

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SP19-10

Title

Judicial Branch Administration: Policies on Workplace Conduct

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 10.351

Proposed by

Rules and Projects Committee
Hon. Harry E. Hull, Jr., Chair

Action Requested

Review and submit comments by November 15, 2019

Proposed Effective Date

January 17, 2020

Contact

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

Executive Summary and Origin

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 (RUPRO) proposes a new rule of court to establish standardized baseline requirements for court policies on the prevention, reporting, and resolution of these types of complaints. This proposal originated from recommendations made by the Work Group for the Prevention of Discrimination and Harassment, appointed by Chief Justice Tani G. Cantil-Sakauye. Those recommendations, including a recommendation to adopt a rule on these issues, were approved by the Judicial Council on July 19, 2019.

Background

In April 2018, the Chief Justice asked the Judicial Council to take immediate action to amend the court rule 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 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.

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.

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, RUPRO, or its Policy Coordination and Liaison Committee.
It is circulated for comment purposes only.*

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 California 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.

RUPRO created an ad hoc RUPRO subcommittee to develop a rule of court consistent with the Work Group’s direction to the Judicial Council. RUPRO considered the subcommittee’s rule proposal and recommends it.

The Proposal

California Rule of Court, rule 10.351, Judicial Branch Policies on Workplace Conduct, 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 new rule would require court policies to contain, at minimum:

1. A list of all protected classifications under applicable state and federal laws.
2. 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 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 administrative presiding justices, appellate court clerk/executive officers, presiding judges, court executive officers, judicial officers,

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. 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. “Protected classifications” apply to and protect 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.

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

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 it 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.² The proposed rule would benefit judicial branch employees and judicial officers by:

1. Requiring courts to use consistent definitions 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 subject to such conduct as to their rights and available resources; and
5. Clarifying the responsibilities of court management to prevent and address such conduct.

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 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, the ad hoc RUPRO subcommittee considered alternative requirements to include in the proposed rule, including how to best standardize complaint reporting procedures while ensuring

² The Work Group proposed other recommendations, all of which were adopted by the Judicial Council on July 19, 2019. Proposed rule 10.351 is intended to address only the recommendation requiring RUPRO to oversee a rulemaking process. The other recommendations proposing training, creation of sample policies and procedures, improved communication, and follow-up will be addressed by other actions taken by the Center for Judicial Education and Research Advisory Committee, Judicial Council staff, and individual courts.

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.

The ad hoc RUPRO subcommittee also considered providing specific examples of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected characteristic in the proposed rule, and considered providing definitions of industry-accepted terms such as “intake,” “follow-up,” “reporting processes,” “fair, timely, and thorough investigations,” “impartial qualified investigators,” and other similar terms used in the proposed rule. The ad hoc RUPRO subcommittee ultimately determined that these examples and clarifications were best addressed in the sample policy language to be generated by Judicial Council staff, in compliance with the requirements of the Work Group’s recommendations, approved by the Judicial Council. RUPRO anticipates that Judicial Council staff will provide courts with sample policy language that complies with the requirements of proposed rule 10.351 shortly after the proposed rule is approved.

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 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.

RUPRO also anticipates that some courts may be unable to meet the proposed June 30, 2020, 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.

Request for Specific Comments

In addition to comments on the proposal as a whole, RUPRO is interested in comments on the following:

- Does the rule appropriately address the stated goal of promoting improvement and consistency in how judicial branch entities prevent and address harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification?

RUPRO also seeks comments from courts on the following implementation matters:

- Does the proposal create any additional workload not considered by this *Invitation to Comment*?
- Does the currently proposed implementation date provide sufficient time for implementation, specifically considering each court's unique process for proposing and approving changes to personnel policies?

Attachments and Links

1. Cal. Rules of Court, rule 10.351, at pages 6–8

Rule 10.351 of the California Rules of Court would be adopted, effective January 17, 2020, to read:

1 **Rule 10.351. Judicial branch policies on workplace conduct**

2
3 The judicial branch is committed to providing a workplace free of harassment,
4 discrimination, retaliation, and inappropriate workplace conduct based on a protected
5 classification. Consistent with this commitment, each court must take reasonable steps to
6 prevent and address such conduct, including adopting policies prohibiting harassment,
7 discrimination, retaliation, and inappropriate workplace conduct based on a protected
8 classification and establishing for such conduct complaint reporting and response
9 procedures that satisfy the minimum requirements stated in this rule.

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11 **(a) Prohibition policies**

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

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18 (1) A prohibition against harassment, discrimination, retaliation, and
19 inappropriate workplace conduct based on a protected classification by
20 judicial officers, managers, supervisors, employees, other personnel, and
21 other individuals with whom employees come into contact;
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23 (2) A list of all protected classifications under applicable state and federal laws;
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25 (3) Definitions and examples of harassment, discrimination, retaliation, and
26 inappropriate workplace conduct based on a protected classification;
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28 (4) A clear prohibition of retaliation against anyone making a complaint or
29 participating in an investigation of harassment, discrimination, retaliation, or
30 inappropriate workplace conduct based on a protected classification; and
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32 (5) Comprehensive complaint reporting, intake, investigatory, and follow-up
33 processes.
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35 **(b) Complaint reporting process**

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

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41 (1) Establish effective open-door policies and procedures for reporting
42 complaints;

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- (2) Offer multiple avenues for raising complaints, either orally or in writing, and not require that the employee bring concerns to his or her immediate supervisor;
- (3) Clearly identify individuals to whom complaints may be made regarding 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, and/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 such 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;

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(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.