

Disorder in the Court: A Case Study on Reforming Bias, Discrimination, and Harassment in the Federal Judiciary

Deeva Shah & Erin Meyer

January 19, 2022

Presenter



Deeva Shah

dshah@keker.com



Erin Meyer

emeyer@keker.com

Roadmap

1. **Background on Misconduct in the Federal Judiciary**
2. **The *Jane Roe* Case**
3. **The *Jane Roe* Amicus Brief: Process, Findings, and Impact**
4. **Lessons Learned for Institutions, Change-Makers, and Litigators**

Background: Misconduct in the Federal Judiciary

The Judiciary: A Uniquely Insulated Institution

- The federal judiciary employs over 30,000 employees, from law clerks to administrative employees to federal public defenders.
- Basic workplace protections—e.g., Title VII of the Civil Rights Act and the Americans with Disabilities Act—do not apply to these employees.
- Instead, the federal judiciary has its own internal reporting procedure, premised on protecting judicial independence through self-policing.
- The judiciary's own statistics reflect that people do not feel comfortable reporting misconduct for fear of retaliation. These statistics seems particularly problematic when allegations of misconduct came to the forefront in 2017...

#MeToo and the Federal Judiciary

Workplace misconduct in the federal judiciary became a hot-button issue in December 2017, when former law clerks accused then-Judge Alex Kozinski of sexual harassment.

Shortly thereafter, a law clerk group penned a public letter to the Chief Justice asking for significant changes. The Judiciary formed a Working Group to implement specific changes while dealing with the fallout.



#MeToo and the Federal Judiciary

Los Angeles Times

9th Circuit Judge Alex Kozinski is accused by former clerks of making sexual comments



After The Times published the article, the probe determined that Kozinski had made sexual comments to former clerks. Dec 8, 2017

The Washington Post

Nine more women say judge subjected them to inappropriate



NPR

Alex Kozinski Retires Amid Allegations Of Sexual Harassment ...



Alex Kozinski, a distinguished federal judge, announced his retirement Monday, effective immediately. Dec 18, 2017

Los Angeles Times

9th Circuit Judge Alex Kozinski steps down after accusations of sexual misconduct

Judge Alex Kozinski, pictured in 2015 in his chambers, said he'll retire amid more than a dozen reports of sexual misconduct or inappropriate behavior.

Dec 18, 2017



The Judiciary's Updated Reporting Procedures

- Employees can report misconduct through Employment Dispute Resolution (EDR) plan.
- The judiciary has a “model” EDR plan, which was revised in 2019, but districts and circuits may make amendments prior to adoption.
- Three reporting options:
 1. Seek informal advice about their rights and reporting options
 2. Request Assisted Resolution, which may include preliminary investigation and mediation
 3. File a Formal Complaint
- Formal Complaints go to a Presiding Judicial Officer, who determines the existence and nature of discovery, written submissions, and hearings.
- Appeals are to the judicial council of the appropriate circuit.

Ongoing Issues with Reporting

- In February 2020, Olivia Warren, a former clerk to Judge Stephen Reinhardt accused him of sexually harassing her and other female clerks at a Congressional hearing.
- Multiple experts testified about why the updated procedures were still insufficient.



Case Background

- Plaintiff Jane Roe is a former public defender who endured months of pervasive sex discrimination, including sexual harassment, and retaliation.
- Roe attempted to report this misconduct informally and then formally.
- Members of the judiciary's Administrative Office identified her supervisor's behavior as "classic sexual harassment."
- She did not receive typical protections due to those who report misconduct. She was constructively discharged.



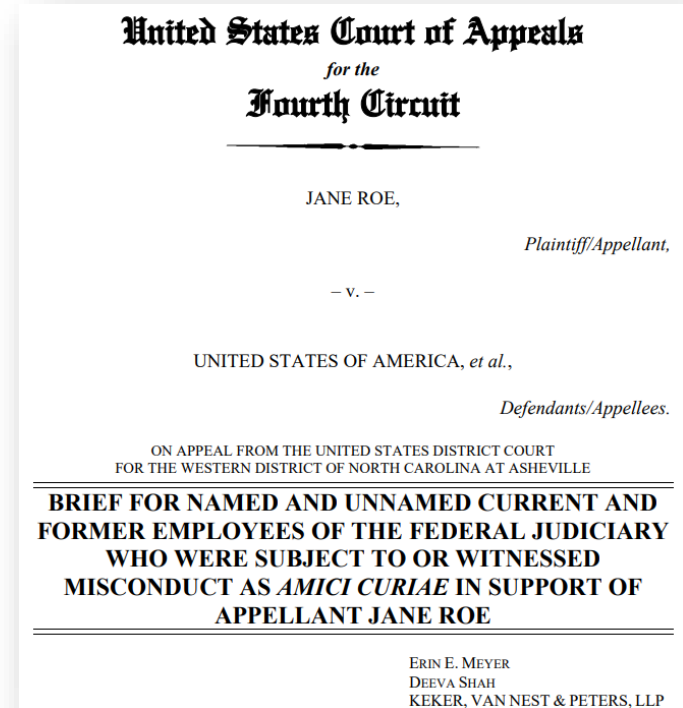
Roe's Federal Complaint

- Roe filed a complaint alleging:
 - Fifth Amendment violations due process and equal protection
 - A conspiracy to violate her rights under the Civil Rights Act
- The District Court dismissed the case and entered judgment for the Defendants, concluding that:
 - Sovereign immunity shields most defendants.
 - Roe fails to state a “cognizable constitutional claim,” because (1) the judiciary’s reporting procedures did not deprive her of any liberty or property interest and (2) Roe’s case doesn’t constitute “tradition class-based discrimination.”
 - Roe did not plead that the defendants had a discriminatory animus under the CRA.
- Roe appealed to the Fourth Circuit.

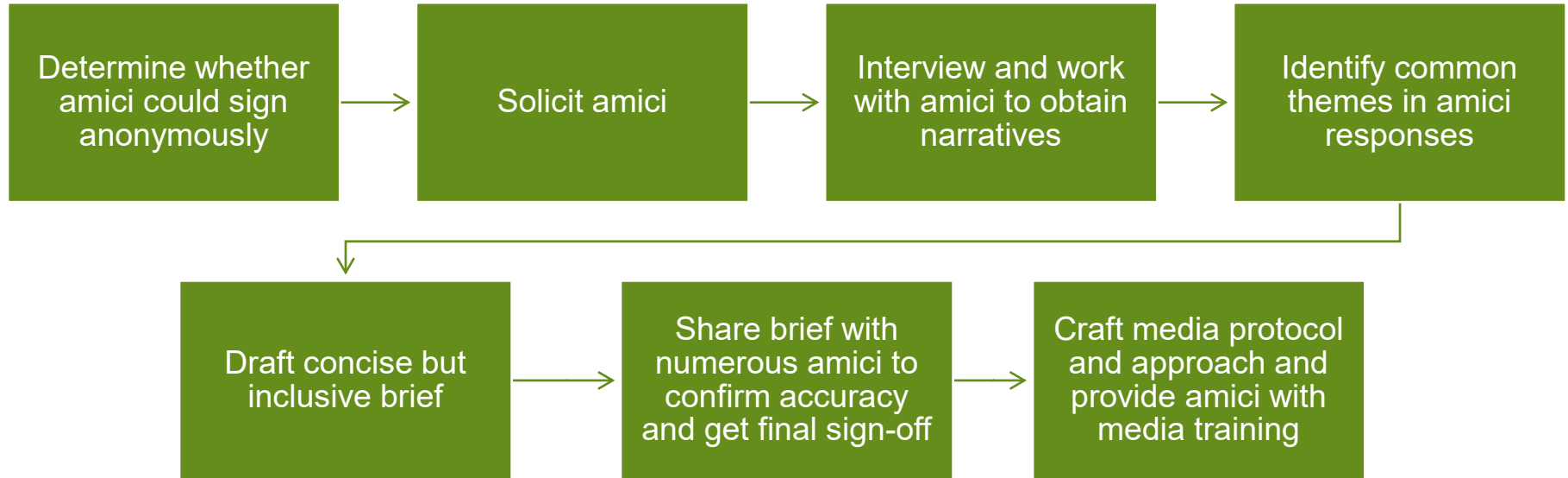
Amicus Brief

Amicus Brief Goals

- Demonstrate the pervasive nature of misconduct in the federal judiciary through the power of story-telling
- Provide a mechanism to shed light on misconduct that employees have not felt comfortable reporting
- Detail the many ways in which the current reporting procedures deprive employees—like *Roe*—of their rights
- Create support for statutory change



Amicus Brief Process



Amicus Brief Findings: Nature of Misconduct

- Discrimination and harassment of all kinds are perpetrated within the judiciary, as seen by first-hand accounts
- Employees impacted included law clerks, federal public defenders, externs, administrative staff
- Forms of harassment and discrimination ranged from explicit and overt to subtle and embedded in the culture



Amicus Brief Findings: Types of Misconduct

- **Discrimination based on sexual orientation**
- **Discrimination based on religion**
- **Race-based discrimination**

amicus recalls.²⁶ The judicial assistant also made disparaging comments about queer and Jewish individuals—this amicus is bisexual and Jewish.²⁷ “I felt persistently harassed every day and it made it really hard to show up and try to succeed at my job,” she said.²⁸

One amicus noted that at least seven of his coworkers openly acknowledged the “rampant racial discrimination” in his FPD office. This discrimination took multiple forms: attorneys of color were bullied regularly, given higher caseloads and more grunt work, deprived of opportunities to work on high profile cases, and consistently denied leave for family-related matters.¹⁹ He noted that the discrimination was subtle; instead of being overt, it was embedded in the office culture. But

Amicus Brief Findings: Types of Misconduct (cont'd)

- **Sexual harassment**
- **Discrimination based on marital status and pregnancy**
- **Abusive behavior and verbal hostility**
- **Retaliation for reporting**

for two more years.³⁰ After she disclosed her pregnancy, the permanent clerk acted in a hostile manner and privately criticized her work to the judge.³¹ When the amicus confronted her, the permanent clerk said “she was angry that [amicus] was pregnant” because “the pregnancy and the baby were going to add to [the permanent clerk’s] workload” and interfere with her personal life.³² The day after the amicus reported this abuse, the judge began looking for a new term clerk to replace amicus.

Although this section provides first-hand accounts of harassment, bullying, and discrimination, many potential amici chose not to include their accounts (even anonymously) for fear of retaliation. Nevertheless,

Amicus Brief Findings: Four Major Flaws

1. Opaque Processes

- Processes vary by circuit and district, to the extent they exist
- Cursory investigations
- Lack of guidance and communication

Amicus Brief Findings: Four Major Flaws

2. Lack of Meaningful Confidentiality, Heightened Risk of Retaliation

- Supervisors are siloed and have significant control, especially in small/isolated districts
- Retaliation is not defined and there is no remedy for it
- Retaliation can take many forms (e.g., retaliation from a “clerk” family)
- Shame and ridicule from colleagues who learned of confidential information

Amicus Brief Findings: Four Major Flaws

3. No Indicia of Impartiality

- No division between investigation, prosecution and adjudication
- Procedures typically overseen by someone who recommended, hired, or is friends with the accused
- Judges or supervisors viewing misconduct and doing nothing

Amicus Brief Findings: Four Major Flaws

4. Limited Remedies

- Lack of enforcement ability in chambers or in federal defender's office
- No follow-up
- Continued work with the accused outside of very limited circumstances

Amicus Brief Findings: Impact

- **Impact on Amici**

- Lost jobs because of retaliation
- Fear of reporting any misconduct in the future
- Compounding anxiety, depression, and PTSD
- Self-selection out of the profession
- Disproportionately affected underrepresented populations in our profession—i.e., women, people of color, other minority groups

- **Impact on Profession**

- Direct impact on diversity in clerkships and public defenders' offices
- Lack of diversity in post-clerkship pipeline
- Lack of faith in the judiciary as an institution

Amicus Brief Aftermath

- **Fourth Circuit affirmed in part and reversed in part, remanded**
 - Survived MTD on 5th Am. equal protection and property-related due process claims, not liberty interest
 - Limited recovery to prospective equitable relief (sovereign immunity)
 - Dismissed remaining claims and all against individual defendants
- **JAA Congressional Hearing**
- **Media coverage, more witnesses, and shift in tone**



Key Lessons

Lessons Learned as Counsel to Amici

- **Find creative ways to provide testimony from witnesses who fear retaliation**
- **Balance client interviews with empathy and clear questioning**
- **Concisely summarize each client's experience without diminishing or devaluing any portion of that experience or the client's agency**
 - Acknowledge the limited space up front but solicit input along the way
 - Frame experiences with precise language
- **Balance relevant analysis for case with bigger picture considerations**
- **Draft with media coverage in mind: Prepare clients early and often for potential coverage and be proactive if coverage is inevitable.**

Misconduct and Institutions

- **Harassment, abuse, and biases can take many forms – sometimes subtle or embedded discrimination can be far harder to determine or address.**
- **Misconduct is more likely to occur when perpetrators believe there are no repercussions.**
- **Misconduct can be exacerbated by the lack of bystander intervention.**
 - Many amici described a fear of reporting because they knew other supervisors or judges were aware of the misconduct but had done nothing to address it
- **The fear of retaliation should inform how institutions structure reporting.**
 - The amici who felt most comfortable signing the brief with their names or even anonymously were those least likely to face direct ramifications.

Structuring Reporting Mechanisms

- **Provide clear guidance and opportunity to ask questions with anonymity.**
 - A lack of clear, formal reporting processes and adjudication procedures disincentivizes reporting.
- **Provides multiple avenues to report and be clear about when further reporting obligations arise.**
- **Recognize that confidentiality can mean different things to people. Be proactive about defining those limits.**
- **Remove any mechanisms that could be perceived as inviting bias.**
- **Consider creative, survivor-focused remedies.**
- **Train investigators about impartiality and appropriate interview techniques.**

Lessons Learned about Creating Institutional Change

- **Cultural changes can be harder to implement than procedural changes, but will inform how effective new procedures will be.**
- **Cultural shifts require buy-in and establishment from management.**
 - Some of the most effective examples of reporting were when supervisors and judges explicitly implemented zero-tolerance and open-door policies at the outset of employment.
 - Diversity in management can also create cultural shifts because employees feel more comfortable reporting harassment and discrimination.
- **Institutions that are open to criticism and change often fare better in curbing instances of misconduct, encouraging reporting, and avoiding public concern.**
- **Our profession can often be risk-averse and adhere to the status quo; however, with issues of misconduct and bias, the status quo poses more of a risk. Good news or bad news, it's better to plan for potential misconduct.**

Questions?
