Accountability Requires Tenacity

Author : Brooke D. Coleman

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Law Clerks for Workplace Accountability, *Public Comment* On The Judicial Conference of the United States' Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct & Disability Rules.

In 2017, United States District Court Judge Lynn H. Hughes of the Southern District of Texas mused, "It was a lot simpler when you guys wore dark suits, white shirts and navy ties… We didn't let girls do it in the old days." The Assistant U.S. Attorney appearing before Judge Hughes that day, Tina Ansari, believed Hughes' comments were aimed at her, something Hughes disputes. The Fifth Circuit reversed the judge's merits decision in Ansari's case. It also scolded the judge for his courtroom remarks, calling them "demeaning, inappropriate and beneath the dignity of a federal judge."

Fast forward to 2019. Judge Hughes summarily dismissed Ansari from his court. She appeared in his court four days later. Again, without explanation, he dismissed her. His reason? Judge Hughes—still smarting from the Fifth Circuit's comments—explained that "Ms. Ansari is not welcome here because her ability and integrity are inadequate."

This story may sound like an unusual example of one female lawyer's unfortunate experience with one federal judge. I and many other women are here to tell you it is not. Undoubtedly, plenty of members of the judiciary have positive and respectful relationships with the women with whom they work. At the same time, as with any profession, the federal judiciary is not immune to sexual harassment, gender discrimination, and complicity in an environment that creates fertile ground for those behaviors. Recently approved changes to the Code of Conduct for U.S. Judges and Disability Rules represent a recent effort to improve the judicial workplace for women. Important Public Comment from Law Clerks for Workplace Accountability ("LCWA") represent the kind of tenacity necessary to ensure real change takes place.

In 2017, Heidi Bond and Emily Murphy first went on the record about Ninth Circuit Judge Alex Kozinski's harassment of them as law clerks. Following their courageous act, other clerks came forward, and Kozinksi resigned. In response, Chief Justice Roberts acknowledged that even the federal judiciary was going to have its *#MeToo* moment. In his 2017 annual report, Roberts explained that he had appointed a working group to undertake a "careful evaluation of whether [the judiciary's] 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."

In 2018, James Duff, the Director of the Administrative Office of the Courts, formed the Federal Judiciary Workplace Conduct Working Group, comprised of eight judges and court administrators. Although former-law-clerk reports of sexual harassment inspired the creation of this group, no current or recent former law clerks were members. This oversight inspired a group of former law clerks to form LCWA. LCWA contributed to the Working Group's work, but it never had a seat at the decision-making table.

In June of 2018, the Working Group released its report, which made three broad recommendations: (1) revise the judiciary's existing codes of conduct; (2) improve procedures for reporting inappropriate behaviors; and (3) increase efforts to educate and train judges and other employees. The LCWA lauded many aspects of the Working Group's report, including its recommendation that the Judicial Conference create a national Office of Judicial Integrity. Yet, it had its criticisms as well, namely that the report's proposals were often vague.

In September 2018, and in response to the Working Group's report, the Judicial Conference published changes

to the Code of Conduct for U.S. Judges ("Code") and the Judicial Conduct & Disability Rules ("Rules"). Like the Working Group's report, there was much to commend. Revised Canon 3 provides that judges "should not engage in behavior that is harassing, abusive, prejudiced, or biased." The Rules define cognizable misconduct as including "engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault." Finally, Canon 3 now states that judges should take appropriate action when learning of these types of behaviors, whether that behavior be from a fellow judge, a court employee, or lawyer.

The LCWA celebrated the progress made, but identified numerous deficiencies. The LCWA's work is thorough, so I will summarize a few of the critical shortcomings it brings to light.

First, neither the Rules nor the Code provide a mechanism for reporting charges of judicial misconduct to the Administrative Office. There are no apparent mechanisms to track any reports made to the AO. This leaves the AO and the judiciary unable to assess and appreciate the scale of the problem before it. At the very least, the revised provisions should provide for mandatory reporting and tracking of misconduct charges. Only then, as the LCWA points out, will the judiciary "better understand the scope of the problem and how best to remedy it."

Second, and relatedly, the provisions regarding public disclosure of misconduct are weak. If a complaint is dismissed because a judge resigns, no public disclosure is required. If the complaint is settled privately, public disclosure is prohibited. But we know that hiding sexual harassment allegations is a conduit to their repetition. While the Conference's desire to protect judges is understandable, that concern should be outweighed by the judiciary's obligation to maintain the public trust. This kind of transparency, including not just reporting individual claims but also aggregate annual reporting of misconduct allegations, the LCWA argues, is required to restore that trust.

A final critique of the Code and Rules goes to the heart of the process. The Rules provide that the judges will regulate themselves. When an allegation of misconduct is made, the Rules allow for a judge or group of judges to both investigate and adjudicate the charge. As the LCWA points out, there are myriad problems with this approach in the context of sexual harassment charges. Judges are not trained to investigate these types of claims. Victims are unlikely to feel comfortable sharing their experiences with a judge. Investigation and adjudication are two distinct strands of the process, and the lack of clarity in the revised rules about how to separate the two will lead to confusion. The LCWA argues that there should be an independent process to evaluate claims.

In addition to the LCWA comments on the Code and Rules, the group reiterates its concerns from earlier comments that remain unaddressed. These include a request to create a national, confidential reporting system for harassment claims; establishment of a standing body within the AO to assess and examine whether these (and other) changes are working; and a requirement—not an option—that all federal courts address the issue of harassment. Most paramount in the LCWA comments, in my opinion, is that there has been no reckoning. Much of the response to the 2017 accusations has been forward-looking, which is a good, but not enough. The LCWA asks that the AO conduct a climate survey of court employees to get a real sense of workplace experience. Only then can the judiciary "understand how harassment has been allowed to flourish in the past and how prevalent misconduct currently is."

The LCWA's tenacity is making a difference. In the 2018 Year-End Report, the Chief Justice again addressed the judiciary's work in ending "inappropriate conduct in the workplace." He updated us on progress—the Working Group, the revised Code and Rules, and new Federal Judicial Center training materials. He admitted that the work is not done, stating that "[t]he job is not finished until we have done all that we can to ensure that all of our employees are treated with fairness, dignity, and respect." The Chief Justice is taking this issue seriously and understands only a dent has been made. The LCWA is to be commended for holding the judiciary's feet to the fire. Their work honors the brave individuals who have already stepped forward and helps to protect those court employees who may endure treatment yet to come to light.

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