



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: January 17, 2020

Title

Judicial Branch Administration: Policies on
Workplace Conduct

Agenda Item Type

Action Required

Effective Date

January 17, 2020

Rules, Forms, Standards, or Statutes Affected

Adopt Cal. Rules of Court, rule 10.351

Date of Report

December 12, 2019

Recommended by

Rules and Projects Committee
Hon. Harry E. Hull, Jr., Chair
Hon. Dalila C. Lyons, Vice Chair

Contact

Deborah Brown, Chief Counsel
415-865-7667
deborah.brown@jud.ca.gov

Michael Etchepare, Supervising Attorney
916-643-7019
michael.etchepare@jud.ca.gov

Executive Summary

To promote improvement and greater consistency in how judicial branch entities prevent and address harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, the Rules and Projects Committee recommends that the Judicial Council adopt a new California Rule of Court to establish standardized baseline requirements for court policies on the prevention, reporting, and resolution of these types of complaints. This proposal originates from recommendations made by the Work Group for the Prevention of Discrimination and Harassment, and approved by the Judicial Council on July 19, 2019, with a recommendation to adopt a rule on these issues.

Recommendation

To effectuate the action approved by the Judicial Council on July 19, 2019, the Rules and Projects Committee (RUPRO) recommends that, effective January 17, 2020, the Judicial Council adopt proposed California Rule of Court, rule 10.351, Judicial Branch Policies on Workplace Conduct. The proposed rule would require courts to adopt updated policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. The proposed rule is consistent with and carries out the first recommendation made by the Work Group for the Prevention of Discrimination and Harassment and approved by the Judicial Council in July 2019, and would establish minimum requirements for court policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.

The text of the proposed rule is attached at pages 8–10.

Relevant Previous Council Action

In April 2018, Chief Justice Tani G. Cantil-Sakauye asked the Judicial Council to take immediate action to amend the rule of court on public records to clarify that settlement agreements to resolve sexual harassment and discrimination complaints against judicial officers must be publicly disclosed in response to public records requests. She also created the Rule 10.500 Working Group to develop the necessary rule changes required to achieve this goal. Through developing its proposals, the Rule 10.500 Working Group identified other related issues that were beyond its scope, including harassment and discrimination prevention by the courts.

In October 2018, the Chief Justice appointed the Work Group for the Prevention of Discrimination and Harassment (Work Group) to examine these related issues and further support the judicial branch’s commitment to a workplace free of harassment and discrimination. The Work Group examined research and discussed potential areas for improvement relating to harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. The Work Group ultimately proposed recommendations to the Judicial Council, including, among others, that RUPRO “oversee the rulemaking process to propose a rule of court clarifying the responsibility of courts to adopt updated policies that: (a) prohibit harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification; (b) contain definitions and examples of prohibited harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification; and (c) address and clarify complaint reporting and response procedures.”¹ Those recommendations were approved by the Judicial Council on July 19, 2019.

¹ Judicial Council of Cal., Adv. Body Rep., *Judicial Branch Administration: Prevention of Discrimination, Harassment, Retaliation, and Inappropriate Workplace Conduct Based on a Protected Classification* (June 12, 2019), p. 2.

RUPRO created an ad hoc RUPRO subcommittee on the Prevention of Harassment and Discrimination (RUPRO subcommittee) to develop a rule of court consistent with the Work Group's direction to the Judicial Council. The RUPRO subcommittee was chaired by Justice Harry E. Hull, Jr., of the Court of Appeal, Third Appellate District, and consisted of seven judicial officers, court executive officers, and attorneys from Judicial Council membership, many of whom also served on both the Work Group and the Rule 10.500 Working Group. RUPRO considered the RUPRO subcommittee's rule proposal and recommends it to the Judicial Council for adoption.

Analysis/Rationale

Rule 10.351 would require courts to adopt updated policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.² The new rule would require court policies to contain, at minimum:

1. A list of all protected classifications under applicable state and federal laws.
2. A nonexhaustive list of definitions and examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.
3. A prohibition against harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification by judicial officers, supervisors, managers, coworkers, third parties, and other individuals with whom court employees come into contact.
4. A comprehensive complaint reporting procedure that clearly identifies individuals, in addition to an employee's supervisor, to whom complaints may be made; individuals to whom complaints may be made involving the conduct of administrative presiding justices, appellate court clerk/executive officers, presiding judges, court executive officers, judicial officers, and court management; and outside administrative agencies to whom employees may complain.
5. Comprehensive complaint intake, investigatory, and follow-up processes that provide for fair, timely, and thorough investigations conducted by impartial, qualified personnel; consideration of appropriate options for remedial action and resolution; appropriate reassurances of confidentiality, and an explanation that disclosure of information will be limited to the extent consistent with conducting a fair, effective, and thorough investigation; and a clear prohibition on retaliation against anyone making a complaint of

² The phrase "protected classification" is used throughout proposed rule 10.351 and does not limit the scope of the proposed rule to only certain groups of employees. The phrase "protected classifications" applies to and protects all employees, not just those of a particular status within the classification. As an example, the protected classification of sex/gender protects all employees based on their sex, gender expression, and gender identification, regardless of whether they are male or female, identify or express as a gender other than their sex assigned at birth, or identify or express as gender nonbinary. This example applies to other protected classifications as well; the rule applies equally to all groups within that classification. The phrase "protected classification" is used to ensure that all employees are protected and treated equally and that courts are also aware that they have legal obligations to investigate and resolve complaints that involve issues related to classifications that are specifically enumerated by statute.

harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification or participating in an investigation into such complaints.

The proposed rule is consistent with and carries out the first recommendation made by the Work Group and approved by the Judicial Council in July 2019, and would standardize minimum requirements for court policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. The proposed rule would benefit judicial branch employees and judicial officers by:

1. Requiring courts to define and provide examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification;
2. Removing barriers for employees to report such conduct by clearly identifying individuals to whom complaints may be made;
3. Providing a more consistent response to complaints of such conduct throughout the branch;
4. Educating employees who are subjected to such conduct as to their rights and available resources; and
5. Clarifying the responsibilities of court management to prevent and address such conduct.

Policy implications

In drafting the proposed rule, RUPRO considered many of the same policy considerations discussed by the Work Group, including balancing the competing policies of court autonomy with the need for more standardized processes. While both the Work Group and RUPRO acknowledge the critical importance of baseline procedures and protection for branch employees in the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, there was also an acknowledgment that courts are autonomous entities with the independence to manage their own operations and workforces. Courts vary greatly in size and structure, and trial courts have unionized workforces with bargained memorandums of understanding addressing terms and conditions of employment that may require the courts to meet and confer with unions about various policy and procedure changes prior to implementation.

The result is a proposed rule that sets a minimum baseline of compliance consistent with law, regulatory guidance, and direction received from the Judicial Council in the recommendations that were approved on July 19, 2019. The proposed rule ensures that courts will implement standard policies that provide for the protection of all branch employees by delineating mandatory required content for such policies and requiring that courts implement their own appropriate complaint, investigatory, and follow-up procedures. Yet despite these requirements, the proposed rule does not mandate the specific language to be used in policies and does not mandate how courts structure their specific complaint, investigatory, and follow-up procedures. The proposed rule provides branch employees with important and uniform protections while allowing courts to determine how to best achieve and expand those requirements—and in the context of their own structures, limitations, and union relationships.

Comments

This proposal was circulated for public comment from October 16, 2019 through November 15, 2019. The Invitation to Comment elicited a total of four public comment responses. Both the Superior Court of San Diego County and the general counsel for the Superior Court of Shasta County asked RUPRO to provide further definition of the term “inappropriate workplace conduct,” as discussed in the “Alternatives considered” section below. The Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee Joint Rules Subcommittee raised a concern that courts requiring union approval of their personnel policies might struggle to meet the implementation deadline stated in the rule. While RUPRO shares the subcommittee’s concern about the short timeframe for courts to implement the proposed rule, the rule already provides an exception that addresses this issue, as discussed in the “Fiscal and Operational Impacts” section below.

The California Employment Lawyers Association (CELA) also raised a number of general comments on harassment prevention and also specific comments to the proposed rule. Specifically, CELA suggested that the rule contain specific reference to protected classifications listed in the Government Code and suggested that the rule emphasize that any listed definitions and examples provided in a prevention policy are “nonexhaustive.” RUPRO has adopted these suggestions. CELA also made suggestions to bolster retaliation and complaint procedures, and while RUPRO shares CELA’s concerns on these issues, the current rule already includes robust protections and procedures in those areas. CELA also suggested that the rule require courts to retain records related to complaints and investigations for a set period of time after conclusion of the investigation. While RUPRO encourages courts to retain documents related to complaints and investigations consistent with their existing record retention policies, RUPRO notes that this suggestion is beyond the scope of the proposed rule and has not been subject to public comment. RUPRO anticipates that this suggestion will be reevaluated as part of the “follow up” envisioned by the Work Group, and approved by the Judicial Council, to occur by July 2021.

CELA also made a handful of other comments regarding judicial discipline and recusals that were beyond the scope of this proposal: to create a rule to standardize minimum requirements for court policies on the prevention, reporting, and resolution of complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.³ Those comments are addressed more specifically in the comment chart, at pages 11–27.

Alternatives considered

The Judicial Council directed that a rule of court be developed and proposed, including suggested topics for the rule to address. Rule 10.351 was developed consistent with the direction and guidance of the Work Group’s recommendations and approval of those recommendations by

³ Proposed rule 10.351 is intended only to address the first recommendation made by the Work Group and approved by the Judicial Council on July 19, 2019. The Work Group’s other proposed recommendations on training, creation of sample policies and procedures, improved communication, and follow-up to determine if further actions should be taken, all of which were approved by the Judicial Council, will be addressed by other actions taken by the Center for Judicial Education and Research Advisory Committee, Judicial Council staff, and individual courts.

the Judicial Council, and consistent with industry-approved best practices for policies on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.

Even so, RUPRO considered alternative requirements to include in the rule, including how to best standardize complaint reporting procedures while ensuring that the rule provides courts with the ability to adopt reporting and response procedures that suit the size and organization of each court. The result is language mandating broad requirements—that courts provide “multiple avenues for raising complaints” and “identify individuals to whom complaints may be made” against court leadership—while leaving courts to determine the specific avenues and identification of individuals to receive complaints.

As discussed, RUPRO received comments asking that the proposed rule include specific examples and definitions of the phrase “inappropriate workplace conduct.” RUPRO did not change the proposed rule in this manner. The prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification is constantly evolving. Definitions and examples of prohibited and inappropriate workplace conduct have evolved, and will continue to evolve, as employees share their experiences and employers continue to embrace the challenge to provide better, safer, fairer, and more respectful workplaces for their employees. While the desire for greater clarity in the proposed rule is understandable, both the Work Group and RUPRO determined that including specific examples and definitions in the rule risked that those definitions and examples would soon become out of date and fail to account for the newest developments and best practices in harassment prevention.

To balance the competing concerns of creating a robust rule that is flexible enough to adapt to an everchanging landscape while also providing appropriate guidance to the courts, the recommendations presented by the Work Group and approved by the Judicial Council on July 19, 2019, specifically require Judicial Council staff to create sample language for policies on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, and to update those sample policies as necessary. RUPRO anticipates that the sample language created by Judicial Council staff will be disseminated to courts shortly after adoption of the proposed rule, and will provide additional context, examples, and definitions that will guide court compliance with the rule. The examples of inappropriate workplace conduct provided in the comments are illustrative of the concerns facing court employees, and RUPRO will forward those comments and suggestions to Judicial Council staff responsible for creating the sample policies. It is anticipated that these samples will be frequently reviewed and updated by Judicial Council staff.

Finally, RUPRO notes that the Work Group recommended, and the Judicial Council adopted, a requirement that Judicial Council staff follow up on implementation of the Work Group recommendations by July 2021. RUPRO anticipates that the clarity of the proposed rule will be included in that follow-up evaluation and that any necessary changes will be recommended at that time.

Fiscal and Operational Impacts

RUPRO does not anticipate any significant one-time or sustained annual costs associated with adoption of the rule. It does anticipate some operational impacts for Judicial Council staff and courts in the short term, primarily in the period leading up to the rule implementation date. Specifically, it is anticipated that court leadership and human resources staff will examine existing harassment prevention policies to ensure compliance with rule 10.351, and draft or revise informal complaint resolution policies and investigation protocols consistent with the requirements of the proposed rule. Although Judicial Council staff will attempt to alleviate some of these operational impacts through the creation of sample policy language, RUPRO anticipates that some courts will want to create their own policies and procedures or, at the very least, customize sample language to fit the operational realities of their courts.

The proposed rule also includes an implementation date of June 30, 2020. RUPRO anticipates that some courts may be unable to meet this implementation date because of obligations to meet and confer or consult with recognized employee organizations regarding changes to personnel policies. The proposed rule specifically accounts for this possibility by allowing courts to implement the rule “by June 30, 2020, or as soon thereafter as possible,” if satisfying any such obligations delays implementation beyond the deadline. While RUPRO expects that courts will diligently work to implement rule 10.351 by the June 30, 2020 implementation date, the proposed rule anticipates that some courts will face additional steps for approval that may extend beyond the implementation date.

Attachments and Links

1. Cal. Rules of Court, rule 10.351, at pages 8–10
2. Chart of comments, at pages 11–27

Rule 10.351. Judicial branch policies on workplace conduct

The judicial branch is committed to providing a workplace free of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. Consistent with this commitment, each court must take reasonable steps to prevent and address such conduct, including adopting policies prohibiting harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification and establishing for such conduct complaint reporting and response procedures that satisfy the minimum requirements stated in this rule.

(a) Prohibition policies

Each court must ensure that its policies prohibiting harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification conform with the minimum requirements stated in this rule. These policies must contain:

- (1) A prohibition against harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification by judicial officers, managers, supervisors, employees, other personnel, and other individuals with whom employees come into contact;
- (2) A list of all protected classifications under applicable state and federal laws, including all protected classifications listed in Government Code section 12940(a);
- (3) Definitions and a nonexhaustive list of examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification;
- (4) A clear prohibition of retaliation against anyone making a complaint or participating in an investigation of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification; and
- (5) Comprehensive complaint reporting, intake, investigatory, and follow-up processes.

(b) Complaint reporting process

Each court must adopt a process for employees to report complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. These reporting processes must:

- (1) Establish effective open-door policies and procedures for reporting complaints;
- (2) Offer multiple avenues for raising complaints, either orally or in writing, and not require that the employee bring concerns to an immediate supervisor;

- (3) Clearly identify individuals to whom complaints may be made regarding the conduct of administrative presiding justices, appellate court clerk/executive officers, presiding judges, court executive officers, judicial officers, and court management;
- (4) Identify the Commission on Judicial Performance, California Department of Fair Employment and Housing, and U.S. Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints, and provide contact information for those entities; and
- (5) Instruct supervisors, managers, and directors with knowledge of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification to report this information to the administrative presiding justice or an appellate court clerk/executive officer, a presiding judge, a court executive officer, human resources, or another appropriate judicial officer who is not involved with the conduct or named in the complaint.

(c) Court responsibility on receipt of complaint or knowledge of potential misconduct

Each court must develop processes to intake, investigate, and respond to complaints or known instances of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification. These processes must provide for:

- (1) Appropriate reassurances to complainants that their confidentiality in making a complaint will be preserved to the extent possible, including an explanation that disclosure of information will be limited to the extent consistent with conducting a fair, effective, and thorough investigation;
- (2) Fair, timely, and thorough investigations of complaints that provide all parties with appropriate consideration and an opportunity to be heard. These investigations should be conducted by impartial, qualified investigators;
- (3) Communication with complainants throughout the investigation process, including initial acknowledgment of complaints, follow-up communication as appropriate, and communication at the end of the process;
- (4) Consideration of appropriate options for remedial action and resolution based on the evidence collected in the investigation; and
- (5) Timely case closures.

(d) Implementation

All courts must implement the requirements of this rule by June 30, 2020, or as soon thereafter as possible, subject to any applicable obligations to meet and confer or consult with recognized employee organizations.

DRAFT

SP19-10

Judicial Branch Administration: Policies on Workplace Conduct (adopt Cal. Rules of Court, rule 10.351)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Employment Lawyers Association by Wendy Musell, Chair	AM	<p>The California Employment Lawyers Association (CELA) appreciates the opportunity to submit the following comments on the Committee’s Proposal to Adopt Cal. Rules of Court, rule 10.351.</p> <p>CELA a statewide organization of more than 1,200 private attorneys who practice primarily employment law on behalf of workers. CELA was established to assist California lawyers representing employees and unions in matters related to employment. CELA’s mission is to help our members protect and expand the legal rights of working women and men through litigation, education and advocacy.</p> <p>CELA is in a unique position to provide these comments. Specifically, CELA’s members have the ability to bring a unique perspective to these issues, as advocates for the rights of employees, including employees of the judicial branch, and as officers of the Court, many of whom have unfortunately personally experienced or witnessed harassment and discrimination by judicial officers.</p> <p>Our Courts stand for the proposition that all persons shall be afforded equal justice under the law. We commend the Committee for its acknowledgment of the fact that there exists a problem with harassment, discrimination, and</p>	<p>The Rules and Projects Advisory Committee (RUPRO) appreciates the suggestions from the commenter and addresses them below. RUPRO also notes that many of the issues raised by this comment are outside the scope of the proposed rule. Proposed rule 10.351 addresses the Work Group for the Prevention of Discrimination and Harassment (Work Group) recommendation #1, approved by the Judicial Council on July 19, 2019. That recommendation called for RUPRO to create a rule that would: (1) clarify the responsibility of the courts to adopt updated policies that prohibit harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification; (2) require courts to provide definitions and examples of the same conduct in those policies; and (3) address and clarify complaint reporting procedures. RUPRO does not specifically address the comments beyond the scope of this proposal.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

SP19-10

Judicial Branch Administration: Policies on Workplace Conduct (adopt Cal. Rules of Court, rule 10.351)

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	Commenter	Position	Comment	Committee Response
			<p>retaliation – statewide, and up to the highest levels – within California’s hallowed halls of justice. We provide the following comments in hope of assisting the Committee in achieving its goal of promoting improvement and consistency in how judicial branch entities prevent and address harassment, discrimination, retaliation, and inappropriate workplace conduct.</p> <p><u>Public Policy Considerations</u></p> <p>CELA encourages the Committee to consider certain matters of public policy when adopting this Rule and to incorporate these considerations into any future drafts.</p> <p>For example, one of the key issues that has already, and will continue, to affect employees in the judicial branch is institutional knowledge regarding acts of harassment, discrimination and retaliation by the same actors. CELA encourages the judicial branch to include in this Rule a records retention requirement such that complaints – however they are received – are documented in a central location which can be accessed by qualified investigators in the event of future complaints. Complaints and investigative documents should be kept for a period of at least five years following the end of any person’s employment by the judicial branch. This is critical to ensuring that</p>	<p>RUPRO appreciates the importance of record retention for documents related to complaints and investigations and encourages individual courts to create record retention rules for such documents consistent with their own internal record retention procedures. RUPRO notes that the suggestion to include a specific record retention requirement in the rule is beyond the scope of the current proposal and has not been subject to public comment. RUPRO has directed this comment to Judicial Council staff who will be responsible for conducting the follow up envisioned by the Work Group, and approved by the Judicial Council, to occur by July 2021. RUPRO anticipates that part of the follow up will include whether courts have</p>

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SP19-10

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			<p>appropriate remedial measures are being taken against perpetrators who commit multiple acts of inappropriate conduct and/or conduct prohibited under the FEHA and the Labor Code. This also ensures that patterns regarding unlawful behavior are more readily apparent and accessible to investigators, such that problem persons and/or offices can be appropriately – and promptly – investigated and remedial action be taken. This type of institutional knowledge is critical to ensuring that serial harassers, for example, do not repeat this conduct towards multiple employees before action is taken.</p> <p>Another issue that is of particular concern in the judicial branch is guarding against retaliatory actions by members of the judiciary, either towards employees, or the attorneys and/or litigants who appear before the courts and who may have witnessed the conduct under investigation. The safest course would be for judicial officers to recuse themselves from handling cases where a member of the bar or litigant is a witness to alleged discrimination, harassment or retaliation. Further, the proposed Rule should make clear that retaliation in any form, against any witness, whether an employee of the judicial branch or otherwise, is prohibited. A clear explanation of this should be included in the proposal, to enunciate the</p>	<p>implemented such record retention procedures and whether further guidance is necessary in this area.</p> <p>While RUPRO agrees with the importance of emphasizing a commitment to preventing retaliation against those who make complaints, participate in complaints, or are witnesses to complaint investigations, it notes that the proposed rule already includes the requirement that court policies on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification must include a provision preventing retaliation. The issue of recusal of judicial officers is beyond the scope of this proposal.</p>

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SP19-10

Judicial Branch Administration: Policies on Workplace Conduct (adopt Cal. Rules of Court, rule 10.351)

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			<p>public policy underlying full and complete investigations. Investigations rely wholly upon the gathering of facts from witnesses, and this process is greatly impeded if witnesses fear reprisal in any form for simply communicating the facts of what they observed.</p> <p>Further, CELA encourages the creation of a panel of qualified investigators to promptly and thoroughly investigate all complaints originating from the judicial branch. In 2019, the Office of Legislative Counsel created The Workplace Conduct Unit (WCU), independent of the Legislature, to investigate complaints of discrimination, harassment, and retaliation in the Legislature. The WCU could serve as an instructive model for setting up an independent body with experienced investigators to conduct workplace investigations. Having a panel of at least two investigators assigned to complaints will assist in ensuring fairness and impartiality of the investigation. Additionally, setting up term limits for the investigators will help ensure that the investigators maintain their neutrality. These two factors are particularly important in the judicial branch, where even the investigators may be concerned about reprisals from high ranking officials and/or judicial officers.</p> <p>CELA likewise recommends greater transparency and mechanisms to guard against the potential collateral effects of judicial investigations. For example, CELA is aware of</p>	<p>RUPRO notes that the request to create a panel of qualified investigators is beyond the scope of this proposal and is antithetical to the Work Group’s emphasis that courts maintain the autonomy to establish their own processes on addressing and responding to complaints, within the general framework provided by the Judicial Council. RUPRO has directed this comment to Judicial Council staff that will be responsible for conducting the follow up envisioned by the Work Group to occur by July 2021. Specifically, RUPRO anticipates that part of the follow up will include whether courts have been able to obtain fair, qualified, and impartial investigators to conduct their investigations, and whether creation of a panel is necessary.</p> <p>RUPRO notes that the comments regarding discipline of judicial officers are beyond the scope of this proposal. RUPRO directs the commenter to the Commission for Judicial Performance (CJP)</p>

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SP19-10**Judicial Branch Administration: Policies on Workplace Conduct** (adopt Cal. Rules of Court, rule 10.351)

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			<p>instances where, regrettably, members of the judiciary exhibit bias against civil rights cases after allegations of harassment or discrimination have been made against them personally. To remove even the appearance of impropriety, increase confidence among employees and the public in general, and demonstrate that the judicial branch takes seriously the commitment to provide a workplace free of harassment, discrimination, retaliation, and inappropriate workplace conduct, CELA makes the following recommendations to avoid these collateral effects. In every instance of a substantiated case or a settled complaint, either the judicial officer would have all similar cases immediately reassigned to other judicial officers and such cases would not be assigned to that judicial officer for a period of 6 months, or the substantiated or settled complaints would be made public and would serve as sufficient evidence of bias to permit attorneys or parties to remove or disqualify a judge if their case involves similar claims.</p> <p>The potential consequences of a substantiated complaint, up to and including termination and/or removal from the bench, should be communicated to all employees of the judicial branch. It is particularly important that in this branch of government, employees are assured that no one is above the law.</p>	<p>for more information about its policies and procedures: https://cjp.ca.gov/. RUPRO also notes that any person, including court employees, attorneys, litigants, or members of the public, may make complaints of judicial misconduct directly to the CJP. Depending on the circumstances, attorneys and litigants may also consider whether a writ or appeal is appropriate.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree.

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			<p><u>Protection for Officers of the Court</u></p> <p>CELA would also like to request the Committee consider reviewing and modifying the protections for officers of the court who are also victims of harassment, discrimination, retaliation, and inappropriate workplace conduct based on protected characteristics.</p> <p>CELA’s members have reported an alarming amount of discriminatory and degrading behavior at the hands of current and former members of the judiciary. This behavior includes, but is not limited, to:</p> <p>Sexual harassment, including being told to wear skirts and/or low-cut tops to increase our chances of success “on the merits” before certain judicial officers;</p> <p>Demeaning comments about female attorney’s ability to be “tough” or “aggressive” litigators; Berating, hostile, and at times abusive behavior by both members of the judiciary and members of the bar, which goes unchecked by the judiciary when called to its attention in the form of various motions;</p> <p>Denial of continuances of trial, on the basis that pregnancy or childbirth do not constitute “good cause,” when male colleagues receive trial continuances for items such as vacations or simple scheduling conflicts;</p>	<p>RUPRO notes that the comments regarding protections and remedies for attorneys and other officers of the court appearing before judicial officers are beyond the scope of this proposal. RUPRO directs the commenter to the CJP for more information about its policies and procedures: https://cjp.ca.gov/. RUPRO also notes that any person, including court employees, attorneys, litigants, or members of the public, may make complaints of judicial misconduct directly to the CJP. Depending on the circumstances, attorneys and litigants may also consider whether a writ or appeal is appropriate.</p> <p>RUPRO has also forwarded this comment to the Center for Judicial Education and Research Advisory Committee for consideration in the changes to judicial education training that are being contemplated as a result of the Work Group recommendations.</p>

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			<p>Unprofessional conduct, both on and off the record, including berating comments about items that have nothing to do with an attorney’s professional abilities or the merits of a case;</p> <p>Reduction in attorney fee rates based on gender, including being told that a rate reduction is appropriate because a member of the bar could not possibly have been pregnant/breastfeeding/raising children and working as hard as male colleagues in the practice of law.</p> <p>Attorneys are fearful of reporting this conduct, as it is their clients who will bear the brunt of any retaliatory action taken as a result of these reports. Moreover, the Commission on Judicial Performance, while charged with adjudicating complaints, is the same body that defends cases against judicial officers. If the body that creates the rules against harassment and discrimination is the same body that defends the party alleged to have violated the rules, this seems to be a clear conflict. To protect the neutrality of investigations, and the confidence of employees, attorneys, and the public in the integrity of the process, CELA recommends that any complaints received by the Commission on Judicial Performance be referred to the panel of qualified investigators that should be created to investigate complaints made regarding conduct in the judicial branch.</p>	<p>RUPRO notes that the commenter is inaccurate in stating that the CJP defends judicial officers in complaints of misconduct; rather, the CJP website states that it “is the independent state agency responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges.” https://cjp.ca.gov/.</p>

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			<p>Officers of the court who are part of one or more protected classes who are being demeaned, marginalized, and belittled in the judicial branch need an unconflicted method through which to make protected complaints about this unlawful treatment. Absent that, the profession itself will suffer, leading to the exodus of attorneys who are casualties of the justice system to which they have devoted their careers and lives.</p> <p>CELA urges the judicial branch to shine a light on the abuses present within the system, and to seek sweeping changes to how the judiciary treats officers of the court. We call on the judiciary to ensure equal treatment of all attorneys, and for attorneys to likewise enjoy a workplace free from harassment, discrimination, and retaliation.</p> <p><u>Statewide Concerns</u></p> <p>The proposed Rule requires that each individual court adopt policies prohibiting harassment, discrimination, retaliation, and inappropriate workplace conduct. This is a laudable goal, however CELA is concerned about the potential inconsistencies that will inevitably come with 58 different Superior Courts, and 6 different appellate districts, adopting varied versions of these policies, particularly in the areas of what classifications are protected. Rather, CELA proposes that the Rule of Court directs the</p>	<p>RUPRO declines the suggestion to require that one global harassment prevention policy be adopted by the Supreme Court that will be applicable for all courts. The Work Group recommendations emphasized the reality that courts are autonomous entities with the independence to manage their own operations and workforces, varying greatly in size and structure. In addition, the trial courts have unionized workforces with bargained memorandums of understanding addressing terms and conditions of employment that require the courts to meet and</p>

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SP19-10

Judicial Branch Administration: Policies on Workplace Conduct (adopt Cal. Rules of Court, rule 10.351)

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			<p>Supreme Court to adopt one policy that is applicable to all courts throughout the State, to ensure consistency, fairness, and equity among the rules applicable to employees of the judicial branch and officers of the court.</p> <p><u>Subsection (a) – Prohibition Policies</u></p> <p>With respect to subsection (a)(2), CELA proposes that all classifications protected under California’s already existing Fair Employment and Housing Act (“FEHA”) are likewise protected classifications with respect to employees of the judicial branch. Specifically, Cal. Gov’t Code § 12940, subd. (a) already provides a comprehensive list of protected categories and classifications, which are likewise defined in the accompanying regulations promulgated by the Fair Employment and Housing Council (FEHC). By adopting these definitions for employees of the judicial branch, it will ensure consistency in the protections afforded all individuals employed within the State of California.</p>	<p>confer with unions about various policy and procedure changes prior to implementation. As a result, the Work Group created, and RUPRO is recommending, a structure whereby the proposed rule sets a minimum baseline of compliance that ensures protection of all branch employees, while allowing individual courts to determine, consistent with the baseline, how best to achieve and expand those requirements, and in consideration of their own structure, limitations, and union relationships.</p> <p>RUPRO agrees with the commenter’s request that the proposed rule include specific reference to the protected classifications listed in Government Code § 12940(a). The proposed rule has been revised accordingly.</p>

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			<p>CELA proposes that subsection (a)(3) be amended to state that a “nonexhaustive” list of definitions and examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification be provided, but to make clear that these definitions and examples are instructive only, not comprehensive.</p> <p><u>Subsection (b) – Complaint Reporting Process</u></p> <p>CELA proposes that the judicial branch adopt a Rule that follows 2 Cal. Code of Regs. § 11023, subd. (b)(4), which provides for a robust complaint procedure. Specifically, § 11023, subd. (b)(4) provides that a complaint process is (a) designated confidential to the extent possible; (b) receives a timely response; (c) has timely and impartial investigations conducted by qualified personnel; (d) provides documentation and tracking for reasonable progress; (e) provides appropriate options for remedial actions and resolution and (f) provides timely closures. While the proposed rule discusses certain aspects of the regulation, endorsing the above referenced regulation will ensure employees in the judicial branch have clear and consistent parameters for complaint reporting throughout the judicial branch.</p> <p><u>Conclusion</u></p> <p>CELA applauds the Committee for taking these important steps to ensure the judicial branch</p>	<p>RUPRO also agrees with the request to add language to the proposed rule stating that the examples of inappropriate workplace conduct listed in court policies will be “nonexhaustive.” The proposed rule has been revised accordingly.</p> <p>RUPRO declines the suggestion to specifically adopt the complaint reporting procedures of 2 Cal. Code of Regs § 11023, and notes that the proposals made in the proposed rule go beyond the requirements listed in the regulation and provide additional protections.</p>

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			<p>provides a workplace free from harassment, discrimination, retaliation, and inappropriate workplace conduct based on protected classifications. CELA’s Board, and membership as a whole, is eager to assist the Committee in any way possible, and thanks the Committee for their consideration of these comments.</p>	
2.	<p>Superior Court of San Diego County by Mike Roddy, Executive Officer</p>	AM	<p>Whether “inappropriate workplace conduct” should be a separate and distinct category in the rule; and whether it should be treated identically to statutorily unlawful conduct.</p> <p>The rule addresses four categories of prohibited conduct: harassment, discrimination, retaliation, and “inappropriate workplace conduct.” The first three categories are legal terms that are well-defined in state statutes, regulations, and case law. However, the last category is not. A Westlaw search of the term “inappropriate workplace conduct” indicates that the term is not used in any California statute, regulation, or reported appellate case. Nor is any definition of the term provided in the rule itself. The Court questions whether “inappropriate workplace conduct” should be set out as a separate distinct category, and whether that category should be subject to the same requirements as the other three categories. “Inappropriate workplace conduct” appears to be a catch-all term that addresses conduct that is considered improper in the work environment,</p>	<p>RUPRO appreciates the commenter’s concern regarding “inappropriate workplace conduct” being treated identically to harassment, discrimination, and retaliation. However, by equating inappropriate workplace conduct with other forms of prohibited conduct, the proposed rule emphasizes the importance of preventing all inappropriate behavior in the workplace, regardless of whether it amounts to inappropriate conduct or violation of a statute. RUPRO notes that the charge of the Chief Justice in creating the Work Group for the Prevention of Discrimination and Harassment specifically tasked the Work Group with taking measures to eliminate not just harassment, discrimination, and retaliation, but also “inappropriate workplace conduct.”</p> <p>RUPRO declines to provide specific examples of inappropriate workplace conduct in the proposed rule. The prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification is constantly evolving. Definitions and examples of prohibited and inappropriate</p>

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			<p>but not actionable as unlawful. It is a highly subjective term. It clearly includes the other three categories, as harassment, discrimination, and retaliation all fall into the category of “inappropriate workplace conduct.”</p> <p>The Committee indicates an intent to have Judicial Council staff provide “sample language” to assist the courts in defining this term and providing examples, but that would seem to be an incredibly difficult task given the lack of any legal guidance in this area. Broad ambiguous definitions will be highly objectionable to employee unions, who will not want to subject their members to possible discipline based on such an amorphous concept. Disputes over discipline imposed under a policy prohibiting “inappropriate workplace conduct” will be decided by labor arbitrators who again will have no interpretive guidance and will create their own definitions in individual cases. Arbitrators applying the “just cause” standard for discipline typically require that employees have advance notice of what behavior is prohibited. The employer’s policies, practices, and performance rules must be reasonable and job-related. Such broad language may not meet that test.</p> <p>As a possible suggestion, it would seem that the goal of this rule could more effectively and clearly be met by using the terminology “inappropriate workplace conduct based on a</p>	<p>workplace conduct have evolved, and will continue to evolve, as employees share their experiences and employers continue to embrace the challenge to provide better, safer, fairer, and more respectful workplaces for their employees. While the desire for greater clarity in the proposed rule is understandable, including more specific examples and definitions in the proposed rule poses risks of those definitions and examples soon becoming outdated and failing to account for the newest developments and best practices in harassment prevention.</p> <p>To balance the competing concerns of creating a robust proposed rule that is flexible enough to adapt to an everchanging landscape, while also providing appropriate guidance to the courts, the recommendations presented by the Work Group and adopted by the Judicial Council on July 19, 2019 specifically require Judicial Council staff to create sample language for policies on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, and to update those sample policies as necessary. RUPRO anticipates that the sample language created by Judicial Council staff will be disseminated to courts shortly after adoption of the proposed rule, and will provide additional context, examples, and definitions that will guide court compliance with the proposed rule. The examples of inappropriate workplace conduct provided in this comment are</p>

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			<p>protected classification, including but not limited to harassment, discrimination, and retaliation.”</p> <p>If the term “inappropriate workplace conduct” is to be included in the rule, the question becomes whether such conduct should be considered on a par with harassment, discrimination, and retaliation, and subject to all of the same requirements. As stated in the Report Of The Federal Judiciary Workplace Conduct Working Group To The Judicial Conference Of The United States (June 1, 2018) https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf: “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.” (page 12) A possible option here would be not to add</p>	<p>illustrative of the concerns facing court employees, and RUPRO will forward those comments and suggestions to Judicial Council staff responsible for creating the sample policies.</p> <p>RUPRO anticipates that the examples to be outlined in sample policy language will provide courts, judicial officers, employees, unions, labor arbitrators, and members of the public with sufficient notice and understanding of the conduct that is prohibited by the proposed rule. To the extent there is still insufficient notice and understanding of conduct prohibited by the proposed rule, RUPRO notes that the Work Group recommended, and the Judicial Council approved, a requirement that Judicial Council staff follow up on implementation of the Work Group recommendations by July 2021. RUPRO anticipates that the clarity of the proposed rule will be included in that follow-up evaluation and that any necessary changes will be recommended at that time.</p>

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			<p>“inappropriate workplace conduct” as a separate and distinct category, but to include language to the effect that acts that do not rise to the level of statutorily prohibited discrimination, harassment and retaliation may nonetheless constitute inappropriate workplace conduct, and should be addressed appropriately through either informal or formal means.</p> <p>[The proposal could possibly create additional workload not considered by this <i>Invitation to Comment</i> because]*, if the term “inappropriate workplace conduct” remains as recommended, this could result in employment disputes between courts and their employees due to the failure to have a clearly defined definition for this type of prohibited conduct.</p>	
3.	Superior Court of Shasta County by Summer Ryan, General Counsel	AM	<p>The proposed rule contains the term inappropriate workplace conduct.” Unlike the terms harassment, discrimination and retaliation, “inappropriate workplace conduct” has no defined parameters, and apparently no statutes or case law making it clear as to what is “inappropriate workplace conduct”. Absent a definition or examples, the term is extremely subjective and open to vastly differing interpretations of “inappropriate”. In order to comply with the proposed rule, courts are required to have policies prohibiting “inappropriate workplace conduct” and providing examples, yet it is entirely unclear what such conduct entails as intended by</p>	<p>RUPRO declines to provide specific examples of inappropriate workplace conduct in the proposed rule. The prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification is constantly evolving. Definitions and examples of prohibited and inappropriate workplace conduct have evolved, and will continue to evolve, as employees share their experiences and employers continue to embrace the challenge to provide better, safer, fairer, and more respectful workplaces for their employees. While the desire for greater clarity in the proposed rule is understandable, including specific examples and definitions in the proposed rule</p>

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			<p>RUPRO, and undoubtedly there will be extremely differing policies throughout the state. In order to accomplish the intent of Committee, everyone needs to have a clear understanding of what is meant, and currently the rule is very unclear with respect to the term “inappropriate workplace conduct”, and what kind of conduct might fall within this term that would not be considered within harassment, discrimination or retaliation based on a protected class.</p>	<p>poses risks of those definitions and examples soon becoming outdated and failing to account for the newest developments and best practices in harassment prevention.</p> <p>To balance the competing concerns of creating a robust proposed rule that is flexible enough to adapt to an everchanging landscape, while also providing appropriate guidance to the courts, the recommendations presented by the Work Group and adopted by the Judicial Council on July 19, 2019 specifically require Judicial Council staff to create sample language for policies on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, and to update those sample policies as necessary. RUPRO anticipates that the sample language created by Judicial Council staff will be disseminated to courts shortly after adoption of the proposed rule, and will provide additional context, examples, and definitions that will guide court compliance with the proposed rule.</p>
4.	<p>The Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee Joint Rules Subcommittee</p>	A	<p>The JRS notes the following impact to court operations:</p> <p>1. Trial court labor or employment related issues and/or concerns.</p> <p>Local courts vary as to the detail and content of current policies they have regarding harassment, discrimination, retaliation and inappropriate workplace conduct. Some courts will need</p>	<p>RUPRO agrees that many courts will have to make at least some changes to their existing policies to comply with the rule, and that those changes may require meet and confer obligations with their unions. While RUPRO agrees that this process may extend beyond the June 30, 2020 implementation date for some courts, the current</p>

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			<p>additional time if their current policies are not as detailed. Many courts will have current policies that meet most of the requirements of the proposed new rule but a change in current policy is nearly unavoidable. Any changes to the court policies will require all courts to meet and confer with their unions.</p> <p>2. Results in additional training, which requires the commitment of staff time and court resources Training is a minor impact which can be easily addressed by a special one-time training that all courts can do once the rule becomes effective. Then the new requirements can be included in all subsequent periodic harassment and discrimination training.</p> <p>3. Proposed date for implementation is problematic. Some courts will need additional time if their current policies are not as detailed. However, the new requirement including definitions and examples of harassment, discrimination, retaliation and inappropriate workplace conduct in court personnel policies is a requirement that most courts will need to add to current policies. These changes to the court policies will definitely require all courts to meet and confer with their unions. This may make it difficult for</p>	<p>language of the proposed rule allows courts to go beyond the implementation date if necessary to meet and confer with their unions. RUPRO also notes that Judicial Council staff will provide sample policy language to courts to aid the implementation of the proposed rule.</p> <p>RUPRO agrees that the impact on court resources for training on the requirements of the rule should be minimal. The CJER Advisory Committee is evaluating further training needs related to the Work Group recommendations that were approved by the Judicial Council on July 19, 2019.</p> <p>RUPRO acknowledges that courts will need time to review their existing policies and make changes to their policies to comply with the proposed rule. RUPRO understands that these potential policy changes might make a June 30, 2020 implementation date difficult for some courts, especially if the court is required to meet and confer with its union regarding the proposed changes. RUPRO notes, however, that the current language of the proposed rule allows courts to go beyond the implementation date if necessary to meet and confer with their unions. Given the importance of promptly addressing harassment,</p>

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			courts to meet the implementation deadline of June 30, 2020.	discrimination, retaliation, and inappropriate workplace conduct based on a protected classification, RUPRO has maintained its recommendation of a June 30, 2020 implementation date in order to require courts to act quickly on this significant issue, understanding that some courts may need to take advantage of the exception for extra time.

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