



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Judicial #MeToo Hearing Wrestles With Reporting Misconduct

By **Andrew Strickler**

Law360 (October 30, 2018, 11:03 PM EDT) -- Should a judge who gets a complaint of sexual harassment about another justice be duty-bound to report it up the chain? That was the question that occupied much of a Tuesday hearing in Washington, D.C., about #MeToo-inspired changes proposed for the federal courts.

While the question might seem straightforward, a series of witnesses and the members of two judicial committees grappled with how a mandatory obligation for judges to take complaints to their district or circuit chiefs might encourage or inhibit victims from coming forward.

The six-hour hearing held at the Thurgood Marshall Federal Judiciary Building was one stage of an ongoing effort to improve the judiciary's response to problematic judges. In the wake of revelations last year about serial sexual harassment by Judge Alex Kozinski of the Ninth Circuit, a working group in June called for a **long series of policy updates** and changes to the codes of conduct and disciplinary procedures.

During Tuesday's public forum, speakers weighed the need to maintain "informal" ways to police lifetime-appointment judges while giving clerks and staffers safe avenues to bring complaints against their influential bosses.

Among them was Chief U.S. District Judge Lawrence O'Neill of the Eastern District of California. Addressing the Judicial Conference's committees on codes of conduct and judicial conduct and disability, Judge O'Neill discussed two past incidents from his court that he said highlighted the need to keep some level of "local discretion" in handling harassment complaints.

In one incident, a clerk made a serious allegation about a judge making a lewd comment to her. Judge O'Neill said that, within a day, he had learned directly from the judge's wife that the judge was suffering from dementia. After what Judge O'Neill called "the most difficult conversation" of his judicial career, the judge agreed to step down.

In another, a staffer complained about their judge "becoming a complete jerk." Another informal discussion revealed that the judge was having a serious domestic problem and began going to counseling. The problems never recurred, Judge O'Neill said.

Those complaints "were dealt with directly, they were dealt with honestly, they were dealt with seriously, and they were dealt with correctly," he told the committees. He also urged that any rule changes also outline the reporter's right to have the issue taken directly to the district or appellate circuit leadership.

"I ask you to give some discretion to the local level, because we know the personalities," he said.

The review, being conducted at an unusually fast pace for the federal courts, comes after a December report in The Washington Post detailed a series of allegations from six former clerks of Judge Kozinski about his sexualized behavior over many years.

Others quickly came forward to detail their own troubling experiences with the lauded jurist, many of whom called Judge Kozinski's lewd misconduct an "open secret." Judge Kozinski stepped down from the bench days later, a move that brought a just-begun judicial conduct investigation to a halt.

In his year-end report, Chief Justice John Roberts announced a top-to-bottom look at the judiciary's methods for addressing sexual harassment training and responses, and he announced the formation of a working group for recommending improvements.

That group's eventual report called for a new emphasis on judges' "affirmative duty" to ensure a workplace free of sexual harassment. Among the recommendations was a call for amendments to conduct rules to include an "express reference" to harassment within the definition of misconduct and the inclusion of "substantive obligations" for a judge to take action when a complaint is brought.

"Confidence in court [employment dispute resolutions 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," the group said.

"Ensuring that the circuit court is informed of such reports would provide an additional incentive to investigate that report properly ... and would create a record at the circuit level that could prove relevant if there are future complaints against the same judge," the report states.

Echoing the sentiments of Judge O'Neill, judicial ethics expert Charles Geyh said at the hearing that the informal — and quiet — ways court leaders often rein in line-crossing judges can bring a just and swift resolution to at least some problems.

At the same time, victims also need a "safe" alternative to lodging complaints without triggering a judge's reporting obligation and potentially starting a formal disciplinary investigation, he said. He also raised the concern that a mandatory reporting duty would undermine a judge's ability to comply with a reporter's request for confidentiality.

"The informal mechanisms are incredibly valuable, and not something we want to lose," Geyh said.

On the other side of that issue were representatives of Law Clerks for Workplace Accountability, a group **formed in the wake** of the Judge Kozinski scandal that has urged the judiciary to sharpen rules and policies on harassment and other kinds of misconduct.

LCWA co-founder Jaime Santos of Goodwin Procter LLP, a one-time federal clerk, told Law360 that Judge O'Neill's story about the judge with dementia was a "perfect" example of a situation in which the district or circuit would stay ignorant of a problem that may have festered for years and affected many of those who had worked under the judge.

"These things are hard to deal with, but it's for that reason, I think, that [reporting] discretion should, as much as possible, not be cabined" within the local court, she told Law360 at a break in the hearing.

The mandatory reporting recommendation also appeared to have the support of Senior U.S. District Judge Sarah Evans Barker of the Southern District of Indiana, who sits on the conduct and disability committee.

“When we pull back from that obligation to do something, we invite people to be negligent of a complaint, or wish it away,” she said.

--Additional reporting by Sam Reisman and Natalie Rodriguez. Editing by Haylee Pearl.

All Content © 2003-2018, Portfolio Media, Inc.