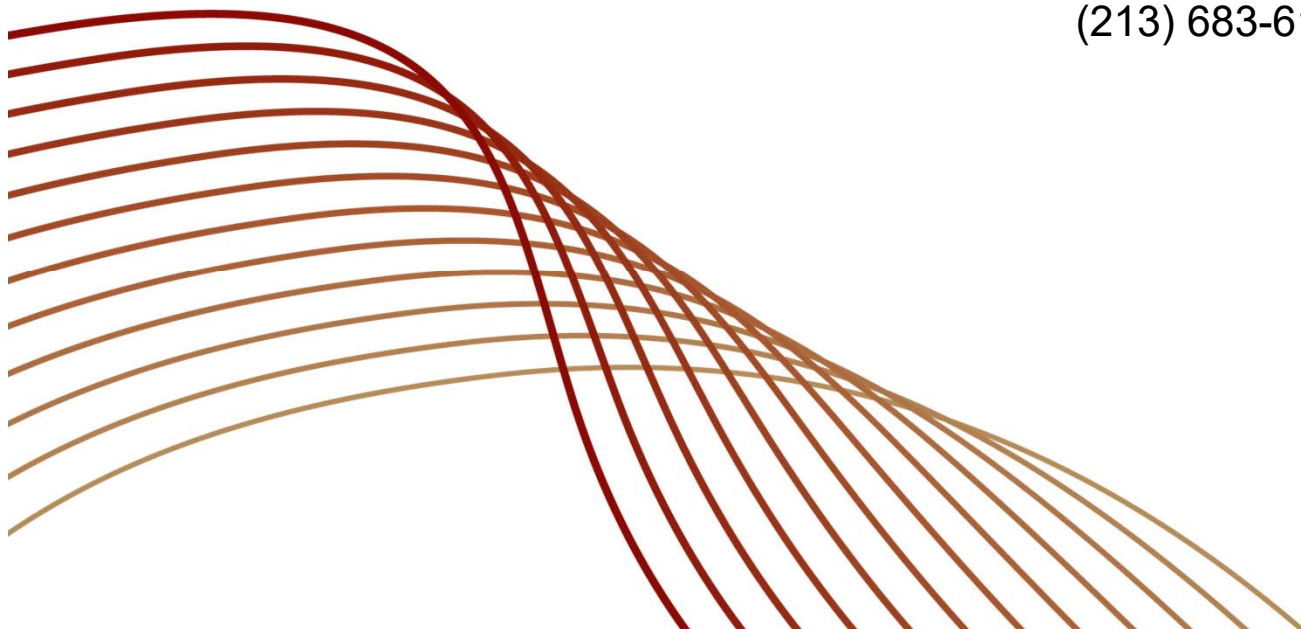


SEX-BASED HARASSMENT IN THE WORKPLACE: PROTECTING THE COURT, ITS EMPLOYEES AND THE PUBLIC

November 2018

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Paul Hastings LLP
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PAUL

HASTINGS

A SINGLE TWEET...



Alyssa Milano 
@Alyssa_Milano

Follow 

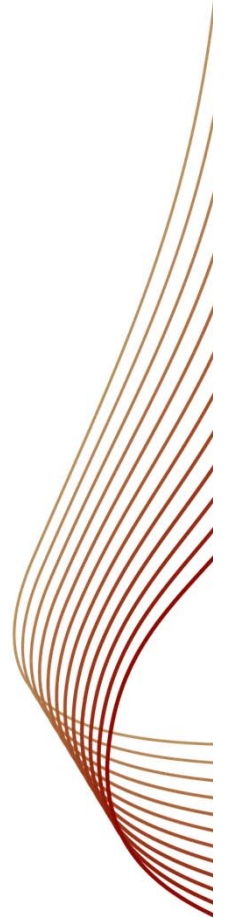
If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

Actress Alyssa Milano initiated a viral Twitter campaign

Reuters/ TWITTER



STARTED A MOVEMENT

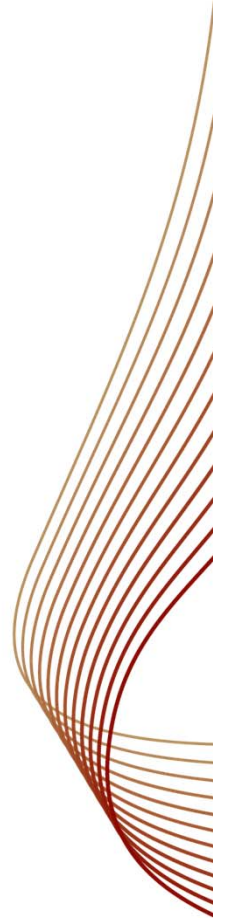
- Within 48 hours, #MeToo had over one million tweets
- Within a day, there were more than 12 million posts, comments and reactions to #MeToo
- Within 25 days of Milano's tweet, a CNN Poll found that one in five Americans knew someone who said "#MeToo"



NEARLY HALF OF AMERICAN WOMEN SAY THEY HAVE BEEN HARASSED AT THEIR JOBS

3

- A poll conducted by NBC News and the Wall Street Journal in October 2017 found:
 - 48% of currently-employed women in the U.S. have experienced unwelcome sexual/verbal/physical harassment at work
 - 41% of men have personally witnessed mistreatment of women in the workplace

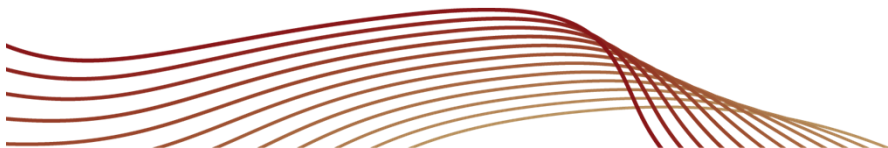


LIVES ARE FOREVER CHANGED AND INSTITUTIONS ARE COMPROMISED FOR WORKERS

4

The New York Times

*Federal Judge Alex Kozinski
Retires Abruptly After Sexual
Harassment Allegations*



PAUL
HASTINGS

...AND THE PUBLIC

THE BALTIMORE SUN

State panel finds demeaning remarks cause for Judge Nance to be expelled



A state panel on judicial discipline has recommended that Baltimore's Chief Judge Alfred Nance be removed from his position and not be permitted to serve as a judge in any jurisdiction in the state. (Amy Davis / Baltimore Sun)

- Judge:
 - dismissively referred to a public defender as “lady,” “mother hen” and “child”; and
 - displayed “facial expressions, tone of voice and body language” that were “gratuitous, insensitive, inflammatory and relentless”

SHOULD RESIGNATION END THE INVESTIGATION?

6

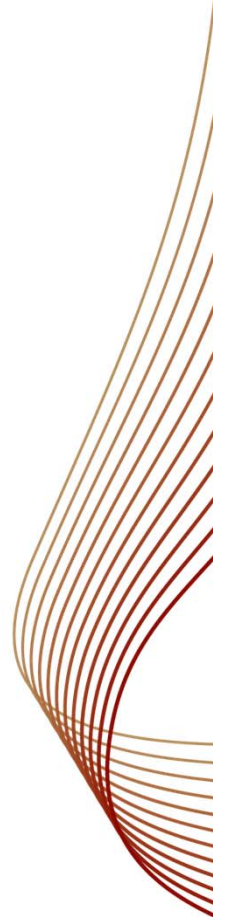
“The judicial council tasked with investigating allegations of sexual misconduct against former appeals court judge Alex Kozinski announced Monday that it was closing its probe because his retirement effectively took away its legal authority to explore the matter.”

-- *The Washington Post*

February 5, 2018



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HASTINGS

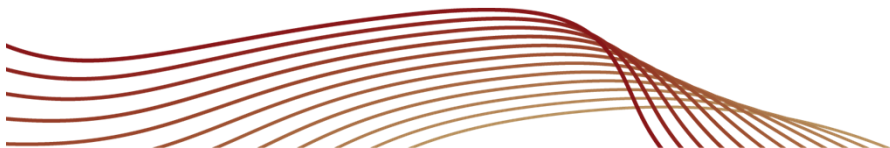


KEY ELEMENTS OF AN ANTI-HARASSMENT PROGRAM

7



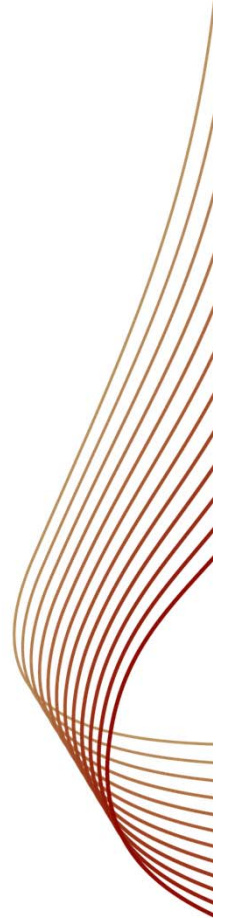
- Declaration of unequivocal commitment by leadership
- Anti-harassment policy
- Training of all personnel
- Complaint procedure
- Trained team to promptly address any issues
 - Impartial investigators
 - Investigation protocol: prompt and thorough
 - Findings
 - Appropriate remedial action
 - Periodic check-ins
- Periodic “culture” checks



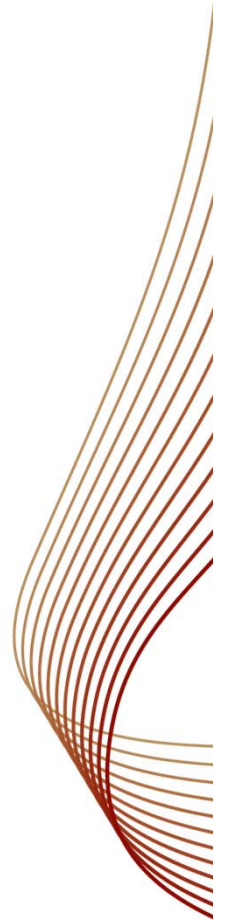
AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION SAMPLE POLICY

8

- Appendix A – Sample Policy Prohibiting Harassment (with minor amendments)
 - Comprehensive scope prohibiting harassment:
 - On the basis of all protected group status expressly protected by applicable federal or state law (e.g., gender, race, national origin, religion, disability, age, pregnancy)
 - On the basis of other personal characteristics even if not protected by applicable law (e.g., sexual orientation, gender expression, gender nonconformity, and/or gender identity)?



- Robust examples for these broad categories:
 - Verbal statements: slurs, jokes, insults, epithets, gestures, or teasing
 - Visual or graphic images: offensive posters, symbols, cartoons, drawings, computer displays, e-mails, text messages, or postings to social media sites including blogs, forums, chat rooms, digital or social networking sites, and other social media applications
 - Physical conduct: touching, physical threats, and blocking someone's path
 - Include all forms of communication that:
 - Show hostility, disrespect or aversion toward, or tease, an individual because of any protected characteristic, or
 - Contain sexually-explicit or implicit messaging



ABA SAMPLE POLICY

- Prohibit harassment on and off employer premises:
 - ABA policy: enumerated behaviors are “unacceptable in the workplace itself and in other work-related settings such as business-related social events”
- Prohibit more than “actionable harassment” (*i.e.*, severe or pervasive)
 - Any commentary or behavior prohibited by the policy is a violation, even if it does not give rise to a legal violation



ABA SAMPLE POLICY

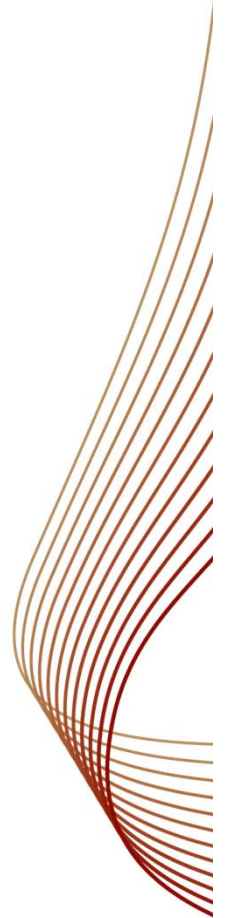
- State consequences of violating the policy
 - What does a “zero tolerance” policy mean?
- Address bystander responsibility
 - When is action required to stop observed harassment and report it?
- Spell out the complaint procedure
 - Set forth alternative avenues for complaints
 - Are anonymous complaints accepted?
 - Require prompt reporting
 - Emphasize no-retaliation policy
- Not included by the ABA: Define and prohibit bullying



IS THE ABA SAMPLE POLICY'S SUGGESTED REPORTING APPROPRIATE FOR YOUR COURT?

12

- You may report the incident to your supervisor in an effort to resolve the problem informally and discreetly.
- You are **not** required to complain first to your supervisor if that supervisor is the individual who is doing the harassing, is condoning the harassing behavior, or is retaliating because of a claim of harassment, or if you are uncomfortable reporting it to your supervisor for any other reason.
- Employees are encouraged, when possible, to tell the perceived harasser to stop the allegedly objectionable behavior. However, this is **not** required.

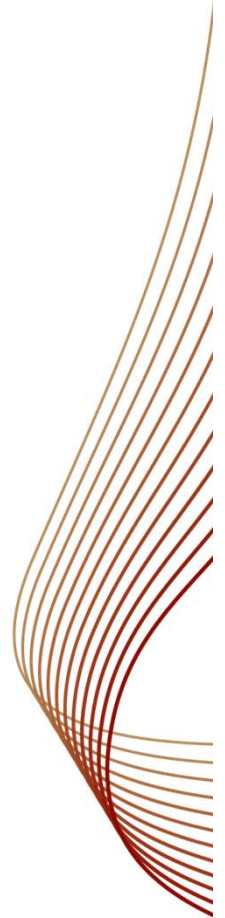


DOES THE COURT'S CONFIDENTIALITY POLICY REQUIRE AN UPDATE?

- The Federal Judicial Center revised the Law Clerk Handbook in December, 2017 to make clear that “the requirement to maintain confidentiality” does not mean concealing misconduct, including harassment:

“However, nothing in this handbook, or in the Code of Conduct, prevents a clerk, or any judiciary employee, from revealing misconduct, including sexual or other forms of harassment, by their judge or any person. Clerks are encouraged to bring such matters to the attention of an appropriate judge or other official.”

Source: Federal Judicial Center

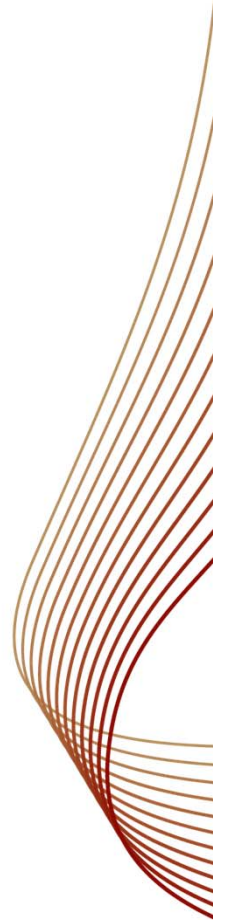


Judicial #MeToo Hearing Wrestles With Reporting Misconduct

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.

See Appendix B.



CAN THE BYSTANDER SIMPLY STAND BY?

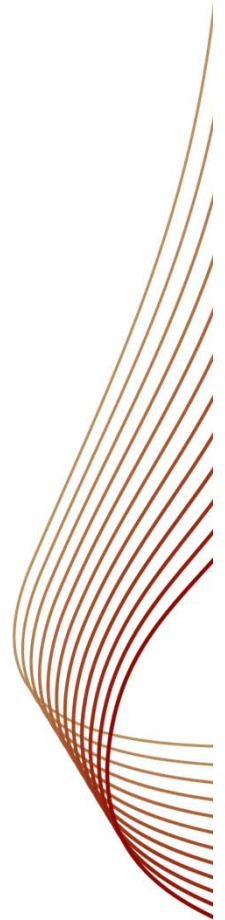
- Over a period of two months, Ralph, a staff attorney, observes Judge Lee flirting with a student extern (e.g., sitting on her desk for long periods of time, asking her to lunch often, touching her hair and at a candlelit dinner at a local restaurant)
 - Does Ralph have an obligation to report his observations to the court?



WHAT TRIGGERS YOUR DUTY TO INVESTIGATE?

16

- You see Judge Romano give his secretary a bear hug and lean his head against hers as you pass by his chambers
 - No complaint has been made by this secretary or anyone else
 - Is a conversation with Judge Romano about your single observation required?



BYSTANDERS: ABA SAMPLE POLICY

- It reads:
 - “All incidents believed to be harassment or a violation of this policy **must be reported, even if the reporting employee was not the subject of the alleged harassment or violation**. We cannot remedy claimed violations unless you bring these claims to the attention of management. Failure to report claims of violations prevents us from taking remedial steps.”
- What action should be taken against bystanders who fail to timely report?

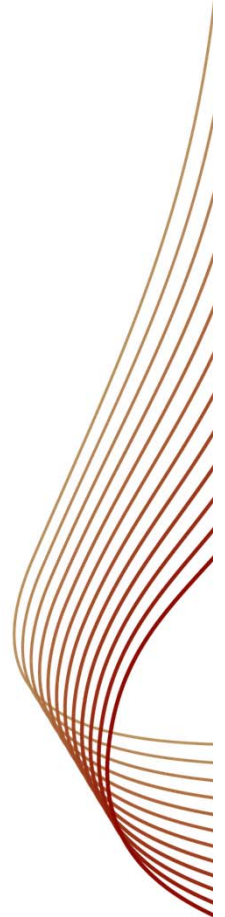


INVESTIGATION PROTOCOLS – 1

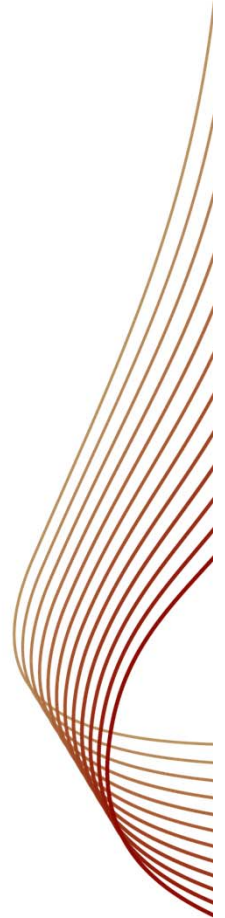
- Intake
- Interim actions if appropriate – but changes for complainant should be voluntary
 - On paid leave pending completion of investigation?
 - Temporary transfer?
- Unbiased investigator
- Scope evidence and background information required and obtain it
 - Interviews
 - Other evidence collection (including email, text messages, social media and recordings)
 - Policy review
 - Applicable laws, regulations and state/federal legal guidance
 - Record of past complaints against accused(s)



- ❑ Schedule that will drive prompt conclusion of investigation
- ❑ Interview preparation
- ❑ Interview admonitions (including retaliation prohibition), outlines and notes
 - ❑ Proof that admonitions were given (e.g., written statement reviewed at commencement of interview and signed)
 - ❑ Proof that material points were covered with the witness
- ❑ Appropriate scope and necessary follow-up as new evidence obtained
- ❑ Witness statements or confirmation that notes are accurate and complete



- ❑ Determinations, basis for them, witness credibility (but not recommendations for discipline/termination)
 - ❑ Standard for findings
 - ❑ California DFEH Guide: “Investigators should make findings based on a ‘preponderance of the evidence’ standard.”
 - ❑ Example
 - ❑ There was a violation [or inappropriate conduct]. [Insert basis]
 - ❑ There was not a violation [or inappropriate conduct]
 - ❑ The investigator cannot make a determination
 - ❑ Avoid: “The complaint was not substantiated”
- ❑ Report – what detail
- ❑ Case file
- ❑ Records retention



- ❑ Decision-making
- ❑ Communication to complainant(s), accused(s) and involved managers
 - ❑ Complainant should be informed of the remedial actions taken
- ❑ Appropriate follow-up
 - ❑ Policies
 - ❑ Re-training
 - ❑ Periodic monitoring
- ❑ See Appendix C for sample materials



CAN YOU PROMISE CONFIDENTIALITY?

- Angela, a staff attorney, informs you that she is appalled that Judge Remer watches pornographic videos on his iPad in his chambers, which she hears and/or sees when she enters
 - Is it appropriate to honor Angela's request that you keep her report confidential and not take any action?
 - Do you have a duty to investigate Angela's report to you?
 - Should Judge Remer receive some form of discipline if you determine the allegation is true?



“SHE SAID” / “HE SAID”

- One of Judge Smith’s law clerks complained that he forced her to engage in sex two nights ago
- She went to see her doctor and called the rape crisis hotline yesterday
- Judge Smith, a 30-year veteran of the court with an unblemished record, vigorously denied the incident
- There are no witnesses



INNOCENT UNTIL CORROBORATION FOUND?

- Is there any circumstance under which Judge Smith should be deemed to have violated the court's harassment policy when there are no witnesses to corroborate either witness's account?
 - Should the court find the law clerk's complaint "unsubstantiated" because there were no other witnesses?

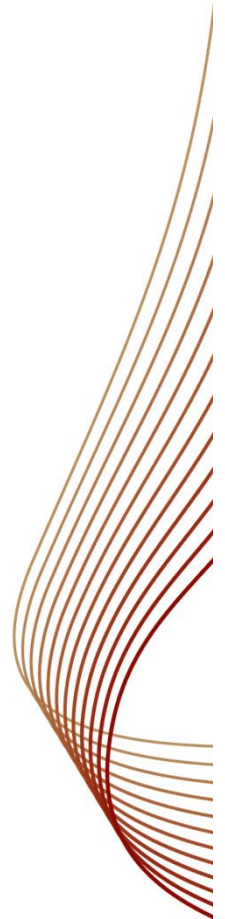


CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING (DFEH) CREDIBILITY FACTORS

25

1. Inherent plausibility
2. Motive to lie
3. Corroboration
4. Extent a witness was able to perceive, recollect or communicate about the matter
5. History of honesty/dishonesty
6. Habit/consistency
7. Inconsistent statements
8. Manner of testimony
9. Demeanor

See Appendix D.



HOW FAR SHOULD AN INVESTIGATION GO?

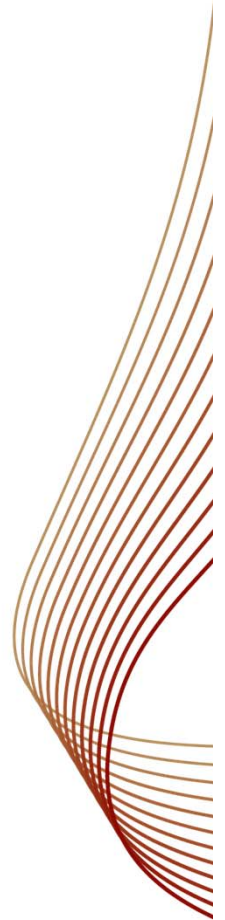
- If both Judge Smith and his law clerk appear equally credible, should the court:
 - Ask to review the rape crisis hotline and medical reports?
 - Ask for and test any DNA evidence that may exist?
 - Interview others?
 - If so, who?



WHO SHOULD INVESTIGATE ALLEGATIONS OF HARASSMENT BY THE JUDICIARY?

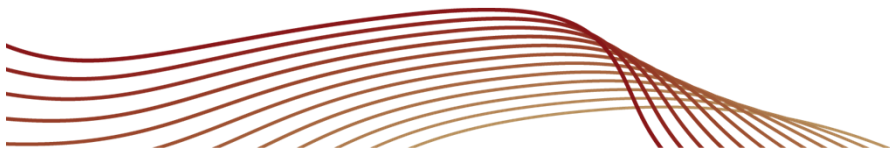
27

- Is there a referral or reporting obligation?
- Options:
 - Another judge?
 - Human resources?
 - A third-party investigator?



"A system that relies for investigation solely upon judges themselves risks a kind of undue 'guild favoritism' through inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem"

- 2006 Judicial Conduct and Disability Act Study Committee led by Justice Breyer



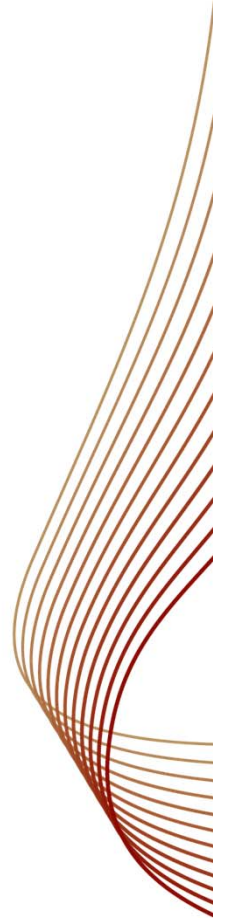
- May Judge Smith refuse to take a female law clerk on overnight business travel because his wife does not want him subjected to false allegations of harassment?



WHERE IS THE LINE BETWEEN “STRICTLY BUSINESS” AND “UNDUE RISK”?

30

- No entry into hotel rooms?
- No “intimate” dinner settings, drinks at bars or drives on isolated roads?
- Limits on alcohol consumption?
- Intimate and certain personal subjects off limits?
 - Romantic relationships?
 - Sex?
 - Sexual orientation?
 - Appearance?
 - Dreams?
 - Personal relationships with others?
- Closed-door meetings unwise?
- What physical proximity is inappropriate?



WHO STAYS AND WHO GOES?

31

- When the court finds a violation of the harassment policy, appropriate remedial action is required



ROMANTIC RELATIONSHIPS

- Prohibit all supervisor/subordinate relationships?
- If not:
 - Should personnel be required to report such relationships to a designated official?
 - Should a “love contract” be required?
 - Should the subordinate be transferred to a different judge?

