that these are empirically supported principles. The summaries also provide some evidence of the level of effectiveness for each principle/strategy. In providing this, we admit to oversimplifying what are sometimes complex research questions. For example, although Belland et al. (2015) report moderately large effect sizes for scaffolding, they also cite prior meta-analyses in which the mean effect sizes ( $d$ ) range from 0.02 for multimedia instruction to 0.96 for dynamic assessment.

To illustrate the relevance of these principles to effective workplace instruction, we briefly discuss the five core principles. One key to effective instruction is to organize content in ways that are meaningful and helpful to learners. Adult learners function best when they are presented with clear objectives and see a connection to current or future work (Noe & Colquitt 2002). Learning events are organized logically, and extraneous details that waste cognitive resources are reduced (Mayer 2008). For example, graphics that illustrate key concepts should be placed in close proximity to the concept, and explanations for an event should be provided as soon as the event occurs, not days after.

A second key is to optimize the sequencing of training content. Effective training presents content relevant to the learner's level of expertise, ensuring that learners master requisite knowledge before attempting complex skills, providing learning support for more difficult content, ordering learning tasks in increasing difficulty, and, when appropriate, decomposing and learning complex tasks or skills before combining them. For example, early in language training, foreign words might be paired with visual cues, but the cues are removed as learners develop their vocabulary. Interestingly, although part-whole training has been a long recommended instructional principle, meta-analyses suggest that part-training either produces negative effects or only produces positive effects under fairly narrow conditions (e.g., Fontana et al. 2015, Wickens et al. 2013). This is in part due to the inability of learners to practice time-sharing skills in managing task subcomponents (Wickens et al. 2013). On the basis of this evidence, we did not include this popular principle in **Table 1**.

By extension, the more the instruction actively engages learners in the learning event, the better the outcomes. Engagement means more than interest and takes the form of the learner responding to and acting on training content by restating, generating answers or explanations, consciously monitoring, and evaluating progress toward learning goals. The benefits of encouraging deliberate practice are irrefutable (although claims of the number of hours to become an expert are questionable). In an exemplar study, Gingerich et al. (2014) examined two groups: One group of students was prompted to generate their own personal examples of a concept defined by the instructor, whereas the other group was given the examples by the instructor. The study showed that the personal example group retained the information more from the prompts, which helped them integrate the new concept with their existing knowledge base, thus making it easier to retain and access when needed.

Effective practice leads to the acquisition of new knowledge or skills by requiring attention, rehearsal, and repetition in the learner (Campitelli & Gobet 2011). However, not all practice conditions are equal, and learning and retention are improved to the extent learners ( $a$ ) encounter

practice conditions similar to performance conditions, (*b*) are exposed to problems or conditions that vary trial to trial, and (*c*) encounter practice trials that are distributed over time. In a classic study involving British postal workers, Baddeley & Longman (1978) compared the speed of acquisition and retention of learning to the type of new postal codes for workers depending on whether trainees practiced for several hours a day or had their practice distributed over longer intervals. As is now commonly found in such studies, postal workers who practiced all at once required fewer hours of training to reach the desired criterion, but the workers who spaced their practice retained their new skills longer.

Finally, as any parent discovers with a baby's first words or first steps, initial mastery does not ensure fluid subsequent performance, such that instruction is necessary to facilitate development past initial mastery. Continued repetition leads to overlearning, but greater mastery also results from reinforcement that declarative knowledge, mental models, and skills are correct, as well as constructive feedback of how to refine further knowledge or skills. Common examples of overlearning come from public speaking or acting. It has been estimated that TED Talk presenters practice on average 70 h for a 15-min talk, ensuring that they will remember their points even if they feel stressed in the moment.

## Delivery

Delivery represents the processes by which instructional events are designed and shared to facilitate learning events. Delivery consists primarily of instructional methods and training media.

**Methods.** Instructional methods refer to theoretically sound approaches to structuring learning events. Examples of instructional methods include behavioral modeling training, error-management training, adaptive guidance training, and intelligent tutoring systems. Theoretically sound is a key attribute of a method, in part because it differentiates a broad, systemic approach to instruction from the use of tools or submethods such as PowerPoint. A theory-driven instructional method is more likely to be effective because it is built on a sound theory of human behavior. One instructional method is not inherently better than another, but any method is likely to result in achieving learning outcomes when it is theoretically sound, is suitable for the intended learning outcomes (e.g., hands-on skills versus mental models), and incorporates evidence-based instructional principles.

**Media.** Training media or channels refer to the materials and physical means that are used to convey content to learners. Examples of media are job aids, workbooks, classroom lectures, podcasts and webinars, technology-distributed instruction (TDI) (e.g., online learning), and technology-enabled instructional systems (e.g., virtual reality and serious games). Media are not explicitly called out because effective instructional methods are equally effective regardless of channel. This point was made forcibly more than 25 years ago by educational psychologist Richard Clark (1994), who argued that “media will never influence learning” (p. 21). Clark's argument is that any empirical evidence of the superiority of one medium over another is due to the inclusion of attributes of instructional design in one but not the other; when design principles are held constant, media should be equally effective. This is illustrated in a meta-analysis by Sitzmann et al. (2006), who found that across all studies, web-based instruction was more effective than classroom instruction on the acquisition of declarative knowledge. However, when they controlled for the presence or absence of training attributes (e.g., feedback and practice), the effectiveness of both methods was equivalent.



The effectiveness of methods should be invariant over forms of media. As we discuss below, effectiveness can be enhanced not by changing the medium (e.g., incorporating virtual reality) but by successfully incorporating instructional design principles into the training.

## Intersection of Learners and Methods

Building from these three foundational elements, the science of workplace instruction can advance training practice and guide future training research through the areas of intersection in **Figure 2**: learners and delivery, instructional principles and delivery, and learners and instructional principles. In the case of the latter two areas, training researchers are uniquely positioned to contribute to the science of workplace instruction by investigating the interactive nature of principles and methods and principles and learners in the context of rich organizational cultures and a wide range of learners with different needs. In the case of the former area, progress will occur more rapidly when training researchers and professionals reject a long-standing tradition in training orthodoxy to group participants on some individual difference variable and offer different training methods for each group. As we show below, this practice is not supported by empirical research and runs opposite of our assertion (and meta-analytic findings) that effective training works for all.

**Aptitude-treatment interactions.** The study and promotion of aptitude-treatment interactions (ATIs) have been called for in several different domains in psychology and education, including training research (Aguinis & Kraiger 2009, Salas & Cannon-Bowers 2001). This has occurred despite the early insistence of Cronbach & Snow (1977) that ATIs are complex and difficult to demonstrate reliably and that no particular ATI effect is sufficiently understood to stand as the basis for instructional practice. Cronbach (1975) admitted, “Snow and I have been thwarted by the inconsistent findings coming from roughly similar inquiries. Successive studies employing the same treatment variable find different outcome-on-aptitude slopes” (p. 119).

Although the methodological and statistical challenges in validating ATIs—if they exist—are beyond the scope of this article, in the educational domain there is now more than 50 years of research that has struggled to find replicable, substantive, and theoretically meaningful ATIs (e.g., Bracht 1970, Preacher & Sterba 2019). In training research, Kowollik et al. (2010) conducted a meta-analysis to test a popular ATI hypothesis that lower general mental ability (GMA) learners benefit from greater training structure: Across 51 studies, Kowollik et al. found that although there was evidence for small interactions, there was not consistent support for the commonly purported disordinal ATIs across outcome criteria. They concluded that the small instructional gains from designing a GMA-structure ATI approach would not outweigh implementation costs and that ATIs imported from educational psychology are somewhat of a “received doctrine” (Kowollik et al. 2010) in the training literature. In short, training research and training practice are better served by linking instructional principles to training delivery for all learners and not by chasing ATI effects. The disruptive effects of chasing ATIs can be seen in two lines of research: learning styles and age-specific learning.

**Learning styles.** Tailoring instruction to match individual learning styles is a long-standing instructional practice not empirically supported by research. The approach assumes individuals have innate, measurable learning styles. The meshing hypothesis states that if learners are provided instruction in their preferred modality (e.g., visual versus kinesthetic versus auditory), they will learn better than if given a different modality (Pashler et al. 2008). However, there is no consensus as to what constitutes a learning style; one review reported more than 50 distinct learning style theories (Cofield et al. 2004).

Pashler et al. (2008) conducted an extensive review of the learning styles research applying strict screening criteria to the inclusion of studies. They were unable to find any evidence using their study criteria supporting the learning styles hypothesis and found several reputable studies providing evidence that contradicted the effect. Thus, Pashler et al. concluded that although there is ample evidence that when asked, individuals will state a preference for one learning modality over another, there is little evidence that catering to these preferences leads to superior learning outcomes. Pashler et al. did not report the number of studies they reviewed or overall effect size; however, Aslaksen & Lorås (2018) recently conducted a meta-analysis of the same literature and found “still no replicable statistical evidence for enhanced learning outcome by aligning instruction to modality-specific learning styles” (p. 1).

Empirical support for styles instruction is undoubtedly hampered by several methodological issues, including low statistical power for detecting moderation. Nonetheless, the promise of the ultimate customization of learning to individuals is not supported empirically and runs counter to our proposition that well-designed instruction works for all learners. In the words of Pashler et al. (2008), “it is undeniable that the instruction that is optimal for a given [learner] will often need to be guided by the aptitude, prior knowledge, and cultural assumptions that [the learner] brings to a learning task. However, assuming that people are enormously heterogeneous in their instructional needs may draw attention away from the body of basic and applied research on learning that provides a foundation of principles and practices that can upgrade everybody’s learning” (p. 117).

**Age-specific learning.** A second ATI application is the design of age-specific instruction. This practice stems from research confirming age-related differences in cognitive skills such as processing speed (Kraiger 2017, Wolfson et al. 2014) as well as meta-analytic evidence that adults on average learn less and take longer to complete training compared to younger learners (Kubeck et al. 1996). Advocates of age-specific training call for unique training interventions that account for known age-related deficits of older learners (e.g., Mead & Fisk 1998, Truxillo et al. 2015). For example, training design could remove practice variability to support older adults with slower cognitive processing speeds.

In contrast, age-inclusive training proposes that empirically based instructional principles should be beneficial to all age groups (Van Gerven et al. 2006, Wolfson et al. 2014). There may be treatment by age interactions, but of a different form. Because older adults may need more learning support, it may be the case that well-designed training works for all but especially for older learners. This includes the use of instructional principles (discussed above) as well as fundamental submethods such as clear learning objectives, job-relevant exercises, instructional aids to organize encoding and recall, and timely feedback (Kraiger 2017). Many studies in fact demonstrate that implementing validated instructional principles significantly improves outcomes in learners of all ages (e.g., Kornell et al. 2010, Van Gerven et al. 2006, Wolfson & Kraiger 2014). Well-designed training works for all.

## ADVANCING THE SCIENCE OF WORKPLACE INSTRUCTION

At the outset of this article, we noted a diminishing interest in training research; we are also aware that the learning and development industry continues to change—perhaps not always with a solid foundation in empirically supported principles and methods (Rynes et al. 2007). We contend that training research can be reinvigorated and training practice advanced by applying the framework shown in **Figure 1** and understanding how theoretically based instructional methods incorporating empirically supported principles facilitate effective learner events, leading to targeted, multi-dimensional learning outcomes that ultimately result in positive changes at the learner, job, and organizational levels.

A specific and important research need is to examine how to optimize learning in work contexts through a focus on instructional principles. We recommend three areas for further research. First, research should focus on how to optimize theoretically based training methods by incorporating relevant instructional principles. Second, given the move to self-directed learning, research should determine direct ways to support learners through known instructional principles. Third, the rapid adaptation of technology-enhanced instructional methods can be supported through the integration of instructional design with these synthetic environments.

## Intersection of Instructional Principles and Training Methods

At the outset of their review, Salas et al. (2012) asserted “(a) properly designed training works, and (b) the way training is designed, delivered and implemented can greatly influence its effectiveness” (p. 74). Meta-analytic evidence confirms the first assertion, but there is important work to be done to understand precisely how training design and implementation affect the achievement of training objectives in organizational contexts. Specifically, meta-analyses reveal the effectiveness of many training methods, including behavioral modeling (Taylor et al. 2005) and error-based framing (Keith & Frese 2008). However, meta-analyses such as these typically report large heterogeneity in effects across studies, suggesting the possibility of study-level moderators. For example, crew resource management training is a specific training method that is informed by several theories of shared cognition and root causes of errors (Salas et al. 1999). O’Connor et al. (2008) conducted a meta-analysis on crew resource management training and found overall positive effects on attitudes, knowledge, and behaviors but noted “substantial variation in effect sizes across these studies” (p. 361). Similarly, cross-cultural training encompasses a variety of training practices that are grounded in theories of social learning and culture shock, as well as the dynamics of adjustment (Littrell et al. 2006). In their meta-analysis of cross-cultural training, Morris & Robie (2001) found significant main effects for training on performance and adjustment. However, effect size variance attributed to statistical artifacts was small, again suggesting the possibility of substantive factors moderating study outcomes. Observing this study-to-study variability in the effectiveness of cross-cultural training, Littrell et al. speculated that this variability could have been due to variance in training rigor. Similarly, Mattingly & Kraiger (2019) conducted a meta-analysis of emotional intelligence training. They reported a significant main effect for training, but substantial heterogeneity across studies. Using regression analysis, they found that variance in training properties including practice and feedback explained significant variance in training outcomes.

One implication is that although theory-based training works, its effectiveness is likely moderated by characteristics of effective instruction that are generalizable across all forms of training (Noe & Colquitt 2002). (This is not to discount other moderators of training effectiveness but to stress that variation in effects due to design characteristics has been understudied and likely underrecognized.) Researchers have begun to explore the intersection of training methods and instructional principles through meta-analysis by coding for the absence of principles in source studies, as Mattingly & Kraiger (2019) demonstrate. Several meta-analyses provide direct evidence for the moderating effects of design characteristics generally and instructional principles specifically on relationships between methods and learning outcomes. For example, Taylor et al. (2005) found that behavioral modeling training (method) is more effective with spaced versus massed practice (instructional principle). Kalinoski et al. (2013) also reported that distributed practice led to stronger effects for diversity training on cognitive and affective outcomes compared to massed practice. Finally, Keith & Frese (2008) reported that the clarity of task feedback moderated the effectiveness of the error-based training methods. Collectively, these reviews show that empirically

supported training methods are more effective when accompanied by the use of sound instructional principles and training design.

Latham & Saari's (1979) classic study of behavioral modeling illustrates nicely the benefits of pairing empirically supported instructional principles with theoretically sound training methods. Drawing on social learning theory, they found strong evidence for the effectiveness of behavioral modeling on knowledge, skill, and transfer outcomes. The study demonstrated the value of social reinforcement to enhance motivation and use of demonstration and practice to aid retention and reproduction. However, a closer examination reveals how multiple time-tested instructional principles facilitated encoding, organization, and retrieval processes. Consistent with the principle of distributed practice, Latham & Saari spaced their 18 h of instruction over nine 2-h sessions. Consistent with the principle of practice variability, the training presented nine different practice scenarios based on a prior job analysis. The generative effect was implemented by asking trainees to recreate actual situations that had happened to them and role-play that event. After each instructional session, learners were given a performance aid listing the key behaviors and instructed to practice the skills learned immediately with an employee, illustrating practice effects (Dunlosky et al. 2013) and opportunity to perform (Ford et al. 1992). Theory-based training interventions are effective, but they work better when they incorporate sound instructional principles.

Because workplace training interventions and instructional principles have been proposed and tested in different disciplines, less is known about the intersection of the two. From a research perspective, the greatest progress will come not from designing new methods or from testing additional instructional principles, but from examining how best to integrate instructional principles into effective training methods. For example, how important are identical elements for the effectiveness of error management training? Does the length of spacing matter for behavioral modeling training? What are the best ways to implement generative learning into adaptive guidance platforms? In the science of workplace instruction, questions such as these can be pursued within the rich context of providing job-relevant training within organizational contexts.

## Enhancing Self-Directed Learning

Self-directed learning refers to “learners’ active and volitional approach to conceptualize, design, conduct, and evaluate a learning project” (Noe et al. 2014, p. 249). Organizations increasingly are encouraging employees to stay on top of their career by identifying learning needs and managing their own discrete learning events. In this way, incumbents can reduce the potential for skill obsolescence or gain new skills for other more sustainable types of jobs within the organization. Properly executed, self-directed learning can increase learning efficiency and enhance individual performance. Organizations may also save costs by shifting the responsibility for learning to members of their workforce.

As with various forms of formal training, there is cumulative evidence that self-directed learning is effective. One variation of self-directed learning is informal learning. Informal learning typically occurs on the job and without organizational oversight, for example, when learners ask a coworker for help or search the Internet for job-relevant information. A recent meta-analysis showed positive effects for informal learning behaviors on outcomes such as knowledge/skill acquisition and job performance (Cerasoli et al. 2018).

**The problem.** With self-directed learning, the learner assumes greater control in the planning, scheduling, and executing of learning events than during formal training. Accordingly, the effectiveness of self-directed learning is limited by how well learners manage these events. Effective self-management requires two broad skill sets—the monitoring of learning processes and

outcomes and the regulation of the affective, cognitive, and behavioral processes that promote learning (Sitzmann & Ely 2011). Evidence suggests learners are challenged in both respects.

Monitoring and regulating are implicit in the construct of learner control—how the training system allows learners to make decisions that alter the learning environment (Landers & Reddock 2017). Landers & Reddock proposed a nine-dimensional framework of objective learner control consisting of instructional control (skipping content, supplementing content, and managing the sequence, pace, practice, and guidance control of content), style control (control of aesthetic training characteristics), and scheduling control (time and location control). Their meta-analysis showed that these dimensions of instructional control generally had small but positive effects on skill outcomes. However, for training reactions and knowledge outcomes, effects were smaller and inconsistent across specific dimensions (e.g., practice control versus supplement control). Although these findings show some support for providing learner control, the researchers cautioned that multiple dimensions were so frequently confounded within single studies that it may be misleading to conclude that any one dimension is effective.

The limitations of learner control revealed by research can be explained by the predictable errors trainees make in regulating their learning behaviors. Bjork et al. (2013) reviewed research in educational psychology on learner self-regulatory behavior and concluded the following: “Although individual differences occur in effective strategy use, with some students using effective strategies that contribute to their achievement, many students not only use relatively ineffective strategies (e.g., rereading), but believe that they are relatively effective” (p. 423). Specifically, learners generally (*a*) mistakenly believe that blocked or massed practice is more effective than spacing, (*b*) erroneously believe that rereading content is more effective for learning than being tested on it, (*c*) fail to overlearn to enable mastery, and (*d*) are overconfident in their mastery or are poor judges of whether they have retained newly learned content. Furthermore, the use of ineffective self-regulatory behaviors can be difficult to extinguish. For example, in Kornell & Bjork’s (2008) study, students rated their learning as superior using massed study practices even when they were given feedback that they perform better using spacing. Bjork et al. suggested that this may be a metacognitive illusion because massed practice is perceived to be easier than spacing.

The sum effect of these judgments and biases is that providing instructional control may undermine learning due to suboptimal decisions during the learning event (Kraiger & Jerden 2007). Thus, the problem is that learners are being given more responsibility for guiding their own learning, whereas research demonstrates that they are flawed executors of the necessary skills to do so.

**Research to enhance self-directed learning.** The science of workplace instruction allows us to view the problem of suboptimal self-directed learning from the broader perspective of workplace training. For example, prior training research has shown positive effects for accountability on instructional outcomes, but there is no research on how it affects learning events. Accountability refers to the perceived need to justify one’s action to an audience with sanction or reward power (Frink & Klimoski 1998). Accountability manipulations or perceptions of trainee accountability have been shown to positively impact learning during training (DeMatteo et al. 1997) and transfer (Saks & Belcourt 2006). But there is little research on how accountability affects learning. DeMatteo et al. found a stronger effect for an accountability manipulation before training rather than after training—but before transfer was measured. They also reported that increased accountability resulted in greater notetaking by participants during training. Thus, it appears that holding learners accountable may increase their engagement during learning events and their efforts to encode or organize information. However, this needs to be established empirically. Additionally, it would be useful to investigate the extent to which specific instructional principles interact with increased accountability. For example, cognitive prompts are brief queries inserted into

training for purposes of encouraging meta-cognitive, elaboration, or active processing (Kraiger et al. 2020). Cognitive prompts have a demonstrated impact on learning outcomes (Sitzmann et al. 2009). Would prompts that remind learners of the need to justify their actions increase accountability and promote improving encoding and organizing processes? Is the need to apply training content to the job sufficient to create accountability, or does there need to be a threat of post-training evaluation? What are effective prompts that increase perceived accountability but do not distract from the learning task?

The necessity of providing job-related learning and development leads to other solutions for organizations. Kraiger & Jerden (2007) speculated that many learners either expect or prefer that the learning and development enterprise structure their training experiences—determining what should be learned when. They further distinguished between objective and perceived learner control, with the former managed by the training system and the latter by personal perception. Landers & Reddock (2017) found that objective control is related to learning outcomes and perceived control is related to training reactions. Together, these propositions create opportunities to mitigate negative effects of learner control by minimizing what aspects of training the trainees can affect. To improve training, multiple instructional principles could be added to the system and learners given guidance as to which principles are activated and how they are operationalized. For example, trainees could be given freedom to choose the timing or space between learning trials and specific transfer tasks from within a broader population of potential, varied tasks. In these ways, training could be structured to enhance perceived control and agency, but with sufficient design features “baked in” to support learning. Using scaffolding, as learners progress, the system would provide more choice in designing learning and transfer trials. Tactics to support learner decision making have been common for a long time in technology-enhanced environments such as intelligent tutoring systems (Ma et al. 2014). They are also consistent with adaptive guidance training (Bell & Kozlowski 2002), which has been found to have a positive effect on trainees’ study and practice, self-regulation, knowledge acquisition, and performance. Determining the optimal balance of objective and perceived control, as well as how that balance is affected by individual, job-related, and organizational factors, is an important applied research problem.

Another research area worth pursuing is the investigation of optimal instructional principles to guide self-directed learning as a function of the developmental stage of the learner. Kanfer & Ackerman (1989) demonstrate how in early stages of skill acquisition, learners must devote greater attentional resources to a task, and learning events require less attention as skills are compiled and automatized. Thus, it stands to reason that instructional principles that facilitate attentional control (e.g., coherence and contiguity) would be more effective early in self-directed learning events, and principles that demand less attention (e.g., metacognition and practice variability) would be more effective later. Although these effects have not been closely studied in the self-directed learning literature, we know from studies of formal instruction that the utility of some principles has been dependent on the stage of learner acquisition. As one example, the principle of part-whole training holds that part-task instruction has greater utility early in skill acquisition, but whole-task instruction is more useful at later stages (Plott et al. 2014). Similarly, research on the development of motor skills shows that constant, blocked practice schedules are beneficial early in training to enable the acquisition of basic skills, but more variable practice is more beneficial later to promote fine-tuning and generalization (e.g., Lai et al. 2000). Because much of this is basic research on discrete knowledge or skills, additional research is needed to determine the extent to which such effects generalize to self-directed workplace learning.

Research in educational contexts confirms that students frequently endorse and practice ineffective study methods (Dunlosky et al. 2013). To support self-directed learning in organizational contexts, it would be beneficial to know what instructional principles adult learners routinely use



to monitor and guide their learning. We also need to better understand how effective each instructional principle is with respect to self-directed learning and how to help learners adopt the most effective strategies. Given our tendency to overestimate our own abilities (Kruger & Dunning 1999), we may be prone to resist efforts to improve our capacity to learn. Thus, research will need to explore ways to overcome these tendencies so as to best guide individuals during self-directed learning.

## Enhancing Synthetic Learning Environments

Synthetic learning environments refer to technology-enabled training media that augment, create, and/or manage learning events in a world characterized by both realistic context and embedded instruction (Cannon-Bowers & Bowers 2010). Common examples are simulations (e.g., Hays et al. 1992), serious games (Susi et al. 2007), and virtual reality (Howard & Marshall 2019). There is considerable overlap in the definitions and operationalizations of these three forms of media, as all involve the creation of technology-enabled interactive and artificial environments that facilitate the development of job-related knowledge, skills, and affect. Serious games stand somewhat apart, because although they also employ a synthetic environment for purposes of training or education, they add elements associated with most forms of games such as immersion, conflict/challenge, rules/goals, and human interaction (Bedwell et al. 2012).

Meta-analytic evidence supports the effectiveness of both simulations and virtual reality. Many of these investigations are specific to an industry, job, or function. For work simulators, there is evidence of building skills in contexts such as medical education (Issenberg et al. 2005) and flying (Hays et al. 1992). Meta-analytic evidence for the effectiveness of virtual reality training includes areas of laparoscopic surgery (Alaker et al. 2016) and social skills (Howard & Gutworth 2020). However, the level of effectiveness of synthetic learning environments may depend on the type of learning tasks. A recent meta-analysis found support for virtual and augmented reality training for physical tasks, but null effects for cognitive tasks (Kaplan et al. 2020). Additionally, the efficacy of serious games remains in question. Mixed or null effects have been typically reported for large-scale reviews of serious games in both education contexts (Lamb et al. 2018) and training and education when the comparison group had similar activity levels as the test group (Sitzmann 2011). Despite several decades of empirical research on games for training purposes, even these results should be viewed with caution, as there is a relatively small percentage of rigorous investigations (e.g., Clark 2007).

**The problem.** Synthetic learning environments are increasingly popular in industry and education (e.g., Gasparevic 2018) and are being driven largely by the availability of ubiquitous, device-enabled, high-bandwidth distribution channels. Capability is only increasing as 5G becomes more prevalent. As others have noted (e.g., Bedwell et al. 2012, Gunter et al. 2006), advancements are being implemented by software providers without evidence that the platforms facilitate learning (e.g., Mayer 2011b). Thus, the risk here is that we are building and propagating high-speed, data-rich instructional tools that do not take advantage of what is known about how people learn (the science of learning) or how to best facilitate learning (the science of instruction). Just as we have advocated for greater integration of instructional principles into theoretically supported training methods, we see the value in understanding which instructional principles best lend themselves to synthetic learning environments and how these principles can be incorporated.

**Research to enhance synthetic learning environments.** In the short run, there is a need for theory-based papers that marry scientific principles with technology-based training (e.g., Gunter et al. 2006; Mayer 2008, 2019). However, such work needs to appear in forums that are available to

developers who in turn see value in implementing scientifically sound instruction. In the long run, research is needed to understand optimal conditions for implementing instructional principles in various forms of TDI.

As have others before us (Clark 1994, 2007; Mayer 2011b; Sitzmann et al. 2006), we contend that the medium is much less important than sound instructional design—incorporating empirically based instructional principles improves learning regardless of the medium. That said, we also believe that some principles can be more easily and more effectively implemented in synthetic learning environments. For example, the instructional principle of identical elements states that transfer is enhanced to the extent to which the stimuli and responses during learning events are identical to those in the actual work environment (Saks & Belcourt 2006). As one example of this, Libin et al. (2010) trained customer support staff in healthcare settings by showing them realistic videos of scenarios in which they are confronted with actual patient problems and must make real-time decisions and then see the consequences of their actions. Practice variability can be easily implemented by varying the situations and problems that trainees must confront, and in more sophisticated software, generative learning can be supported by enabling learners to author their own scenarios from problems previously faced.

With baseline knowledge of the effectiveness of each instructional principle (see **Table 1**) and sound theories underlying synthetic learning environments as instructional events (e.g., Howard & Marshall 2019, Landers et al. 2019), researchers can select and test the principles that are expected to be more effective in these contexts. Thus, referring to **Figure 2**, we expect some instructional principles to be differentially relevant for facilitating learning when enacted in certain synthetic learning environments. There may well be ordinal interactions of some principles with different environments. For example, although generative learning is generally effective in all contexts, it may be more effective in virtual reality training where learners may be more used to exploratory behavior.

## CONCLUDING COMMENTS

The past three decades have seen tremendous growth in theory and research on learning and development in organizations. The development and testing of models of training systems embedded in organizational contexts have demonstrated both the overall impact of training and role of individual and organizational factors as antecedents and moderators of that effectiveness. From this we understand that instructional events lead to instructional outcomes. Less clear are the ways in which learning events and outcomes mediate that relationship. To reinvigorate training research, we proposed the learner, instructional principles, and training delivery as the elements of the science of workplace instruction. By delineating the critical role of instructional principles in workplace training and by exploring the intersections of those principles with learners and emerging training technologies, we hope to inform the next decade of research on workplace instruction.

### SUMMARY POINTS

1. The science of workplace instruction postulates that instructional events managed by the organization lead to learning events and learning outcomes within individuals which are manifested as instructional outcomes at the organizational level.
2. The science of workplace instruction postulates that learning is facilitated by active processing of the learner and sound application of instructional principles and delivery.



3. Five core instructional principles have empirical support and can be applied in multiple ways to facilitate learning.
4. The most effective instructional methods are rooted in sound theories of human behavior and incorporate evidence-based instructional principles.
5. The relative impact of different training media or channels is substantially less important than the use of theory-based methods and empirically supported instructional principles.
6. There is little to no evidence to support matching instruction to individual learning styles; effective instruction results from the use of theory-based methods and empirically supported instructional principles.
7. There is little to no evidence to support varying instruction based on learner age; effective instruction results from the use of theory-based methods and empirically supported instructional principles.

## FUTURE ISSUES

1. Include information on the incorporation of instructional principles in training research reports even if not the primary focus of the study or training.
2. Examine the moderating influence of instructional principles on training effectiveness in meta-analyses of training methods and training effectiveness.
3. Determine the value of including specific empirically supported instructional principles when combined with effective, theoretically based training methods.
4. Investigate the impact of the organizational context on learners' disinclination to effectively monitor and regulate their own learning, as demonstrated in educational contexts.
5. Specify and test the effectiveness of instructional principles that are most likely to optimize learning in synthetic learning environments.

## DISCLOSURE STATEMENT

The authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

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## Errata

An online log of corrections to *Annual Review of Organizational Psychology and Organizational Behavior* articles may be found at <http://www.annualreviews.org/errata/orgpsych>

# Sexual Harassment Prevention Training: Information For Employers



## FAQ

California law (Government Code section 12950.1) requires that all employers of 5 or more employees provide training to their employees regarding sexual harassment and abusive conduct prevention. Every two years, non-supervisory employees must receive 1 hour of training and supervisors must receive 2 hours of training. The first training deadline is January 1, 2021. An employer is required to train its California-based employees so long as it employs 5 or more employees anywhere, even if they do not work at the same location and even if not all of them work or reside in California.

The Department of Fair Employment and Housing (DFEH) offers free online trainings that satisfy these requirements - one for supervisors and one for non-supervisors. Both trainings are available in Chinese, English, Korean, Spanish, Tagalog, and Vietnamese ([CLICK HERE TO ACCESS THE TRAININGS](#)). The law requires the Department to produce and post both training courses to its website, which employers may utilize instead of hiring a trainer.

For more information, see [Government Code sections 12950.1](#) and [12950.2](#), and [California Code of Regulations, Title 2, sections 11023](#) and [11024](#).

### ■ Why is this training required?

California takes sexual harassment very seriously, and it is against the law. Despite greater awareness of sexual harassment and its harms, many workers are still subjected to harassment because of their sex or other protected characteristic. These trainings are legally required and designed to educate or remind everyone about what is – and is not – acceptable behavior in the workplace.

### ■ By what date must employees be trained?

Employees must be retrained once every two years, either two years from the date of completion of the last training or by the end of the next designated “training year”; employers shall not extend the designated training year for new employees. New supervisory employees must be trained within six months of assuming their supervisory position, and new non-supervisory employees must be trained within six months of hire. For more information, see California Code of Regulations, Title 2, section 11024(b)(1).

### ■ Do the DFEH’s online sexual harassment and abusive conduct prevention courses satisfy the requirements of Government Code section 12950.1?

Yes.

### ■ Do my employees have to take DFEH's training?

No. DFEH offers these trainings as a resource to help employers meet their obligation, but employers may elect other ways that satisfy the training requirement.

### ■ If I have employees located outside of California, are they required to be trained?

No. While employees located inside and outside of California are counted in determining whether employers are covered by Government Code section 12950.1 (and California's Fair Employment and Housing Act more generally), employees located outside of California are not themselves required to be trained.

### ■ What is meant by "effective interactive training"?

Government Code section 12950.1 requires "effective interactive training," which can include any of the following:

- Classroom training that is in-person, trainer-instruction, whose content is created by a trainer and provided to an employee by a trainer, in a setting removed from the employee's daily duties.
- E-learning that is individualized, interactive, computer-based training created by a trainer and an instructional designer that includes a link or directions on how to contact a trainer who shall be available to answer questions and to provide guidance within two business days after the question is asked. The trainer shall maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response.
- Webinar training that's an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time.
- Other "effective interactive training" and education includes the use of audio, video, or computer technology in conjunction with classroom, webinar, and/or e-learning training.

### ■ If an employer utilizes DFEH's online interactive training, can the training be watched in a large group at the same time?

No. E-learning trainings cannot be watched in a group setting. The online interactive trainings offered by DFEH are "e-learning" trainings that are individualized, interactive, and computer-based. For more information regarding training, trainer guidelines, and interactive training guidelines, please see California Code of Regulations, Title 2, section 11024.

### ■ Does the employer have to pay for the sexual harassment and abusive conduct prevention training required by Government Code section 12950.1? Does the employer have to provide paid time for such training?

Yes. California law specifies: “An employer... shall provide” sexual harassment and abusive conduct prevention training. Government Code section 12950.1(a)-(b). It is the employer’s – not the employee’s – responsibility to provide the required training, including any costs that may be incurred. This language also makes clear that employees may not be required to take such training during their personal time; the training must be “provided” by the employer as part of an individual’s employment.

### ■ What if the employees are seasonal, temporary, or otherwise work for less than six months?

For employees hired for less than six months, employers are required to provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first, beginning January 1, 2021.

- Employers are not required to train employees who are employed for fewer than 30 calendar days and work for fewer than 100 hours.
- If an employee is hired to work for less than six months but has not worked in the 30 calendar days after being hired, then the “hire date” is the first day of work.
- In the case of a temporary employee employed by a temporary services employer, as defined in [Section 201.3 of the Labor Code](#), to perform services for clients, the training shall be provided by the temporary services employer, not the client.

### ■ Can I provide a text-only training for my employees to read?

No. Government Code section 12950.1 requires that the training be “effective interactive training,” as defined above.

### ■ Must the training be online, done individually, or completed all at once?

No. You may provide training live in a classroom, online, or in any other effective interactive format. Training may be completed by employees individually or as part of a group presentation (unless it is an e-learning training) and may be completed in segments as long as the applicable hourly total requirement is met within the two-year reporting period.

### ■ Do employers need to train independent contractors, volunteers, and unpaid interns?

No, but employers might consider doing so to be a best practice. However, in determining whether an employer meets the threshold of having 5 employees and is subject to the harassment prevention training requirement, independent contractors, volunteers, and unpaid interns are counted. For example, if an employer has 2 full time employees and 6 unpaid interns, the employer would meet the training threshold requirement and would need to ensure the two full time employees receive training.

## Sexual Harassment Prevention Training: Information For Employers

### ■ **What if an employee received the training in compliance with Government Code section 12950.1 within the prior two years either from another employer? Do they have to be trained again?**

No. An employee who has received training in compliance with Government Code section 12950.1 within the prior two years during employment with a current, a prior, or an alternate or a joint employer, or who received a valid work permit from the Labor Commissioner that required the employee to receive training in compliance with section 12950.1 within the prior two years, must read and acknowledge receipt of the employer's anti-harassment policy within six months of assuming their new position. That employee must then be put on a two-year tracking schedule based on the employee's last training. The current employer is responsible for ensuring that the prior training was legally compliant with the law. See California Code of Regulations, Title 2, section 11024(b)(6) regarding "Duplicate Training" for more information.

### ■ **Am I required to provide bystander intervention training for my employees?**

While not required by law at this time, an employer may also provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and resources they can call upon that support their intervention.

### ■ **Does DFEH have a list of approved outside training providers, or can DFEH recommend or approve an outside training provider for my company to use?**

DFEH does not approve training providers. DFEH cannot offer recommendations or approvals for other training providers.

### ■ **I believe I may be eligible to become a trainer; how can I verify this?**

There is currently no certification requirement for qualified trainers, and DFEH is unable to provide guidance as to whether one meets the qualifications of a trainer.

### ■ **Does a trainer who is also an employee need to receive sexual harassment prevention training?**

No. An individual who is a qualified training provider according to California Code of Regulations, Title 2, section 11024(a)(A) (and who does provide the training) does not need to participate in a separate sexual harassment prevention training for their employer to be in compliance with the training requirements.

### ■ What documentation is required for those who have completed the training?

The law requires employers to keep documentation of the training it has provided its employees for a minimum of two years, including but not limited to the names of the employees trained, the date of training, the sign in sheet (if used), a copy of all certificates of attendance or completion (if issued), the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider. Examples of documentation to track individual compliance include a certificate and/or a sign-in sheet that includes a verification that trainees completed the training. Documentation of the training should not be sent to DFEH but should be kept on the employer's premises.

### ■ What if an employee misplaces or fails to save (or print) the certificate of completion available at the end of DFEH's online training, can they request a replacement copy?

No. DFEH does not store or track certificates or completion of their trainings. If the employee still has their training session open on their browser, they may try using the 'PREVIOUS' button to backstep and regenerate their certificate. Otherwise, they should retake the training to retrieve a certificate of completion.

### ■ Should my employees contact DFEH for training content questions?

No. Government Code section 12950.1 states that questions resulting from DFEH's online training courses shall be directed to the trainee's employer's human resources department or equally qualified professional.

### ■ In addition to the requirements of Government Code section 12950.1, must employers provide anything else to their employees?

Yes, employers must provide employees with a poster or fact sheet developed by DFEH regarding [sexual harassment](#), or equivalent information. Additionally, California Code of Regulations, Title 2, section 11023(b) requires employers to develop and provide employees with a harassment, discrimination, and retaliation prevention policy.

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For additional training questions: [shpt@dfeh.ca.gov](mailto:shpt@dfeh.ca.gov)

## TO TAKE THE TRAINING

[www.dfeh.ca.gov/shpt/](http://www.dfeh.ca.gov/shpt/)



# Sexual Harassment Prevention Training For Employees



## FAQ

California law now requires that all employers of 5 or more employees provide 1 hour of sexual harassment and abusive conduct prevention training to nonsupervisory employees, and 2 hours of sexual harassment and abusive conduct prevention training to supervisory employees, once every two years. The first training deadline is January 1, 2021. The bill also requires the Department to produce and post both training courses to its website, which employers may utilize instead of hiring a trainer.

DFEH is now offering a free online training that satisfies this requirement for supervisors and nonsupervisors in English, Spanish, Korean, Chinese, Vietnamese, and Tagalog ([CLICK HERE TO VIEW TRAINING](#)).

An employer is required to train its California-based employees so long as it employs 5 or more employees anywhere, even if they do not work at the same location and even if not all of them work or reside in California.

### Why is this training required?

California takes sexual harassment very seriously, and it is against the law. Despite greater awareness of sexual harassment and its harms, many workers are still subjected to harassment because of their sex or other protected characteristic. These trainings are legally required and designed to educate or remind everyone about what is – and is not – acceptable behavior in the workplace.

### Must I be trained?

For employers of 5 or more employees, all supervisory and nonsupervisory employees must be trained. Nonsupervisory employees must receive 1 hour of sexual harassment and abusive conduct prevention training and supervisory employees must receive 2 hours of sexual harassment and abusive conduct prevention training.

### How often must I be trained?

Once every two years.

### By what date must I be trained?

All employees must receive training by January 1, 2021. Employers of 50 or more employees have an existing and ongoing obligation to train new supervisory employees within six months of assuming their supervisory position. Beginning January 1, 2021, new supervisory employees in workplaces of 5 or more employees must be trained within six months of assuming their supervisory position, and new nonsupervisory employees must be trained within six months of hire. Employees must be retrained once every two years.

### ■ If I am a temporary or seasonal employee, must I be trained?

Yes. Beginning January 1, 2021, if you were hired to work for less than six months, you must be trained within 30 calendar days from when you began working or 100 hours of work, whichever occurs first.

### ■ If I am an independent contractor, volunteer, or unpaid intern, must I be trained?

No.

### ■ Must the training be online, done individually, or completed all at once?

No. Your employer may provide training live in a classroom, online, or in any other effective, interactive format. The training may be completed by employees individually or as part of a group presentation, and may be completed in segments as long as the applicable hourly total requirement is met.

### ■ What does the training have to cover?

The training must include information and practical guidance regarding federal and state law concerning the prohibition against, and the prevention and correction of, sexual harassment and the remedies available to victims of sexual harassment. The training must also include practical examples of harassment, discrimination, and retaliation, as well as information about preventing abusive conduct and harassment based on sexual orientation, gender identity, and gender expression.

### ■ Do I have to take DFEH's training?

No. DFEH is offering these trainings as a resource to help employers meet their obligation, but you do not have to use one of DFEH's trainings to satisfy the training requirements.

### ■ May I get more training than is legally required?

Yes. There is no maximum number of hours you may do. If you feel you would like to do more training, speak with your employer to see if more programs are available and if you can get time off or extra pay for doing more.

### ■ What if I received the training in compliance with Gov. Code 12950.1 within the prior two years either from a current, prior, alternate, or joint employer? Do I have to retake the training again?

No. See [2 CCR 11024\(b\)\(5\)](#) regarding "Duplicate Training" for more information.



# ■ Sexual Harassment Prevention Training For Employees

## ■ If I am a trainer who is also an employee, do I need to receive sexual harassment prevention training in order for my employer to be compliant?

No. An individual who is a qualified training provider according to the regulations (and who does provide the training) does not need to participate in a separate sexual harassment prevention training for their employer to be in compliance with the training requirements.

## ■ If I am an employee located outside of California, am I required to be trained?

No. Employees located outside of California are not required to be trained.

## ■ After completing the training, do I need to submit any documentation of the training to my employer?

Your employer may require you to submit a certificate of training completion. Please consult your employer for direction.

## ■ What if I misplace or fail to save (or print) the certificate of completion, can I request a replacement copy?

No. DFEH does not store or track your certificate or completion of this training. If you still have your training session open on your browser, you may try using the 'PREVIOUS' button to backstep and regenerate your certificate. Otherwise, you should retake the training to retrieve a certificate of completion.

## ■ Do I have to pay for sexual harassment and abusive conduct prevention training?

No. California law specifies that, "An employer... shall provide" sexual harassment and abusive conduct prevention training. Gov. Code 12950.1(a)-(b). It is the employer's – not the employee's – responsibility to provide the required training, including any costs that may be incurred. This language also makes clear that employees may not be required to take such training during their personal time; the training must be "provided" by the employer as part of an individual's employment.

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## TO TAKE THE TRAINING

[www.dfeh.ca.gov/shpt/](http://www.dfeh.ca.gov/shpt/)

# WORKSHOP

## 4B

# California Labor & Employment Law Review

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## MCLE Specialty Credit in Ethics:

## Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary

By Lindsay E. Harris and Mark L. Tuft

Many employers and attorneys misunderstand the circumstances in which outside attorneys may conduct independent workplace investigations, including those involving harassment and discrimination claims, in compliance with California law. California's Private Investigator Act<sup>1</sup> (CPIA, or the Act) requires that only persons licensed as private investigators may conduct most workplace investigations, unless the person comes within one of several statutory exemptions.<sup>2</sup> One of the exemptions is for "[a]n attorney at law in performing his or her duties as an attorney at law" (the so-called "attorney exemption").<sup>3</sup> The meaning of the attorney exemption, however, has proven elusive, generating substantial confusion in the field, and giving rise to disparate practices by outside attorneys who conduct independent investigations. Among the most common mistakes is for attorneys to structure their engagements in a way that makes it clear they are not "acting as attorneys" in conducting independent investigations, believing that their status alone (as attorneys) suffices to bring them within the

exemption, or that acting in an attorney capacity would somehow be inconsistent with the role of conducting an independent and impartial workplace investigation. Another common practice is for attorney-investigators to structure their engagements ambiguously, leaving it unclear whether they are functioning as lawyers or in some other capacity in conducting their investigations.

Precisely defining the proper role of an attorney-investigator is critical, and the consequences of conducting an investigation in violation of the CPIA are significant. An attorney violating the Act may face a potential misdemeanor conviction, punishable by a fine of \$5,000 and/or imprisonment up to one year.<sup>4</sup> In addition, an attorney who is convicted under the Act may be subject to State Bar discipline as well as civil liability. Furthermore, an employer who "knowingly" retains a nonexempt, unlicensed investigator, or any person who "conspires with another person" to violate the Act, may also face a misdemeanor conviction.<sup>5</sup> An employer could lose the ability to utilize the attorney-client privilege and/or work

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product protection that may apply to an attorney's investigation. The validity of the investigation may also be challenged in civil proceedings on the basis that the investigation was conducted unlawfully.

### **WHEN DOES THE EXEMPTION APPLY?**

Few legal authorities provide guidance as to the meaning of the attorney exemption and the circumstances in which an attorney may conduct workplace investigations under the exemption. Two older Attorney General Opinions, however, address the meaning of a prior, similar version of the exemption.<sup>6</sup> According to these opinions, investigations must be conducted pursuant to an attorney-client relationship to come within the exemption.<sup>7</sup> In addition, for the exemption to apply, the services performed must have some connection to the attorney's practice of law such that the attorney is performing the services usually performed by an attorney in the practice of law. Thus, the application of the exemption depends on the "character of the services rendered" and not on the investigator's status as an attorney.<sup>8</sup>

Some attorneys conduct workplace investigations as a separate business apart from their law practice. If an outside attorney structures an investigation as a non-legal or ancillary business service,

the exemption likely will not apply. Ancillary or law-related business services are generally considered non-legal services that are related or incident to the practice of law.<sup>9</sup> Likewise, if the engagement is ambiguous as to the character of the services being provided, the services may not qualify for the exemption.

Some law firms retain outside attorneys directly to conduct independent investigations on behalf of the law firm's clients. They do so, presumably, in order to ensure that the attorney's investigation relates directly to the law firm's advice to the client such that communications regarding the investigation will be protected by the attorney-client privilege between the outside law firm and the client. There is a risk, however, that this practice could run afoul of the attorney exemption, particularly since the attorney under this arrangement could be considered to be acting as a non-attorney assistant or investigator for the law firm. Because in this scenario there typically is no attorney-client relationship between the investigating attorney and the law firm or the law firm's client, the attorney's investigation may not qualify as legal services rendered by an attorney at law under Cal. Bus. & Prof. Code § 7522(e), as interpreted in the Attorney General opinions. In sum, for the investigation to be considered legal services within the exemption, it is better that the

investigating attorney establish an attorney-client relationship directly with the employer rather than being engaged by the law firm.

Another critical question is whether a factual investigation constitutes legal services. A lawyer must provide "services usually performed by an attorney in the practice of law" (*i.e.* legal services) to qualify for the attorney exemption. Many workplace investigations conducted by lawyers are strictly factual investigations; the attorney does not render legal advice or make recommendations, but only conducts an objective investigation and provides factual findings. While some attorneys will provide findings that go beyond the facts, such as whether an employer's policy was violated, attorney-investigators typically do not (although they may) reach legal conclusions; for example, whether unlawful discrimination or harassment has occurred. Outside attorney-investigators also typically do not render legal advice to the employer regarding what actions the employer should take based on the investigation results. In order to maintain the neutrality of the investigation, that function often is performed by the company's regular counsel.<sup>10</sup>

Given the widespread practice of bifurcating workplace investigations from the rendering of legal advice, it should come as welcome news that several courts have recognized that attorneys can in fact be performing

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*"Among the most common mistakes is for attorneys to structure their engagements in a way that makes it clear they are not "acting as attorneys" in conducting independent investigations . . ."*

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“legal services” when they conduct factual investigations for clients. In *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996), for example, the Ninth Circuit rejected the government’s argument that a law firm’s associates’ fact-finding to investigate alleged misconduct by another firm attorney did not constitute professional legal services. The Ninth Circuit explained that, in analyzing the attorney-client privilege, fact-finding is a necessary part of rendering professional legal services to clients and courts should not draw a distinction between “fact-finding” and “lawyering.”<sup>11</sup> Likewise, in *Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612 (7th Cir. 2010), the court held that a law firm retained to use legal expertise in conducting an investigation of facts regarding sexual abuse allegations was performing “an integral part of the package of legal services for which it was hired” and that the firm’s fact-finding was a “necessary prerequisite” to providing legal advice.<sup>12</sup> Several other cases have similarly held.<sup>13</sup> Thus, an attorney retained in his or her capacity as a lawyer to utilize his or her skill, training, and professional judgment in employment law to conduct a factual investigation will qualify for the exemption even if the attorney is not requested to also give legal advice or render legal conclusions.

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*[T]he  
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significant.*

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## **ATTORNEYS IN CALIFORNIA MAY LIMIT THE SCOPE OF CLIENT REPRESENTATION TO PERFORMING A FACTUAL INVESTIGATION**

Since the exemption under Cal. Bus. & Prof. Code § 7522(e) requires attorneys to perform services usually performed by an attorney in the practice of law, why have attorneys who conduct factual investigations shied away from doing so in their capacity “as attorneys at law?” This reluctance may be explained in part by a mistaken belief that functioning as an attorney necessarily entails engaging in advocacy, or requires the provision of legal advice on behalf of the client. In fact, however, attorneys perform various functions for clients apart from advocacy, and they are permitted to limit the scope of their professional services by entering into discrete or task-based agreements with clients so long as the agreed scope of services can be performed competently.<sup>14</sup> This form of legal services—variously referred to as “task-based,” “limited scope,” or “unbundling”—is an increasingly common and efficient means of serving the legal needs of employers and other clients in California.<sup>15</sup>

Task-based representation is particularly suited to workplace investigations. Under California and federal law, employers are required to promptly investigate claims of harassment, discrimination, and retaliation.<sup>16</sup> The Equal Employment Opportunity Commission (EEOC) and Department of Fair Employment and Housing (DFEH) further have specified that such investigations be “objective” or “impartial.”<sup>17</sup> Hiring outside attorneys with employment law expertise who do not serve as the employer’s regular counsel, and who perform fact-finding investigations without rendering legal advice, is an appropriate form of task-based representation that assists employers in complying with Equal Employment Opportunity (EEO) laws.

Of course, engaging a lawyer to conduct a workplace investigation as a task-based representation requires that the limited scope of services be reasonable under the circumstances. The lawyer also must be able to competently perform the limited services, and the client must give informed consent.<sup>18</sup> In some circumstances, limiting an attorney’s representation to a strictly factual investigation may not be reasonable if the client is not sophisticated and does not have other counsel available to advise the client on legal issues related to the investigation and investigation results. An attorney conducting a facts-only investigation may also be required to alert the client to reasonably foreseeable legal issues that become apparent during the investigation, even if these issues fall outside the scope of the agreed-upon representation.<sup>19</sup>

## **SPECIAL CONSIDERATIONS FOR ATTORNEYS CONDUCTING WORKPLACE INVESTIGATIONS**

Although an attorney can limit the scope of his or her representation as discussed above, under California’s ethics rules and other law attorneys conducting workplace investigations for clients under the attorney exemption still owe certain fiduciary duties to their clients that would not necessarily apply in the case of a non-lawyer investigator. These duties include the duty to perform legal services with competence;<sup>20</sup> the duty of loyalty, including the duty to avoid conflicts of interest;<sup>21</sup> the duty to keep clients reasonably informed of significant developments and to promptly comply with requests for information;<sup>22</sup> and the duty to protect the client’s confidential information.<sup>23</sup> Attorneys representing clients also have certain obligations in communicating with third parties that may not apply to non-attorney investigators, including the duty not to communicate with parties known to be represented by counsel

in the matter without their lawyer's consent, and the duty not to mislead employees or other constituents of the company regarding such matters as the lawyer's role and the identity of the lawyer's client.<sup>24</sup> The standard of care for lawyers conducting workplace investigations may also differ from the standard applicable to a non-lawyer investigator.

Various problems can arise if an attorney fails to structure the engagement properly. Assume, for example, that Attorney A is hired to conduct a workplace investigation but does not enter into a formal legal services agreement with the employer because he does not perceive that he is functioning as an attorney in an attorney-client relationship. In the course of the investigation, Attorney A learns that Employee B, who is the subject of an internal harassment complaint, is represented by counsel in connection with the internal investigation. Since Attorney A does not consider himself to be representing the employer as an attorney and wants to avoid being dragged into a potentially adversarial interaction with Employee B's attorney, he contacts Employee B directly and conducts an interview without obtaining consent from Employee B's attorney. Employee B is later discharged based on the results of Attorney A's investigation. He then complains that Attorney A, acting on behalf of the employer, violated the anti-contact rule and misled him in arranging for and conducting the interview.<sup>25</sup> What is Attorney A's response? If Attorney A claims that the anti-contact rule does not apply because he was not functioning as an attorney for a client, he and the employer risk violating the CPIA. If, on the other hand, he claims he qualifies for the attorney exemption because he was performing services as an attorney in the practice of law, his communications with Employee B violate the anti-contact rule and he risks State Bar discipline. In addition,

any violation of the ethics rules by Attorney A could be used to challenge the propriety of the employer's investigation and call into question the validity of information obtained and the grounds for termination.

Some have argued that it is inappropriate for an attorney to conduct an independent workplace investigation in a lawyer-client relationship with the employer because representing the employer as a client means that the investigation will not be objective or impartial. This position appears to be part of a larger misconception that the dominant role of an attorney is that of an advocate. However, lawyers perform various functions in representing clients, including acting as advisors, negotiators, and fact-finders, as well as advocates.<sup>26</sup> A lawyer's duty of loyalty to an employer-client does not prevent the lawyer from conducting an objective and impartial investigation, if that is the purpose for which the lawyer is hired and the lawyer is capable of performing that function. Rather, the duty of loyalty implies an obligation to accomplish the client's objective with respect to the matter for which the lawyer's services have been retained and to not allow other interests or responsibilities to interfere with achieving that objective.<sup>27</sup> Thus, the duty of loyalty relates to the role the lawyer assumes and the scope of the agreed-upon legal services. In the context of a limited-scope representation undertaken for the purpose of conducting an impartial workplace investigation, the lawyer satisfies the duty of loyalty by applying his or her legal training and expertise in conducting an independent and unbiased investigation.

### **Privilege Issues Are Analyzed Separately from the Exemption**


The fact that the attorney exemption requires legal services performed by an attorney at law in

the context of an attorney-client relationship does not automatically mean that the investigation or its results will necessarily be protected by the attorney-client privilege or as attorney work product. Whether an investigation is covered by the attorney-client privilege is an issue distinct from whether the investigation constitutes legal services for purpose of the exemption. Generally speaking, to fall within the privilege, the dominant purpose of the investigation must be to further the rendering of legal advice or legal services.<sup>28</sup> When an attorney conducts a factual investigation that is not connected to the rendering of legal advice or other legal services by the investigating attorney or by other counsel, the results of the investigation will likely not be privileged or protected as work product.<sup>29</sup> An attorney who performs a fact investigation under these circumstances would be well-advised to ensure that the client understands in advance the implications of structuring the engagement in this way and obtain the client's informed consent to conduct an investigation that will likely not be privileged.

As noted above, workplace investigations are often bifurcated, with independent counsel conducting the investigation, and in-house or outside counsel rendering legal advice to, and representing, the employer in any litigation. The attorney-client privilege may apply to legal services that are bifurcated in this manner, provided the relationship is structured properly. A number of cases have held that the privilege may shield the results of an attorney's investigation when the dominant purpose of the investigation is to facilitate the rendering of legal advice or legal services to the client.<sup>30</sup> Although these cases involve situations where the same firm conducted the investigation and rendered legal advice, there is no reason why the attorney-client privilege should not

apply to bifurcated task-based legal services when one attorney conducts a factual investigation in coordination with other counsel who provides legal advice to the employer—provided the dominant purpose of the attorney’s investigation is to facilitate the rendering of the advice to the client, the lawyer performing the investigation is acting in his or her capacity as an attorney at law, and other elements of the privilege apply.<sup>31</sup>

## CONCLUSION

An attorney’s workplace investigation will qualify as legal services for purposes of the exemption if the attorney is functioning as an attorney at law in an attorney-client relationship with the employer-client. Attorneys may qualify for the attorney exemption under Cal. Bus. & Prof. Code § 7522(e) and satisfy the EEO goals of fair and objective fact-finding by limiting the scope of the representation to conducting an objective and impartial investigation. There are steps lawyers can take to increase the likelihood that the work will be considered legal services for purposes of the exemption, including structuring the engagement as a limited scope attorney-client relationship, holding themselves out to third parties as attorneys at law rather than consultants or lay investigators, ensuring that other counsel are responsible for rendering legal advice to the client regarding the investigation, and complying with the ethics rules and other laws governing attorneys in conducting workplace investigations. 

## ENDNOTES

1. Cal. Bus. & Prof. Code §§ 7512–7573.
2. Cal. Bus. & Prof. Code § 7523(a). “Investigator” is broadly defined and arguably covers those who perform most workplace investigations in response to complaints of discrimination,

- harassment, retaliation, workplace safety issues, and other breaches of company rules, policies, or standards. See Cal. Bus. & Prof. Code § 7521(b), (e).
3. Cal. Bus. & Prof. Code § 7522(e). The statute also exempts from its licensing requirement a person employed “exclusively and regularly” by an employer, in connection with the affairs of that employer. Cal. Bus. & Prof. Code § 7522(a). Notably, the statute contains no exemption to its licensing requirement for workplace investigations performed by outside human resources professionals.
4. Cal. Bus. & Prof. Code § 7523(b).
5. *Id.*
6. 30 Op. Att’y Gen. 175 (1957) and 11 Op. Att’y Gen. 177 (1948).
7. 30 Op. Att’y Gen. 175 (1957).
8. 11 Op. Att’y Gen. 177, 178 (1948).
9. Paul W. Vapnek, Mark L. Tuft et al., *Professional Responsibility*, ¶ 1:314 (The Rutter Group California Practice Guide 2010); ABA Model Rule 5.7; Cal. State Bar Formal Op. 1995-141.
10. Workplace investigations often are bifurcated in this manner to avoid conflicts of interest that may arise when an employer’s regular

counsel purports to conduct an independent investigation on behalf of a client for whom they also provide advice and advocacy, and when they receive substantial fees for services unrelated to any monitoring or investigative function. See, e.g., *Commission on Public Trust and Private Enterprise: A Personal Postscript* 12 (The Conference Board 2003) (concluding that practices such as independent investigations conducted by an organization’s regular law firm, and combining auditing and advocacy functions, present potential conflicts of interest inconsistent with effective corporate governance, which requires a variety of truly independent, objective, outside professional organizations acting in the corporation’s best interest); see also Cal. Rule of Prof. Conduct 5-210 (limiting circumstances in which attorney may serve as both witness and advocate) and ABA Model Rule 3.7 (lawyer as witness).

11. 96 F.3d at 1296-97 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981): “The first step in the resolution of any legal problem is ascertaining the

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*Generally speaking, to fall within  
the [attorney-client] privilege, the  
dominant purpose of the investigation  
must be to further the rendering of  
legal advice or legal services.*

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factual background and sifting through the facts with an eye to the legally relevant.”).

12. 600 F.3d at 620.
13. *Better Gov't Bureau Inc. v. McGraw (In re Allen)*, 106 F.3d 582 (4th Cir. 1997) (where lawyer is retained to use legal expertise to conduct investigation, lawyer is performing “legal work”); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 91 F.R.D. 552, 557 (S.D. Tex. 1981) (confidential communications made by attorneys “hired to investigate through the trained eyes of an attorney” are privileged), *vacated on other grounds*, 693 F.2d 1235 (5th Cir. 1982); *Wellpoint Health Networks Inc. v. Superior Court*, 59 Cal. App. 4th 110, 121-22 (1997) (lawyer performing factual investigation pursuant to attorney-client relationship may be acting as lawyer for purposes of privilege).
14. See Paul W. Vapnek, Mark L. Tuft et al., *Professional Responsibility*, ¶ 1:333.5 (The Rutter Group California Practice Guide 2010); ABA Model Rule 1.2(c).
15. The California State Bar has adopted a resolution promoting the use of task-based representation in appropriate circumstances. *State Bar of California Limited Scope Legal Assistance (Unbundling) Resolution* (May 15, 2009) (defining “limited scope legal assistance” as a “relationship between an attorney and a person seeking legal services in which it is agreed that the scope of the legal services will be limited to the defined tasks that the person asks the attorney to perform.”)
16. See, e.g., the Fair Employment and Housing Act (FEHA) (Cal. Gov't Code §§ 12900–12996); the Civil Rights Act of 1964 (Title VII) (42 USC §§ 2000e–2000e-17).
17. See, e.g., *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (EEOC, June 1999); *Sexual Harassment: The Facts about Sexual Harassment* (DFEH-185, 11/07).
18. Cal. Rule of Prof. Conduct 3-400, Discussion; ABA Model Rule 1.2(c); see generally, *An Ethics Primer on Limited Scope Representation* (State Bar of California Committee on Professional Responsibility and Conduct 2004).
19. See *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1683-84 (1993).
20. Cal. Rule of Prof. Conduct 3-110.
21. Cal. Rule of Prof. Conduct 3-310.
22. Cal. Rule of Prof. Conduct 3-500.
23. Cal. Rule of Prof. Conduct 3-100; Cal. Bus. & Prof. Code § 6068(e).
24. See, e.g., Cal. Rule of Prof. Conduct 2-100 (the “anti-contact” rule), ABA Model Rule 4.3 (dealing with unrepresented person), and Cal. Rule of Prof. Conduct 3-600(D) (duty not to mislead constituents of an organizational client).
25. See Cal. Rule of Prof. Conduct 2-100 (the “anti-contact” rule) and ABA Model Rule 4.2. See also, ABA Model Rule 4.3 (dealing with unrepresented person).
26. See ABA Model Rules, Preamble, ¶ 2, and see ABA Model Rule 2.1 (lawyer as advisor).
27. See ABA Model Rules 1.2(a) and 1.7(a)(2).
28. See Paul W. Vapnek, Mark L. Tuft et al., *Professional Responsibility*, ¶ 7:238.5 (The Rutter Group California Practice Guide 2010); see also *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 746 (2009) (courts must determine dominant purpose of relationship between attorney and person or entity claiming privilege).
29. See *Wellpoint Health Networks, supra*, 59 Cal. App. 4th at 122.
30. *Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612, 620 (7th Cir. 2010) (“when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney client privilege”); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) (*Upjohn* made “clear that fact-finding which pertains to legal advice counts as ‘professional legal services’ for purposes of the attorney-client privilege”); *Costco*, 47 Cal. 4th at 743 (2009) (rejecting plaintiff’s argument that an attorney’s interviews of managers was fact-gathering that could have been performed by a non-attorney, since it was not disputed that Costco had retained the law firm, experts in California wage and hour law, to provide legal advice regarding the exempt status of employees).
31. Of course, if the employer raises the adequacy of the investigation as an affirmative defense, a court may find that the privilege and the work product doctrine have been waived with respect to the factual results of the investigation and the attorney who conducted the investigation may be a witness. *Wellpoint*, 59 Cal. App. 4th at 128.



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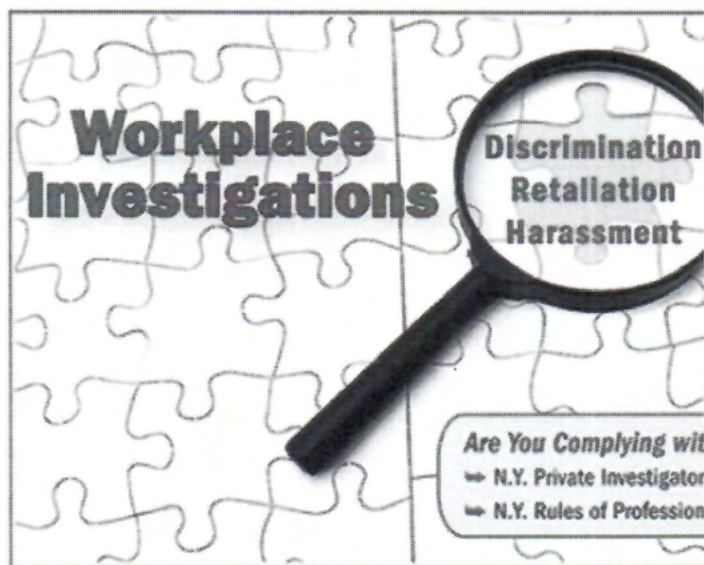
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**How Attorneys Conducting Workplace Investigations Can Comply with N.Y.'s Private Investigator Law & Rules of Professional**

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Settlement Negotiations  
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## Conduct

By Ronald C. Minkoff, Lindsay Harris, and Andrew Jacobs

The recent high-profile trial in *Ellen Pao vs. Kleiner Perkins*, No. CGC-12-520719 (S.F. Cty. Super. Ct. filed 5/10/2012), in which Pao unsuccessfully sued her employer, venture capital firm Kleiner Perkins, for gender discrimination and other claims, highlights the increasingly important role of attorneys who are retained by organizations to conduct impartial investigations of alleged workplace discrimination, retaliation, and harassment. Though not as widely covered by the mainstream media as other aspects of the case, the trial included crucial testimony from an attorney whom Kleiner Perkins had retained to independently investigate Ms. Pao's complaints, as well as from opposing experts who testified with respect to the adequacy of that attorney's investigation.

Many lawyers who perform such workplace investigations — in Silicon Valley and beyond — face confusion about their proper role and the ethical duties that govern them. In conducting such investigations, are they acting as attorneys? If so, how can they be impartial? And if not, in what capacity do they act? Moreover, increasingly, these questions are finding their way into court cases and judicial and administrative decisions. For example, at trial, the judge in *Pao* asked the employer's expert whether the employer's attorney investigator possessed authority under state law, absent a private investigator's license, to conduct the type of workplace investigation he did.

Faced with such riddles, lawyers who conduct workplace investigations have taken different tacks. While some conduct investigations in their capacity "as attorneys," many do not. Of those who do not, some structure their investigative engagements ambiguously, leaving it unclear whether they are acting as attorneys or not, while still



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Is Right

Why the  
"Stock"  
Decision Is  
Wrong —  
And Why It

others explicitly state in their engagement agreements that they are *not* acting as attorneys. Although not licensed private investigators, these attorneys insist they are not performing legal services in connection with the investigation. They contend that eschewing an attorney-client relationship and the responsibility to advocate for a particular client is the only way to ensure their investigation is truly impartial. They further contend that, since they are not acting as attorneys, the full range of attorney ethics rules do not apply to their investigative work.

In this article, we will show that this approach, when applied to workplace investigations in New York, violates New York's statutory scheme, which allows attorneys to conduct workplace investigations without a private investigator's license only if they are acting "in the regular practice of their profession." Moreover, this approach misperceives the flexibility built into New York's Rules of Professional Conduct (RPCs), particularly RPCs 1.2(c) and 2.3, which allow lawyers to limit their roles to purely impartial investigative functions. Finally, it ignores that while the RPCs do place strictures on what attorneys can do in investigations, they also provide advantages that non-attorney investigators do not have — most notably, the attorney-client privilege and work product protection.

### **New York Private Investigator Licensure Requirement & Attorney Exemption**

New York, like most other states, requires private investigators to be licensed. Under New York General Business Law §70(2) (N.Y. GBL) (McKinney 2011), no person or entity "shall engage in the business of private investigator...without having first obtained from the department of state a license so to do." N.Y. GBL §83, however, specifically exempts practicing attorneys from the



licensure requirement, providing that “[nothing] contained in this article shall be construed to affect in any way attorneys or counselors at law in the regular practice of their profession” Similar exemptions exist in many other states.

### **Attorney Investigations Fall Within Scope of ‘Private Investigation’**

N.Y. GBL §83 implicitly recognizes that lawyers’ activities often encompass “private investigation,” as defined by New York law. This is particularly true of attorneys who conduct workplace investigations, which typically include gathering and review of documents, interviews of witnesses, and summarizing the available facts to determine if improper acts or omissions occurred. N.Y. GBL §71(1) defines “private investigator” broadly enough to encompass these activities, as it includes persons who investigate “the identity, habits, [and] conduct ... of any person, group of persons, ... firm or corporation,” “the credibility of witnesses or other persons,” and “the conduct, honesty, efficiency, loyalty or activities of employees, agents, contractors, and sub-contractors.” The definition also includes “the securing of evidence to be used before any authorized investigating committee, board of award, board of arbitration, or in the trial of civil or criminal cases.” See *Id.* In short, New York’s definition of “private investigation” encompasses the sort of factual inquiry often performed by attorneys.

This conclusion is confirmed by Megibow 397-DOS-13 (2011), a recent New York Department of State decision granting a former attorney’s application for a private investigator’s license. Under N.Y. GBL §72 there are certain experience requirements which private investigator applicants must meet in order to obtain a license:

Every such applicant for a license as private investigator shall establish to the satisfaction of the

secretary of state...[that s/he] ***has been regularly employed, for a period of not less than three years***, undertaking such investigations as those described as performed by a private investigator in N.Y. Gen. Bus. Law §71(1) (McKinney 2011), as a sheriff, police officer in a city or county police department, or the division of state police, investigator in an agency of the state, county, or United States government, or employee of a licensed private investigator, ***or has had an equivalent position and experience.***" (Emphasis added.)

A regulation, 19 NYCRR §172.1, sets forth what constitutes "an equivalent position and experience" for purpose of N.Y. GBL §72 listing investigations largely corresponding to those found in N.Y. GBL §71(1), and requiring that "such investigations were conducted on a full-time basis in a position the primary duties of which were to conduct investigations."

In 2011, Steven Megibow, an attorney licensed to practice in New York, applied for a private investigator's license on the basis of his experience working in a non-legal capacity at two private investigation firms. His application was denied because he had only 30 months of creditable investigation experience at those firms, rather than the required 36 months. 507-DOS-11 at 1. Megibow argued that he should also be credited for one year of "full-time investigations experience" from his previous employment as an associate at the law firm Kramer Levin Naftalis & Frankel LLP (Kramer Levin). At a hearing, testimony was presented that Kramer Levin had been retained by a publicly traded company's Audit Committee to conduct an internal investigation into potential financial and accounting misfeasance at the company. Megibow worked full-time as

a junior associate on the matter, with duties including "reviewing and analyzing documents acquired from the subject; evaluating evidence; preparing investigative outlines and issues to be discussed; interviews of witnesses; identifying witnesses to be interviewed; [and] conducting interviews." *Id.* at 7. Kramer Levin's role was purely investigatory; the company had separate litigation and general corporate counsel. *Id.* at 8. Relying on these facts, the Administrative Law Judge held that Megibow's time at Kramer Levin constituted "creditable experience to be granted a license as a private investigator," such that his six-month experience deficiency was cured. 397-DOS-13 at 2.

The definition of "private investigator" in N.Y. GBL §71(1) and *Megibow* thus demonstrate the overlap between the work of an attorney and work that constitutes "private investigation" under New York law. N.Y. GBL §83 thus serves the important function of exempting "attorneys or counselors at law in the regular practice of their profession" from the need to obtain a separate private investigator's license.

### **'Factual' Investigations By Attorneys Constitute 'Regular Practice of Their Profession'**

Still, the question remains whether workplace investigations by attorneys constitute "the regular practice of the [legal] profession" under N.Y. GBL §83. While no New York court has squarely addressed that question, the Court of Appeals has held that materials generated by a law firm during its conduct of an internal investigation are protected by the attorney-client privilege. In *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991), the Court held that the privilege applied to the report of plaintiff's outside counsel of an internal investigation into possible fraud



involving the defendant. The Court acknowledged the “conceded investigative function” of outside counsel and that their final report “did not focus on any imminent litigation,” “reflected no legal research,” and “was inconclusive, looking toward further discussion.” *See id.* at 378–81. Nevertheless, it held that the material was “primarily and predominantly of a legal character” because it “relate[d] and integrate[d] the facts with the law firm’s assessment of the client’s legal position.” *Id.* at 380.

Although *Spectrum Systems* involved application of the attorney-client privilege rather than N.Y. GBL §83, it suggests that investigative work by attorney’s, even if preliminary and mainly factual, constitutes the “regular practice of their profession” under N.Y. GBL §83, regardless of whether the assessment involves legal research or comes to an ultimate legal conclusion. This should come as welcome news for workplace investigators in New York, who typically provide factual findings, or findings on whether the employer’s policy was violated, but do not typically render “legal advice” as that term is commonly understood, for example, advising the employer on legal steps to take based on the investigation. (That function is usually performed by the organization’s regular outside or in-house counsel.)

Under the analysis in *Spectrum Systems*, 78 N.Y.2d at 378–79, as well as that of a growing number of federal courts, the sort of factual investigations commonly performed by these attorneys would fall within the protection of N.Y. GBL §83. *See e.g., Gruss v. Zwirn*, 276 F.R.D. 115, 122–27 (S.D.N.Y. 2011), “[i]nterviews of a corporation’s employees by its attorneys as part of an internal investigation into wrongdoing and potentially illegal conduct have been repeatedly found to be protected by the attorney-client privilege” (applying New York law); *revd. on other grounds*,



2013 WL 3481350 (S.D.N.Y. 7/10/2013); *see also*, *Sandra T.E. v. S. Berwyn Sch. Dist.* 100 [600 F.3d 612, 620 (7th Cir. 2010)], “[W]hen an attorney conducts a factual investigation in connection with the provision of legal services... communications in the course of the investigation are fully protected by the attorney-client privilege.”

This result is consistent not only with the New York law of attorney-client privilege, but with the general principle that “the practice of law relates to the rendition of services to others that call for the professional judgment of a lawyer.” Ethical Consideration 3–5 to the former N.Y. Code of Professional Responsibility; *see also*, ABA Task Force on the Model Definition of the Practice of Law (still good authority given that current RPC 5.5 is identical to former DR 3-101, governing the unauthorized practice of law); Proposed Model Definition, Sept. 18, 2002, “The ‘practice of law’ is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.” As *Spectrum Systems*, 78 N.Y.2d at 380, and the other cases cited show, a factual investigation often does involve “the professional judgment of a lawyer,” even if no ultimate legal conclusion is reached.

### **Being an Attorney Alone Is Insufficient to Guarantee Protection of GBL §83**

While N.Y. GBL §83 protects attorneys acting “in the regular practice of their profession” from private investigator license requirements, an individual’s mere status as an attorney will not provide an exemption from those requirements.

Megibow 397-DOS-13 (2011), is again instructive on this point. As noted above, Megibow’s application was initially denied because his creditable experience at investigative firms did not total three years, in part because one of the

investigative firms at which he worked did not have a private investigator's license for six of the months for which Megibow sought credit. See 507-DOS-11 at 3.

On appeal, Megibow argued that because attorneys are exempt from licensure requirements, *all* of his non-legal work at the investigative firm was creditable as qualifying experience, whether the firm had a private investigator license or not. This argument failed: Because the investigative firm was neither "licensed as a private investigator" nor "authorized to render professional legal services," its business violated N.Y. GBL §70(2), and Megibow's investigative work at the firm during that period was not creditable. See 39-DOS-APP-12 at 5. This aspect of *Megibow* makes clear that unless attorneys are acting "in the regular practice of their profession" (or are employees of a licensed private investigator), they are not exempt from N.Y. GBL §70(2) requirement of obtaining a private investigator's license. In sum, in order to be deemed as acting "in the regular practice of their profession," attorney investigators must possess an active law license (including authority to practice law in New York); must conduct their investigations within the context of an attorney-client relationship; and remain, in the conduct of the investigation, subject to the full panoply of legal ethical duties.

The short of it is that attorneys who perform workplace investigations while disavowing the existence of an attorney-client relationship are breaking the law. These attorneys place themselves in a double-bind: By presenting the services as non-legal, they are unlikely to be deemed as acting "in the regular practice of their profession," and thus, unless they possess a separate private investigator's license, are violating N.Y. GBL §70(2). At the same time, New York courts and disciplinary bodies are likely to view the services as nonetheless subject to the full panoply of

legal ethics rules, because, as discussed further below, New York law generally presumes that services offered by an attorney — or even acts taken by an attorney in her non-legal capacity — are subject to the RPCs. This places the attorney between the proverbial rock and a hard place — especially if, under the misconception that the RPCs did not apply, he or she has failed to observe them in conducting the investigation. For example, the attorney may have failed to observe the so-called “no contact” rule [RPC 4.2] — a not uncommon error of attorney investigators who think they are not “acting as attorneys.” Therefore, in attempting to conduct an investigation as a “non-legal” service, such an attorney may have unwittingly violated both New York’s private investigator law, as well as the RPCs.

The potential consequences for this illegal conduct are severe. Under N.Y. GBL §70(4), a person who violates the private investigator licensing requirements is guilty of a Class B misdemeanor, punishable by up to three months in jail, a \$500 fine, and possible additional financial penalties. N.Y. Penal Law §70.15 and §80.05. Moreover, the violator faces disciplinary consequences for committing a crime and/or misrepresenting his or her qualifications. See RPCs 8.4(b) and (c), an attorney shall not “engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer” or “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The violator also could face civil liability, or the loss of privileged status of his or her communications with the employer. An investigation that was not conducted under a proper license (i.e., under either a private investigator’s or law license) also could be challenged in litigation on the grounds that the investigation was conducted unlawfully; this has actually happened in California. *Complaint, Jolly Tech., Inc. vs. Robert Half Intl.*,



*Inc.*, No. CIV529256, (San Mateo Super. Ct. 6/25/2014).

Finally, out-of-state attorneys who conduct workplace investigations in New York but who are not authorized to practice law in New York could face discipline for the unauthorized practice of law, or see their investigations challenged on this ground in civil litigation.

### **An Attorney May Structure Relationship with Client to Ensure an Impartial Investigation**

For all these reasons, unless they are prepared to apply for a private investigator's license under N.Y. GBL §72, investigative attorneys should embrace, rather than distance themselves from, the label "attorney." Doing so will not, as some attorneys fear, mean they cannot conduct an independent and impartial investigation. The RPCs allow investigative attorneys to structure their client-attorney relationships so that they can act independently.

### **Limited Scope Representation**

In this regard, investigative attorneys may look to RPC 1.2(c). This provision, added to New York's ethics rules when the RPCs were adopted in 2009, allows attorneys to limit the scope of their representation under certain conditions:

"A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent, and where necessary notice is provided to the tribunal and/or opposing counsel."

This allows the attorney, with the informed consent of the client, to adjust both the scope and objectives of the representation to suit the client's needs. "A limited

representation may be appropriate because the client has limited objectives for the representation.” RPC 1.2, Comm.

6. All that is required is that the limitation be reasonable, *i.e.*, so it does not interfere with the attorney’s “duty to provide competent representation” *Id.* Comm. 7, and that the attorney obtain informed consent after disclosing “the reasonably foreseeable consequences of the limitation.” *Id.* Comm. 6A.

Even assuming that the investigative attorney would otherwise be required to “favor” the employer-client in conducting an investigation — a proposition we consider dubious, but which finds some support, in RPC 1.1(c)(2) (prohibiting a lawyer from “prejudic[ing] or damag[ing] the client during the course of the representation”) — compliance with RPC 1.2(c) solves the problem. If the client wants a truly independent investigation, the attorney can provide it by obtaining the necessary informed consent. Once again, Megibow 397-DOS-13 (2011), provides a perfect example. There, Kramer Levin was asked to perform a purely investigative function, reporting on facts uncovered while the corporate client had other attorneys analyze those facts and advise the Board. This allowed Kramer Levin to be fully independent and impartial in its work, knowing the client’s other lawyers would protect its interests. RPC 1.2(c) provides the vehicle for this kind of limitation.

### **Evaluation for Use by Third Persons**

The RPCs provide an even more specific provision for investigative attorneys. RPC 2.3 addresses investigative reports and opinion letters, particularly when written to be shown to third parties, and is intended to address the concerns stemming from RPC 1.1(c)(2)s prohibition on intentionally “prejudice[ing] or damag[ing]” a client. See

*Simon's N.Y. Rules of Prof. Conduct Annotated* at 817

(West 2014). It permits the investigative report to "provide an evaluation of a matter affecting the client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." RPC 2.3(a) allows the lawyer to reveal even confidential information if doing so "advance[s] the best interests of the client" (if reasonable or customary) but does not grant implied authority to harm the client." *Simon's N.Y. Rules* at 818, citing RPC 1.6(a)(2). But RPC 2.3 goes even further: It allows the investigative attorney to reveal in the report information which is "likely to affect the client's interests materially and adversely" as long as the client gives "informed consent." [RPC 2.3(b).] Absent such authorization, "information relating to the evaluation is protected by Rule 1.6." RPC 2.3(c).

This Rule speaks directly to attorneys who, for example, conduct workplace investigations with the understanding that results might be disclosed to the EEOC, the SEC or the U.S. Attorney's office. It permits them to make disclosures to these agencies and other third parties about their client — even adverse disclosures — as long as the client gives "informed consent." See RPC 1.0(j), defining that phrase, and requiring attorney to "adequately explain[]" to the client the "material risks of the proposed course of conduct and reasonably available alternatives."

But implicit in all this is that an attorney, when conducting an investigation, may ferret out all information relevant to advise the client, even if that information proves unfavorable. Indeed, a lawyer has an obligation to "promptly inform the client of...any decision or circumstance" for which the client's informed consent is required [RPC 1.4(a)(1)(i)], and to "explain a matter to the extent reasonably



necessary to permit the client to make informed decisions regarding the representation.” RPC 1.4(b). Thus, the RPCs do not just allow an impartial and independent investigation: they demand it. What the client does with any adverse information uncovered is then between the client and its attorney, with the attorney obligated to obtain the client’s “informed consent” before disclosing that information to a third party. RPCs 2.3(b) and (c).

### **Protections of Attorney-Client Relationship**

It is true that in some instances, attorneys offering so-called “non-legal” services may take off their “attorney hat,” and avoid the strictures of the RPCs. See RPC 5.7(c), defining “nonlegal services” as “those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.” However, doing so is difficult: RPC 5.7, which addresses an attorney’s responsibilities with respect to non-legal services, presumes that services offered by an attorney are subject to the RPCs, unless the services are “distinct” from any legal services offered to the client, *and* the attorney provides an appropriate written disclaimer to the client. RPC 5.7(a)(4) disclaimer. The disclaimer must state that the services are not legal services and that the protections of the lawyer client relationship do not exist with respect to the non-legal services. RPC 5.7(a)(4).

But we should leave no doubt: For the reasons discussed above, providing an RPC 5.7(a)(4) disclaimer in the context of workplace investigations is not a viable option (except perhaps for an attorney working directly for a private investigation firm). And even if it were, there are other reasons why it is not a good idea. For one thing, it deprives the employer of two important protections — the attorney-client privilege and the work product protection. It is

axiomatic that to invoke either of those protections, the employer must be dealing with an attorney in an attorney-client relationship. See, e.g., RPC 1.6, Comm. 3 ("The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information *concerning a client*." (emphasis added); N.Y. County Lawyers' Assn. Comm. on Prof. Ethics Formal Op. 717 (1996) (discussing if a lawyer/employee of an insurance company is not acting as an attorney, former DR 4-101, (the predecessor to RPC 1.6), does not apply); Weinstein, Korn & Miller, *New York Civil Practice* §3101.45 at 31–120 ("Work product protection seeks to maintain the sanctity of the attorney's legal work and thought while the privilege seeks to protect the client's freedom of revelation and right of privacy"); but see e.g., *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (discussing communications between client and others hired by the attorney whose presence is necessary for effective consultation between client and the attorney are still covered by the privilege, even if attorney not present).

To disclaim the attorney-client relationship is to disclaim these important protections, which could result in government investigators and others obtaining sensitive and confidential information to which they otherwise would not be privy. Nor, arguably, does the privilege merely serve the employer's interest. Rather, by creating a protected zone within which organizations can investigate potential misconduct, as well as by promoting candor between lawyer and client, the privilege is thought to "promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. vs. United States*, 449 U.S. 383, 389 (1981).

Of course, the existence of an attorney-client relationship



imposes additional obligations on the investigative attorneys. For example, attorneys have certain duties in communicating with third parties that non-lawyers do not possess, such as the duty already noted under RPC 4.2(a) not to communicate with persons known to be represented by counsel without their counsel's consent, the duty under RPC 1.13(a) to provide adequate warnings as to the lawyer's identity and role, and the duty under RPC 1.13(b) to make disclosures and "climb the ladder" if wrongdoing is uncovered. Nonetheless, attorneys who currently conduct workplace investigations "as attorneys" do not report that complying with these or other attorney ethics rules has impeded their ability to conduct fair and effective investigations.

And in some cases, courts have gone out of their way to protect lawyers conducting internal investigations for employers against claims that they developed a separate attorney-client relationship with the employees they interviewed. See, e.g., *U.S. v. Ruehle*, 583 F.3d 600 (9<sup>th</sup> Cir. 2009) (holding that a corporate officer had no reasonable expectation that interview with corporation's lawyer was confidential even though firm did not give "corporate Miranda" warning and firm had represented officer previously on personal matter); *U.S. v. Weissman*, 195 F.3d 96 (2d Cir. 1999) (discussing that there was no common interest privilege found at meeting between employee, employer and employer's lawyer because existence of common interest not made explicit at meeting); *Matter of Bevill, Bressler & Schulman Asset Mgmt. Co.*, 805 F.2d 120 (3d Cir. 1986) (imposing strict five-part test for determining that corporate employee is represented by corporation's lawyer).

In short, clarifying the attorney investigator's proper role as that of an attorney arguably enhances his or her ability to

conduct fair, impartial and effective workplace investigations — because the rules of the road, including the ethical duties and standards that apply, are well-established and clear to all participants.

## Conclusion

Under N.Y. GBL §83, only attorneys engaged “in the regular practice of their profession” are permitted to conduct workplace investigations without a private investigator’s license. Just as important, the idea that investigative attorneys must eschew the attorney-client relationship in order to maintain their independence is a myth; under RPCs 1.2(c) and 2.3, investigative attorneys can craft limited scope engagements with their employer clients that afford them all the independence they need, even to the point of disclosing adverse information to third parties. Finally, the burdens an attorney-client relationship imposes on investigative attorneys are few, but the advantages, particularly from the attorney-client privilege and work product protection, are vast. Attorneys conducting workplace investigations should embrace their role as attorneys, not reject it. Doing so is better for them, better for their clients and better for the public.

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# PLENARY 5



# **Social Science Strategies for Managing Diversity: Industrial and Organizational Opportunities to Enhance Inclusion**

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Dr. Eden King, Associate Professor of Psychology, joined the faculty of the Industrial-Organizational Psychology program at George Mason University after earning her Ph.D. from Rice University in 2006. Dr. King is pursuing a program of research that seeks to guide the equitable and effective management of diverse organizations. Her research integrates organizational and social psychological theories in conceptualizing social stigma and the work-life interface. In addition to her academic role, Dr. King has consulted on applied projects related to climate initiatives, selection systems, and diversity training programs. She is currently an Associate Editor for the Journal of Management and the Journal of Business and Psychology and is on the editorial boards of the Academy of Management Journal and the Journal of Applied Psychology. Dr. King was honored to receive the State Council of Higher Education of Virginia's Rising Star Award in 2011.



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Dr. Veronica Gilrane joined the People Analytics team at Google as a diversity analyst in January 2014. She received her Ph.D. in Industrial-Organizational psychology from George Mason University in 2013 under the guidance of her advisor, Dr. Eden King. Her dissertation examined the experiences of women in Science, Technology, Engineering, and Math (STEM), with a focus on how STEM women counteract negative stereotypes using impression management behaviors. Her current work involves working with the People Analytics and Diversity and Inclusion teams at Google to design experiments and implement findings related to workplace diversity. Prior to her role at Google, Dr. Gilrane taught in academia and worked in management consulting as well as for the federal government.



## **Social Science Strategies for Managing Diversity: Individual and Organizational Opportunities to Enhance Inclusion**

More than ever before, people work together with others from different gender, racial, sexual orientation, age, religion, parental status, and ability backgrounds.

Common wisdom regarding the “business case for diversity” suggests that employee diversity is a resource that enhances organizational effectiveness. Social science findings, however, suggest that diversity can be both a challenge and an opportunity to human resource managers and organizations as a whole (Guillaume, Dawson, Woods, Sacramento, & West, 2013).

Indeed, research suggests that diversity can yield benefits in complex decision-making and innovation, but also that diversity can create incivility, conflict, and stifled team processes. The key question for scholars and practitioners alike, then, is how to maximize the positive potentials of diversity while minimizing negative outcomes.

Here, we draw from contemporary research across the social sciences to provide evidence-based recommendations for leveraging diversity. This overview considers strategies that can be enacted by individuals—both employees and managers—as well as those that can be adopted within organizations. Aligning such top-down and bottom-up efforts together may ultimately generate the most positive outcomes for people and their organizations (Ruggs, Martinez, & Hebl, 2011).

## *What Can Individuals Do to Realize the Benefits of Diversity?*

The challenges that emerge when people from different backgrounds interact can be understood from the perspective of social identity theory (Tajfel, 1974). Social identity theory suggests that people understand and value themselves in relation to the social groups of which they are a part. These social groupings spur preferences for similar others and disfavoring of people from other social groups. In simple terms, we like people from our own group more than people from other groups. This can lead to dysfunctional behavior such as incivility, biased decision-making, and ineffective group processes. Employees and managers, however, can disrupt these processes and enable positive interpersonal dynamics in several ways.

### ***Employees***

We present two individual-level strategies that facilitate inclusion and the benefits of diversity: psychosocial support and confrontation. Psychosocial support involves listening to and reflecting understanding of the concerns of others. This seemingly simple set of behaviors is incredibly powerful. Indeed, co-worker support is one of the strongest predictors of the attitudes of stigmatized individuals (Huffman, Watrous-Rodriguez, & King, 2008). More generally, perceived organizational support—the extent to which people feel that their organizations genuinely care about them—is strongly linked with

### **What can individuals do?**

#### ***Employees***

- Provide support (listen)
- Confront bias (intervene)

#### ***Managers***

- Beware own bias blind spots
- Question assumptions
- Be role models of inclusion

an extensive number of organizationally-relevant outcomes including job satisfaction, retention and performance (Rhoades & Eisenberger, 2002). Perhaps this is why a panel of chief diversity officers from Fortune 500 companies identified “listening” as fundamental to cultural competence in a session on “The Power of Words” at the Academy of Management Conference in 2014.

People can engage in active support by confronting bias when it emerges in their work. This is a difficult task since (a), it is difficult to detect subtle bias (Jones, Peddie, Gilrane, King, & Gray, 2013), (b), confrontation may feel like conflict, and (c), people are generally hesitant to intervene and instead go along to get along (Nelson, Dunn, & Pardies, 2011). Despite these challenges, people who are not personally the targets of prejudice may be in the best position to change the biased behaviors of others. A clever experimental study showed that challenges to a white participant’s mildly discriminatory statement were more effective when enacted by another white person than when the same thing was said by a black person (Czopp, Monteith, & Mark, 2006). Ally confrontation may be particularly important to support people whose identities are not directly observable—when people can conceal or hide their devalued identity (e.g., sexual orientation minorities, religious minorities), they may be hesitant to respond to prejudice because it risks “outing” themselves in unfriendly environments. Managers, too, can act as supportive allies for people from underrepresented groups.

## ***Managers***

One of the most important things that managers can do is to not be part of the problem. This is, of course, harder than it sounds. Stereotypes can emerge automatically and outside of conscious awareness. Evidence suggests that people uniformly believe that others are more prejudiced than they are personally, a statistical impossibility—that is, we have blind spots to our own biases (Pronin, Lin, & Ross, 2002). In addition, stereotypes are likely to impact behavior when people are occupied by cognitively demanding tasks, a common circumstance for managers (Devine, Plant, Amodio, Harmon-Jones, & Vance, 2002). It is crucial, then, for managers to recognize that their own behaviors may not always match their egalitarian values. This discrepancy can be overcome through a process that involves: (1), noticing that there was a problem, (2), experiencing affective consequences (such as guilt or self-criticism) and (3), reflecting on the behavior that triggered them (Monteith, Mark, & Ashburn-Nardo, 2010). Regret about past unsupportive behavior can actually be translated into positive future behavior.

Given this potential for change, what kinds of behaviors should managers try to notice in themselves and others? In a range of employment decisions, it boils down to questioning assumptions. Stereotypes are essentially assumptions about people based on the groups to which they belong. As an example, managers might assume that a mother with young children would not want to take on an assignment that required substantial travel (King, Botsford, Hebl, Kazama, Dawson, & Perkins, 2012). As another example, a manager might assume that people from different cultures feel equally

comfortable speaking up in meetings or advertising their personal successes. These kinds of assumptions can underlie decisions that ultimately feed into who gets the next promotion or raise. Thus, it is critical to base decisions on measurable outcomes and to directly question the factors that might inadvertently influence decision-making by asking, "What assumptions am I making in this decision?"

Beyond these kinds of decisions, managers also have the opportunity to attend more carefully to interpersonal dynamics of the groups they lead. Social network scholars, who study the frequency and types of communication patterns that emerge in organizations, show that people from underrepresented groups are meaningfully marginalized in social network structures (Mehra, Kilduff, & Brass, 1998). In other words, women and minorities are literally left out of conversations with upper management. Moreover, evidence suggests that even when people from underrepresented groups are in the conversation, their contributions are overlooked, downplayed or attributed to others in their group (Heilman & Haynes, 2005). A quintessential example of this is when a woman's idea is dismissed only to be applauded later when suggested by a man. Managers who pay attention to these patterns can actively work toward making sure everyone is at the table, all voices are heard, and that credit goes where it is due. In making these changes, managers can serve as role models for their followers and help to build inclusive norms.

## *What Can Organizations Do to Manage Diversity?*

Building upon the ways in which individuals and managers can leverage the benefits of diversity, we now focus on organizational strategies for successful diversity management. Although organizational- and individual-level strategies are distinct, they can also be mutually reinforcing. For example, individual phenomena, such as perceptions of supervisors, can have bottom-up influences on organizational phenomena, such as climate. Specifically, the behaviors of one's immediate manager are regarded as key aspects of one's perceptions of the work environment (Kozlowski & Doherty, 1989). Further, an employee's interpretation of the work environment may translate into their perceptions of the organization's climate or culture (Kozlowski & Farr, 1988). Indeed, these climate perceptions are critical for diversity management, with research demonstrating that diversity can have a positive impact on an organization's bottom line in climates that are supportive of diversity (Gonzalez & Denisi, 2009)—that is, when employees possess “shared perceptions that an employer utilizes fair

### **What can organizations do?**

#### ***Hiring***

- Job-related measurement
- Consider full range of competencies
- Address stereotype threat

#### ***Diversity Training***

- Include multiple rather than single group focus
- Use multiple learning techniques
- Awareness and behavioral goals
- Integrate into larger strategic diversity initiatives

#### ***Performance Management***


- Provide more information
- Increase time
- Increase accountability

personnel practices and socially integrates underrepresented employees into the work environment" (McKay, Avery, & Morris, 2008; p. 350).


Top-down (or trickle-down; Weiss, 1977) processes may also influence the behaviors of one's immediate managers, such that they model the behaviors of their supervisors and/or executive level management behavior. Together, this research provides a simple, yet essential conclusion – top and middle management support and dedication to diversity initiatives are critical to creating inclusion (Rynes & Rosen, 1995). These leaders have an opportunity to be diversity champions and to take proactive measures to ensure that their organization's hiring and training processes and procedures are fair and supportive of diversity.

### ***Hiring***


Practitioners often face the difficult challenge of striking a balance between ensuring that the tests and procedures used to evaluate applicants are strongly related to job performance and avoid adverse impact (Ployhart & Holtz, 2008). Fortunately, there are a few approaches that can be taken to thwart this diversity-validity dilemma. It is important to note that each of these approaches has critics, and that eliminating adverse impact has been called an unattainable "holy grail" (Arthur, Doverspike, Barrett, & Miguel, 2013). Nevertheless, opportunities for reducing adverse impact should be considered when they can maintain or enhance validity. We discuss three potentially preventative strategies: (1), focusing on job-related measurements, (2), expanding upon skills measured, and (3), alleviating nervousness or stress that candidates may experience during applications



The first strategy – developing a job-related measurement approach – involves creating a test with a format that provides a more realistic representation of on-the-job performance than traditional test media. For example, a video-based test may give a more realistic preview of a job than a multiple choice test. This strategy may help to reduce adverse impact, especially if the reading or writing requirements of the test are unnecessarily high for a given job. If a video-based test demonstrates greater equivalence to a job than a multiple choice test, the video-based test would be a preferable instrument to evaluate job candidacy (Pulakos & Schmitt, 1996).



A second strategy used to enhance diversity without compromising the functionality of hiring is to evaluate applicants based on their scores on a combination of tests. These tests should include those that are more predictive of job performance, but might hinder diversity (e.g., cognitive tests) as well as those that are less predictive, albeit still predictive, of job performance, but will not adversely impact diversity (e.g., personality tests). In addition to achieving diversity, this strategy has the benefit of improving the collective predictive power of the tests used to hire candidates over and above using solely cognitive measures (Sackett, Schmitt, Ellingson, & Kabin, 2001). In other words, assessing a full range of competencies relevant to the job can reduce overall subgroup differences (Ployhart & Holtz, 2008).



Now, we turn our attention to a third organizational level strategy that may be used by practitioners to ensure that candidates are able to perform under the best conditions possible, with the goal of obtaining the most accurate information about their abilities. Over the past two decades, an abundant body of research has been



conducted on stereotype threat – the concern that one’s behaviors will be perceived as fulfilling a negative stereotype about one’s group (Nguyen, & Ryan, 2008). These empirical studies examined how negative stereotypes may impede outcomes, such as performance, in a stereotype-relevant domain (Schmader & Johns, 2003).

For example, one study found women who were primed with the stereotype that men perform better in math than women performed significantly worse than women who were not primed (Gresky, Eyek, Lord, & McIntyre, 2005). It should be noted that several hiring simulation experiments failed to find evidence for a stereotype threat effect (McFarland, Lev-Arey, & Ziegert, 2003), suggesting that the more realistic nature of these studies transfer concerns toward performance and away from worries about stereotyping (Sackett, 2003; Sackett & Ryan, 2012). Nevertheless, the potential for stereotype threat to influence performance in application testing remains an area of concern for HR professionals.

Given that stereotype threat may account for some detriments in performance among women and racial/ethnic minorities, what, if anything, can practitioners do about it? Luckily, a burgeoning body of literature has focused on creating and assessing stereotype threat interventions, with research suggesting that interventions should be tailored to specific types of stereotype threat (Marx, Stapel, & Muller, 2005).

Specifically, interventions that provide access to a positive group role model have been found to be effective in reducing threat triggered by a concern that one’s behaviors will reflect negatively on one’s group (Cohen, Garcia, Purdie-Vaughns, Apfel, & Brzustoski, 2009).

Conversely, when the concern is focused on how one's actions may be seen as a reflection of one's own stereotypic abilities, thinking about important qualities outside of the stereotyped area may reduce the threat (Pendry, Driscoll, & Field, 2007). Taken together, simple modifications to the selection process – such as presenting a successful exemplar of a female or minority employee or having applicants write about an important value unrelated to the stereotyped domain — can help to ward off these threats and help to level the playing field for all candidates.

### ***Training***

Once an organization has made efforts to create fair and equitable hiring processes, the focus may be shifted to ensure that employees possess the knowledge, skills and abilities to effectively collaborate with diverse others, and this goal may be accomplished through diversity training (Bezruova, Jehn, & Spell, 2012). Although there remains a dearth of empirical evidence to support any set of diversity training “best practices,” we summarize several guiding principles that have emerged from the literature.

First, content that concentrates on inclusion and focuses on multiple groups is preferable to group-specific (e.g., ethnicity) training as it prevents the potential for backlash – groups that are not the focus of the training may inadvertently feel guilty, overly sensitive or potentially offended by the training (Holladay, Knight, Paige, & Quinones, 2003). Second, course instruction that uses multiple techniques (e.g., lectures, role playing, interactive exercises) is described more positively in the literature than training using only one learning method (e.g., all lecture). Specifically, learning


necessitates the balance between different learning styles – feeling, thinking, acting, and reflecting – which may be accomplished with various learning modes (Kolb & Kolb, 2005). Third, coupling awareness-focused training with behavioral training may be more successful than awareness or attitudinal training alone, especially if the goal of the diversity program is behavioral change (Roberson, Kulik, & Pepper, 2002). Finally, research suggests that integrating training into an overarching diversity initiative may be preferable to launching a stand-alone training, as it communicates a message of organizational support for diversity, which may help to shift attitudes toward diversity (Curtis, Dreachslin, & Sinioris, 2007). In light of this guideline, in the following section we focus on performance management as a broader diversity initiative that may be coupled with training.

### ***Performance Management***

Evidence suggests that performance reviews can be subject to unconscious biases. These biases result in part because the employee in question may not meet stereotypic expectations of what a successful incumbent should be like (Higgins & Bargh, 1987). For example, women tend to be evaluated less favorably than their male counterparts in male-dominated or stereotypically male roles (Eagly, Karau, & Makhijani, 1995). Moreover, bias in the delivery of performance feedback can further perpetuate inequalities. Some evidence suggests that women get less negative feedback than men, making it harder for women to improve areas of relative weakness (King et al., 2012). Bias in performance management systems should not be overlooked as they may have a meaningful, harmful impact on salary and career development.

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*Trend Research*

# Women as Mentors: Does She or Doesn't She?

A Global Study of Businesswomen and Mentoring

*Written by  
Stephanie Neal,  
Jazmine Boatman, Ph.D.,  
and Linda Miller*

Women can benefit from mentoring  
and from being mentors. So why aren't  
more women engaging in mentoring  
relationships?

- *Today, women comprise nearly half of the workforce. The additional productive power of women entering the workforce from 1970 until today accounts for about 25 percent of current GDP (McKinsey, 2011). Women are a strong force in the economy, one that is growing as more women across the globe enter the workforce in greater numbers than ever before.*

With such an influx of women into the business world, it would seem inevitable that more women would begin to fill executive offices. However, in 2012 there were no more women in top leadership positions at Fortune 500 companies than in 2011 (Catalyst, 2012). There are a few who successfully make it to the top of their field, but it is a long, hard climb. Among them are familiar names like Meg Whitman, Oprah Winfrey, Indra Nooyi, and Hillary Rodham Clinton. These are all very different women—from different backgrounds, with different education and careers spanning different industries. What they do have in common is the role that mentoring played in helping them along the way.





## Mentoring is widely considered a critical component to career success.

It provides opportunities for protégés to gain a broader perspective and learn more about their business, as well as to network and build social capital (the value of connections to people and their networks). Mentorship is especially important for women's success because they often have difficulty building social capital at work, particularly in settings where there are fewer women (Chrisler & McCreary, 2010). Since there is a growing body of evidence showing how a more gender-diversified C-suite impacts the bottom line (Boatman et al., 2011), this also makes mentorship an imperative for businesses. Mentoring isn't just about boosting careers, and it's not just the women who are mentored that benefit. Mentoring helps retain the practical experience and wisdom gained from longer-term employees. The exchange of knowledge and experience that informs protégés also helps put mentors in touch with other parts of the organization. Businesses benefit not only from the aforementioned professional development of their employees (which can in turn improve productivity and reduce turnover), but also from elevating knowledge transfer between disparate sections of the organization.

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*This research piece grew from the work of three women—all of us at different points in our careers, with varying experience in mentoring—from none at all to coaching executives about how to mentor. Despite our varied backgrounds and experience, we found that we all still had questions about mentoring that weren't answered anywhere else. We anticipated that other women did, as well. In this study we share what we've discovered, in order to better understand more about women as mentors.*

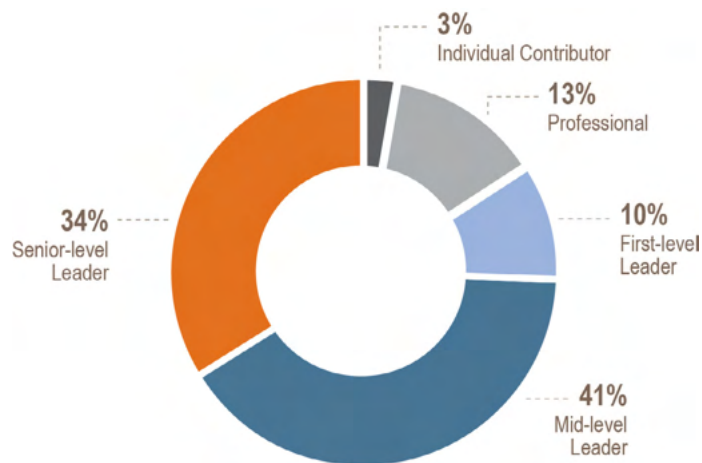
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## A look at the less-explored side of mentoring

It is obvious that professionals who are mentored, leaders who mentor, and their organizations all can benefit from mentoring. As the benefits to individuals who receive mentoring are already widely documented, we decided to take a closer look at the less-explored side of mentoring. Through this survey we sought answers to questions such as: Who is really responsible for making mentoring happen? Are women proactive in seeking out mentors? Do women in more senior roles volunteer to mentor other women, or are they worried about boosting the competition? What will it take to make mentoring more commonplace?

We surveyed a total of 318 businesswomen from 19 different countries and 30 different industries. The respondents on average were 48-years old, with the large majority (75 percent) indicating that they were either mid- or senior-level leaders (see Figure 1).

**FIGURE 1: MANAGEMENT LEVELS OF PARTICIPANTS**



This research piece grew from the work of three women—all of us at different points in our careers, with varying experience in mentoring—from none at all to coaching executives about how to mentor. Despite our varied backgrounds and experience, we found that we all still had questions about mentoring that weren't answered anywhere else. We anticipated that so did other women. In this study we share what we've discovered in response to some of those questions, in order to better understand more about women as mentors.

## Women need to ask

We learned that women are still not seeking out mentors for themselves. Although nearly all women in senior roles (78 percent) have served as formal mentors at one time or another, very few of them had a formal mentor of their own. This is disappointing as there are many sources pointing out how critical having a mentor is for growth and development. An overwhelming 63 percent of women in our study reported that they have never had a formal mentor. This indicates a big development gap, considering that 67 percent of women rate mentorship as highly important in helping to advance and grow their careers. Why are so many opportunities for mentoring being missed?

According to the hundreds of women who responded, it isn't because they aren't willing to mentor; it's that they are not being asked. The majority of women (54 percent) reported that they have only been asked to be a mentor a few times in their career or less, while 20 percent reported they have never been asked to be a mentor. This is problematic because women already have trouble keeping up with their male counterparts in mentoring. Men tend to seek and offer to mentor more readily, and women more typically need to be found and encouraged (Laff, 2009). Although our data show that women are willing mentors, other women are simply not seeking them out.

So why are women not asking? Are they afraid of rejection? If so, then it might help to know that the odds of a mentorship invitation being accepted are in their favor. Seventy-one percent of women in our study reported that they always accept invitations to be formal mentors at work. And, overwhelmingly, women reported that they would mentor more if they were asked. Even though the risk of rejection could be intimidating, more women should be seeking out mentors. The bottom line is if you want a mentor, you just need to ask.

# 63%

of women have NEVER  
had a formal mentor.

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*"It's like walking up to  
someone and asking them  
to be your friend, and no  
one does that."*

—Female executive  
in pharmaceutical  
company

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### A MENTORING SUCCESS STORY

Denise Morrison is a great example of how it pays to be proactive in seeking out mentors. Now the CEO of Campbell Soup Company, she credits early-career guidance from the right mentor with helping her achieve her current role (Emory, 2012). When she was director of sales planning at Nestlé in the 1980's, she began an informal mentorship with then CEO Alan MacDonald. She would go to MacDonald with questions, seek his advice, and share customer feedback insights. Before long, he had recommended her for a promotion which Morrison says was a defining moment in her career. She is now so dedicated to mentoring that she spends as much as 20 percent of her time advising and supporting others.

## It's not a competition

Over the years, many stereotypes have emerged that portray women in the workplace competing with one another. Even as this report was being prepared for publication, *The Wall Street Journal* featured “The Tyranny of the Queen Bee” which depicts women who succeed in the workplace as so protective of their authority that they actively work to keep other women from assuming their place. Contrary to this assumed rivalry and culture of “catfighting”, we found that women do not avoid taking on mentorships because of competition. In fact, the number one reason cited for why women mentor is because they want to be supportive of other women—80 percent agreed (see Figure 2). Additionally, the majority of women (74 percent) indicated that they mentor because they have benefited from their own mentorship experiences.

**FIGURE 2: WOMEN BACK ONE ANOTHER**



% that indicated they mentor other women because they want to be supportive of them

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*“Mentoring helps develop the next generation of leaders by giving beginning and mid-stage leaders the chance to learn from the successes and missteps of an experienced leader.”*

—Senior-level leader  
in finance

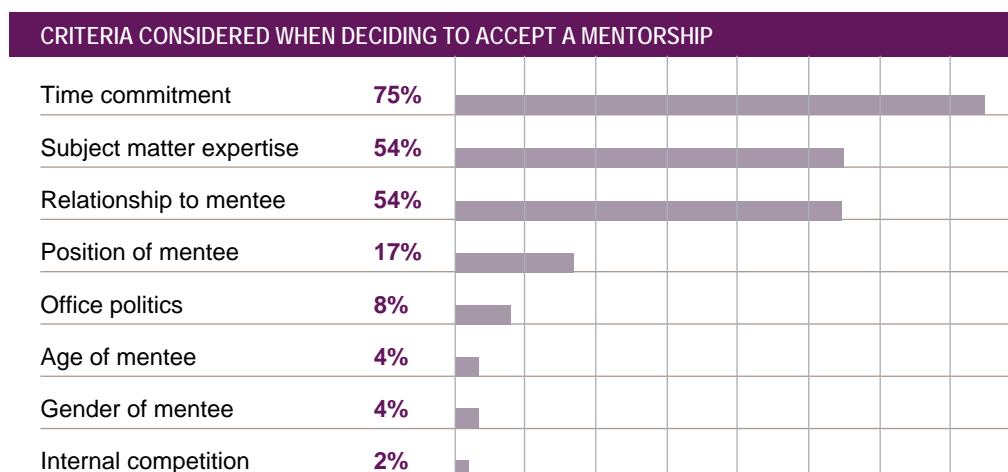
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Our data show that rather than rival other women in the organization, women are actually more likely to sponsor each other and to help other women rise to the top. We can confidently put to rest the myth that women would rather compete than support one another.

## It's about time

So with all the benefits to mentoring, and women willing to be mentors, isn't it about time that more women are mentored? Well, it turns out that time is the problem. The majority of women (75 percent) reported that the time it takes to mentor most affects their decision to accept mentorships. In fact, time commitment was the number one decision criterion for women in taking on a mentoring role (see Figure 3). However, even with time being cited as such a key factor, of those who mentor, only nine percent of women said that mentoring actually takes time away from making progress in their own work. As it turns out, perception does not match reality—once women commit to mentoring, they find that the time it takes to mentor is not a hindrance to their work.

**FIGURE 3: WHAT HOLDS WOMEN BACK FROM MENTORING**



### MYTH BUSTED!

ONLY

1 in 10

women chose not to mentor because it interfered with family time or other commitments.

Now that we've put time aside, subject matter expertise was the other top criterion women considered when deciding to accept mentorships. In fact, lack of expertise in the topic area is what makes women uncomfortable about taking on mentoring roles. But, curiously enough, a recent analysis by *Harvard Business Review* shows that once people reach the C-suite, technical expertise matters less than their core leadership skills (Groysberg, 2011). In most mentoring relationships, it is not subject matter and technical expertise with which mentees struggle. It's the core leadership skills like influencing, working through problems, negotiation, and interpersonal skills with which less-experienced professionals most often need help. Important note to potential mentors: Do not be reluctant to take on mentorships because of a lack of subject matter expertise.

ONLY  
ABOUT HALF  
**56%**

of organizations have  
a formal program for  
mentoring.

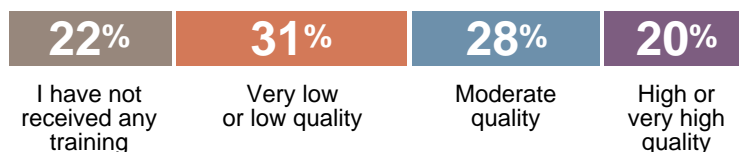
*“Before we had a mentoring program that was employee-run, but not effective. Mentoring is now formal because our new CEO advocated for it.”*

–Female executive  
at a large insurance  
company

## Mentoring: formal = normal

Along with mentoring not being a common practice for women, we also discovered that mentoring is uncharted territory for most organizations. This makes it even more challenging for women to connect with mentors. Only 56 percent of organizations have a formal program for mentoring. And, of those who do have mentoring programs, training is rare and typically ineffective. Organizations are neglecting to arm their leaders with the interpersonal skills (e.g., coaching, networking, influencing) they need to be effective mentors. Only 20 percent of women in our study rated the quality of formal training they received as high or very high, and another fifth of women (22 percent) responded that they have not received any training at all (see Figure 4). This data tells us that rather than having a planned talent strategy in place, organizations are leaving mentoring to chance.

FIGURE 4: MENTORS NEED HELP



To demonstrate the importance of organizational support for mentors, one of the key characteristics of organizations with the largest percentage of women at the C-level is that they encourage or mandate senior executives to mentor women in lower-level jobs (McKinsey, 2010). Formal mentoring programs provide an easier way for women to find mentors, and the numbers of women who report having a formal mentor clearly reflect that (see Figure 5). In organizations with formal programs, half of all women have had a formal mentor in comparison to only one in four at organizations that do not have such programs.

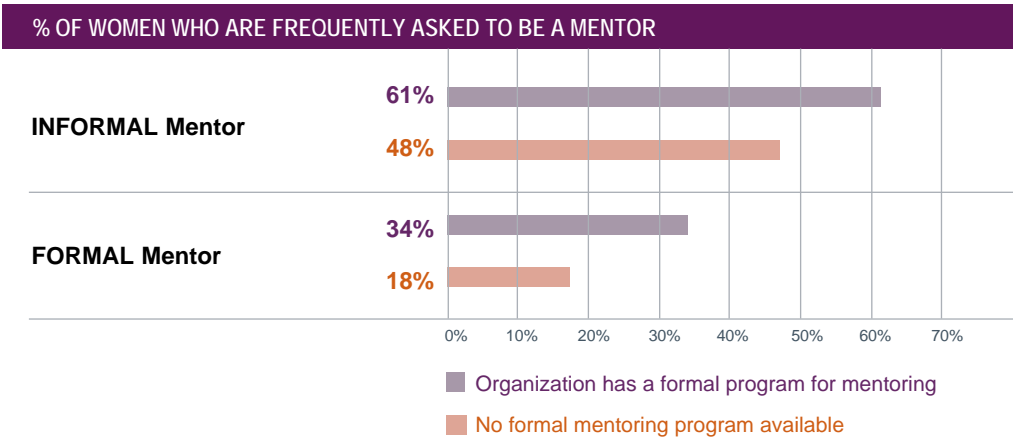
FIGURE 5: MAKE MENTORING FORMAL



Additionally, more women at organizations with formal programs are likely to accept mentoring opportunities. Three out of four women who work for an organization with a formal program reported that they always accept mentoring opportunities. This is nearly 10 percent more than women who work for organizations that do not have a formal program.

A formal program does more than just institutionalize mentoring. It fosters a culture that makes it more acceptable for women to seek out and ask other women to be their mentors, both formally and informally. Women in higher-level positions at organizations with formal programs reported not only being asked more frequently to be formal mentors, but informal mentors, as well (see Figure 6). Among organizations with a formal program for mentoring, one in three women (34 percent) reported being asked frequently to be a formal mentor, in contrast to less than one in five women (18 percent) at organizations without such a program.

FIGURE 6: FORMAL PROGRAMS ENCOURAGE INFORMAL MENTORING



The data confirm that having formalized programs for mentoring helps increase mentoring. More organizations need to not only put programs in place, but also ensure they are providing mentors with effective training and development opportunities to equip them with the necessary skills. They need to remove the ambiguity of what it means to mentor by better defining the “what” and “how” of mentoring. Note to organizations: It is easy to remove the barriers holding women back from seeking out mentoring opportunities.



### Women need to:

**STOP** waiting for mentorships to be assigned.

**START** seeking out mentors for themselves.

**CONTINUE** accepting invitations to mentor.

### Organizations need to:

**STOP** leaving mentoring to chance.

**START** making mentoring contagious—  
formalize programs, provide support and  
training.

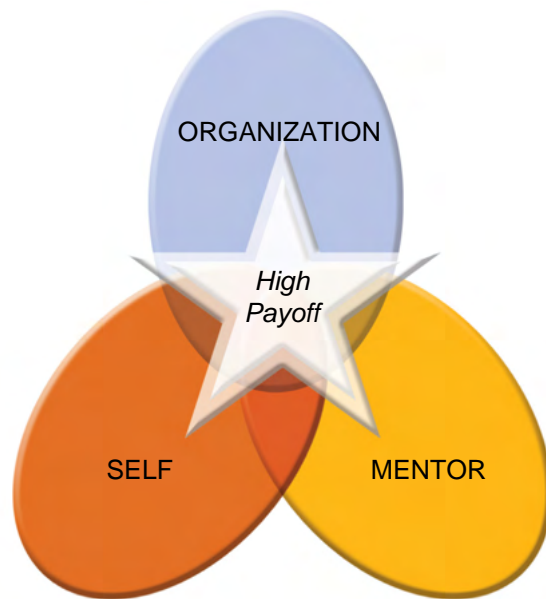
**CONTINUE** to encourage mentoring with  
formal programs.



## Mentoring: make sure it happens

With today's complex business climate, mentoring is more critical than ever.

Women are ready to be mentors, and to be mentored, so what will it take to make sure it happens? This research demonstrates what organizations, mentors, and women need to do in order to ensure a high payoff from mentoring.



### ORGANIZATION

Organizations can do their part by not only instituting formal mentoring programs, but also by providing a culture that makes mentoring a common practice. The more ingrained mentoring is in the organization, the more likely women are to be mentors and to accept mentorships. If your organization has a formal program, are your employees aware of it? Are there training opportunities available to potential mentors? How do you know if these programs are working? Take a hard look at your practices. Provide communication around mentoring as well as training and support for potential mentors and mentees so they are prepared to participate.

## **MENTOR**

According to our findings, women have trouble finding other women to be mentors even though there are willing mentors out there. Denise Morrison's example (page 5) highlights this. There is a shortage of senior-level women to look to for mentoring. Women in top leadership positions must be courageous and make themselves available as mentors in order to ensure mentoring happens. Women need to advertise their willingness to mentor.

Whether you are mentoring as part of a formal or informal program, it helps to establish and set expectations up front for the mentorship. Mentoring is more than a loan of your time, it is an investment. And those investments need to be tailored—in some cases, a mentorship might mean meeting 30 minutes every few months. Others might consist of regular meetings every few weeks.

## **SELF**

Women need to be on the lookout for the right mentors to ask. Although the women in our study reported more frequently mentoring women than men (73 percent of the time), only 55 percent reported that they had been mentored by other women. Because there are often fewer senior women to look to, women need to be both on the lookout for, and open to, finding men who will mentor them. Once an appropriate mentor is found, it is important to clearly define desired learning goals. Since learning is the purpose of a mentorship, clarifying and articulating what you want and expect to learn from a mentor is critical.

## Yes, she should!

We set out to answer the question, “Does she or doesn’t she mentor?” We learned that she doesn’t, but she should. Women are eager to take on mentoring roles and support other women, but they are not being asked or given the opportunity often enough. The feedback we received from hundreds of women makes the message clear. When it comes to mentoring—provide women the opportunities, they will provide the time, and everyone will benefit.



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Jazmine directs research that measures the impact of selection and development programs on organizational performance and uncovers new knowledge and information about global workplace practices and issues. With special expertise in measurement and evaluation, Jazmine has consulted with organizations in a wide variety of industries.

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Linda has global responsibility for DDI's performance management and executive development products and services. She also designs and delivers development initiatives to mid- to senior-level executives, and consults across a wide variety of industries in North America, Europe, and Asia.

## Acknowledgments

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## About DDI

DDI is a global leadership consulting firm that helps organizations hire, promote and develop exceptional leaders. From first-time managers to C-suite executives, DDI is by leaders' sides, supporting them in every critical moment of leadership. Built on five decades of research and experience in the science of leadership, DDI's evidence-based assessment and development solutions enable millions of leaders around the world to succeed, propelling their organizations to new heights. For more information, visit [ddiworld.com](http://ddiworld.com).



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