

October 15, 2007

**COMMENTS TO UNITED STATES JUDICIAL CONFERENCE,
COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
BY HALT – AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM
RE: PROPOSED RULES GOVERNING JUDICIAL CONDUCT AND DISABILITY PROCEEDINGS**

Pursuant to a request from the Judicial Conference of the United States, HALT—*An Organization of Americans for Legal Reform*, hereby submits comments on rules proposed by the Judicial Conference’s Committee on Judicial Conduct and Disability to restructure the federal judicial discipline system.

While the Judicial Conference’s proposals successfully address several problems identified by Supreme Court Justice Stephen Breyer’s Judicial Conduct and Disability Act Study Committee (“Breyer Committee”), the Judicial Conference should go further to instill the rules for federal judicial discipline with principles of transparency and accountability. In particular, we recommend that the Judicial Conference revise the Rules Governing Judicial Conduct and Disability Proceedings to include four critical reforms:

- (1) a revision to Rule 20 that would require all discipline to be formal and public, and prohibit the use of private censures and reprimands;
- (2) an amendment to Rule 23 that would clarify that complainants and witnesses are not subject to the system’s confidentiality requirement and therefore have the right to disclose information about judicial misconduct complaints and the judicial discipline process;
- (3) a modification to Rule 16 that would provide complainants with the unfettered right to attend judicial discipline proceedings; and
- (4) an amendment to Rule 12 that would require public participation on the special committees that investigate and decide complaints against federal judges.

As a nonprofit, nonpartisan public interest group dedicated to helping all Americans handle their legal affairs more simply, affordably and equitably, HALT has a strong interest in ensuring that the Rules Governing Judicial Conduct and Disability reflect real judicial accountability and clear, specific guidelines. Through the efforts of its Judicial Integrity Project, HALT has provided information and materials to members of the House Ways and Means Committee and the Senate Judiciary Committee on issues related to financial disclosure and multi-day judicial seminars. Our organization testified before the American Bar Association’s Joint Commission To Evaluate the Model Code of Judicial Conduct and served on the judicial ethics panel at the ABA Center on Professional Responsibility’s national conference last year.

We believe that the Breyer Committee's recent report and the Judicial Conference's subsequent proposals present an important opportunity to restructure a system that has been largely unchecked since Congress enacted the Judicial Conduct and Disability Act in 1980. In addition to responding to the Breyer Committee's recommendations, we hope that the Judicial Conference will take this occasion to evaluate the federal system of judicial discipline in its entirety. The Breyer Committee's suggested revisions represent a critical first step, but modern concerns about transparency and accountability in the judiciary call for more expansive and meaningful improvements. We urge the Judicial Conference to consider the following reforms, which we believe will help restore public confidence in the integrity of the federal judiciary.

I. The Judicial Conference's proposed changes to the federal judicial discipline system successfully respond to recommendations presented by the Breyer Committee.

Proposals set forth by the Judicial Conference meaningfully address critical weaknesses highlighted by the Breyer Committee, including systemic delays in processing misconduct complaints, insufficient publicity and online resources about the federal judicial discipline system, and a troubling error rate in highly visible ethics cases against members of the federal judiciary.

Among its findings, the Breyer Committee noted that the federal circuits vary considerably in the time they take to process complaints, with some circuits resolving cases in only eight days and others taking upwards of seven months on average. Indeed, Americans routinely report to our organization their frustration with a system that slowly and inconsistently responds to their complaints against unethical judges.

To address this troubling disparity and expedite the system, the Judicial Conference's proposed rules call on the circuits to follow specified timelines for processing complaints against judges. Rule 20, for example, provides that within 21 days after a special committee report filing, a subject judge must send a written response to the members of the judicial council. A petition for review, under Rule 18, must be filed within 30 days of the chief circuit judge's order. Imposing real deadlines like these represent a critical step toward cutting red tape and creating a system that brings swift and reliable justice to victims of misconduct.

Calling on the Judicial Conference to increase publicity, the Breyer Committee noted that many district courts post little to no online information about the federal judicial discipline system. In an era in which most Americans rely on the Internet as their primary research tool, it is critical that court Web sites contain comprehensive information about how to file a complaint against an incompetent or abusive judge as well as the status of such complaints.

In response to the Breyer Committee's criticism, the Judicial Conference included in its rules a mandate that every federal court Web site prominently display instructions on how to file a complaint, information about how the judicial discipline process operates and data related to discipline previously imposed. If followed in practice, this requirement will increase publicity of this critical accountability system and help demystify a process that most Americans had previously perceived to be cloaked in secrecy.

Analyzing grievances filed against federal judges over a recent five-year period, the Breyer Committee found that the resolution of 29 percent of public cases was "problematic" in some way, often because a chief circuit judge failed to adequately investigate allegations before dismissing a complaint. The Breyer Committee noted that this alarmingly high error rate presents not only a significant failing within the system, but also undermines public confidence in the federal structure for investigating complaints against dysfunctional judges.

To ensure thorough review of filed complaints, proposed Rule 5 sets forth detailed instructions for the chief circuit judge. The rules and accompanying commentary clarify that every complaint is to be identified and reviewed, with only limited exceptions. Even in instances in which the chief circuit judge questions the credibility of the complainant's allegations, proposed Rule 5 still requires that he identify and review the complaint. By instituting a reasonably low threshold during this initial phase, the Judicial Conference helps to ensure that fewer complaints will be overlooked.

While the Judicial Conference has successfully addressed many of the problems identified by the Breyer Committee, we urge the Conference to go a step further and amend its proposed Rules Governing Judicial Conduct and Disability Proceedings to include rules that will replace closed-door sanctions with meaningful public discipline, clarify that broad confidentiality rules are not intended to restrain complainants' speech, provide complainants with the right to attend judicial discipline proceedings, and support lay representation on the special committees that investigate complaints and recommend discipline.

II. The Judicial Conference should revise Rule 20 to prohibit the use of private censures and reprimands, and instead require that all discipline be formal and public.

HALT urges the Judicial Conference to revise its proposed rules to require that all discipline imposed against disreputable judges take the form of public sanctions. Private censures and reprimands should not be applied as they undermine the public's confidence in the federal judiciary and its system of discipline.

Currently, the Judicial Conference’s proposed rules authorize circuits to sanction dysfunctional federal judges with private censures and reprimands. Specifically, proposed Rule 20(b)(4)(a) provides:

Subject to the rights of the subject judge, the judicial council, acting on the basis of the report and recommendations of the special committee, may . . . take remedial action to ensure the effective and expeditious administration of the business of the courts, including but not limited to: *censuring or reprimanding the subject judge, either by private communication or by public announcement* . . . [emphasis added].

Proposed rules do not offer guidelines that prescribe when public versus private discipline should be used, nor do the rules specify that private discipline should be applied sparingly. Even when final action on a complaint has been taken and the order imposing discipline becomes a matter of public record, the proposed rules still shield the abusive judge’s identity and misconduct when informal discipline has been imposed. Rule 24(a)(3) provides that “if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.”

Closed-door censures and reprimands do little to meaningfully sanction errant judges or to deter future misconduct. Rather, this secret discipline—which amounts to little more than a slap on the wrist—leads to the perception that the judicial discipline system is shrouded in secrecy. Under current rules, federal judges, who enjoy lifetime appointments and only answerable to the federal judicial discipline system, are permitted to flagrantly abuse their power on the bench without any public accountability.

To instill the Rules Governing Judicial Conduct and Disability Proceedings with teeth and transparency, we urge the Judicial Conference to eliminate private discipline, or, at a minimum, restrict this sanction to very limited circumstances. In the rare situation in which closed-door sanctions must be used, the public record should at least reflect the facts surrounding the misconduct and the circuit’s rationale for applying private discipline.

III. The confidentiality requirements set forth by Rule 23 should not apply to complainants and witnesses.

Complainants and witnesses should be able to exercise their right to speak publicly about their complaints about federal judges, to disclose the identity of an abusive member of the judiciary and to describe their experiences with the judicial discipline system.

Unfortunately, complainants do not enjoy this right because the Judicial Conference’s proposed rules fail to explicitly exempt complainants and witnesses from the

broad confidentiality mandate. Rule 23 requires confidentiality with respect to “papers, documents and records of proceedings related to investigations conducted under this chapter.” The rules state that this information may not be disclosed “by any person in any proceeding.” Complainants and witnesses do not receive any explicit exemption.

Prohibiting a citizen from disclosing the fact that she has filed a complaint against a federal judge or describing her experience with the judicial discipline system infringes upon the right of free speech guaranteed by the Constitution of the United States.

A determination of what speech is subject to the Judicial Conference’s confidentiality requirement cannot be made without reference to the content of the speech. Courts have found similar confidentiality provisions to be content-based restrictions because they limit the “nature” of disciplinary complaints.¹ Content-based restrictions are presumptively invalid and subject to strict scrutiny.²

Under the strict scrutiny standard, the Judicial Conference has the burden to demonstrate that (1) the gag rule is necessary to serve a compelling government interest and (2) it is narrowly drawn to achieve that end.

The Judicial Conference presumably justifies the broad application of its confidentiality requirement by asserting the following three interests: (1) maintenance of the integrity of the judicial discipline system; (2) protection of judges from injuries stemming from frivolous claims; and (3) facilitation of investigations.

These interests are not sufficiently compelling to pass muster under the First Amendment. In *Landmark Communications, Inc. v. Virginia*, the United States Supreme Court struck down a judicial discipline gag rule because it found that the same grounds did not constitute “compelling interests.”³ In *Landmark*, the United States Supreme Court noted that “there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs.” The Court therefore held that “injury to official reputation is an insufficient reason for repressing speech that would otherwise be free . . . [and] the institutional reputation of the courts is entitled to no greater weight in the constitutional scales.” Facilitating investigations is certainly a worthy goal, but it does not justify muzzling complainants and depriving them of their right to free expression.

¹ See *Doe v. Doe*, 127 S.W.3d 728, 732 (2004); *Doe v. Supreme Court of Florida*, 734 F. Supp. 981, 985 (S.D. Fla. 1981); *Petition of Brooks*, 678 A.2d 140, 143 (N.H. 1996).

² See *Horizon Health Ctr. v. Felicissimo*, 135 N.J. 126, 140 (1994).

³ See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

Even if the Judicial Conference's asserted interests were compelling, the interests are not narrowly tailored to serve those interests. With regard to the maintenance of the integrity of the judicial discipline system, an enforced muzzle on disciplinary matters is more likely to engender resentment, suspicion and contempt for the federal judiciary than to promote confidence and respect.

In addition, the construction of the broad confidentiality requirement is not narrowly drawn to facilitate investigations; in fact, forcing a complainant to keep information secret may actually hinder an investigation because it may limit access to third-party witnesses unknown to the complainant—individuals who may have come forward if they only knew that a complaint had been filed.

Because the confidentiality requirement, as applied to complainants and witnesses, does not serve a sufficiently compelling government interest and is not narrowly drawn to achieve such an interest, the Judicial Conference should limit the application of its confidentiality rule to judges, employees of the judicial branch, those persons involved in recording proceedings and other internal administrators.

As many state judicial disability bodies provide in their rules, the Judicial Conference's Rule 23 should contain explicit guidance that "the rule of confidentiality shall not apply to the complainant or witnesses." See, e.g., Kansas Supreme Court Rule 607 (2006) (related to judicial conduct proceedings).

Not only do the proposed rules fail to assure complainants that they may speak freely about complaints, the Judicial Conference's requirements actually threaten to take action against a complainant who chooses to disclose information about a judicial discipline proceeding. Rule 16, which sets forth the rights of the complainant, provides: "In the exercise of discretion under this Rule, the special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge."

Comments to the rule explain that a complainant's role in the judicial discipline process may depend on how well she has preserved the confidentiality rule. If the complainant has dutifully complied with the "gag" rule and withheld information from the public about her complaint and the subsequent process, the special committee may presumably choose to reward her with the privilege of attending proceedings. In the event, however, that the complainant decides to exercise her First Amendment right to speak freely about a complaint she has filed against an incompetent or abusive judge, she could potentially be penalized and deprived of the opportunity to participate in the discipline process.

By applying the confidentiality rule to complainants and threatening them with penalties if they choose to disclose information about the discipline process, the Judicial

Conference not only violates complainants' and witnesses' rights to speak freely, but also, on a practical level, discourages citizens from filing meritorious complaints and testifying against dysfunctional judges.

We urge the Judicial Conference to amend Rule 23 by including explicit instructions that the confidentiality rule does not apply to complainants or witnesses. Further, we ask that the Conference remove language from Rule 16(e) that threatens to penalize a complainant for failing to preserve confidentiality.

IV. Rule 16 should provide that complainants should have the unfettered right to attend judicial discipline proceedings.

An individual who suffers at the hands of an abusive judge, files a formal complaint and initiates the investigation process should have the right to attend federal judicial discipline proceedings involving the subject of his complaint.

Under proposed Rule 16, individuals who file complaints against federal judges will not "ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument." Rather, a complainant may only attend parts of the proceedings at the special committee's discretion.

A victim would never be prohibited from sitting in on a trial in the criminal justice system; there is no reason to bar complainants from disciplinary hearings. From a practical point of view, the complainant may not be able to reasonably respond to the subject judge's position or allegations if the complainant is not privy to the judge's testimony or other evidence presented during the proceedings.

In addition, without the ability to observe the proceedings, the complainant is deprived of much of the information necessary to prepare a petition for review. Rule 18(a) permits complainants who are "aggrieved by an order of the chief circuit judge" to challenge the chief judge's decision through a petition for review. Further, Rule 18(b) provides that the petitioner should "state the reasons why the petition should be granted." Because the proposed rules do not give the complainant the opportunity to monitor the way in which the proceedings are being conducted, she is at a significant disadvantage when attempting to demonstrate why a chief circuit judge's order should be reconsidered.

Further, rules that exclude a complainant from most of the proceedings have the effect of deterring individuals from submitting meritorious ethics complaints against incompetent and abusive judges. Knowing that his role during the proceedings would be limited and that he would not likely be given the chance to evaluate whether his complaint was properly investigated and resolved, many prospective complainants would not be particularly inclined to initiate the judicial discipline process.

Most importantly, in an era that places a premium on principles of sunshine, it is critical that the federal judicial discipline mechanism open proceedings to the public. The self-regulated nature of the system calls for some level of participation and observation by non-judges (see Section V below) to ensure that the system is operating fairly and impartially. While the Judicial Conference remains convinced that most judicial discipline proceedings may not be held before the general public, at a minimum, the individual who filed the complaint against the subject judge and initiated the investigation, should have the right to attend the proceedings.

We urge the Judicial Conference to revise Rule 16 to provide complainants with an unfettered right to attend all judicial discipline proceedings.

V. The Judicial Conference should revise Rule 12 to include lay persons on the special committees that investigate and decide cases against federal judges.

Non-judges should be required to serve alongside judges on the special committees that conduct fact-finding proceedings and recommend discipline for incompetent and abusive federal judges. Unfortunately, the Judicial Conference's proposed rules do not permit lay persons to hear and decide misconduct cases against federal judges. Instead, proposed Rule 12(a) establishes that the special committees:

... must consist of the chief circuit judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge or magistrate judge, the district judge members of the committee must be from districts other than the district of the subject judge.

It is noteworthy that if the complaint concerns a court of appeals judge, the rules do not require that the circuit judges be from districts other than that of the subject judge. Commentary to Rule 12 does not explain why special committees consist only of judges or whether any consideration has ever been given to including lay persons on the committees that investigate and decide federal judicial discipline cases.

The insular nature of the federal judicial discipline system, as set forth by the Judicial Conference's proposed rules, is particularly striking in light of the fact that nearly every other professional regulatory body relies on some level of outside lay participation. Nearly every state mandates that lay persons participate on the panels that decide lawyer discipline cases. And several states, including Alaska, Arizona, Maine, Maryland, New

Hampshire and South Carolina, require non-judges and non-lawyers to serve on the commissions that hear complaints against state and local judges.⁴

Self-regulation without any public check invites the real danger of biased decision-making. Indeed, the Breyer Committee acknowledged, “[A] system that relies for investigation solely upon judges themselves risks a kind of ‘guild favoritism’ through inappropriate sympathy with the judge’s point of view or de-emphasis of the misconduct problem.”⁵

Even when the judges serving on special committees are able to overcome “guild favoritism,” the wholly self-regulated nature of the federal judicial discipline system creates the appearance of impropriety and undermines public confidence in the judiciary. As the Honorable Abner J. Mikva, former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit and Counsel to the President, stressed, “For the system to work as it should, the judges must *be perceived* to be honest, to be without bias, to have no tilt in the case that is being heard.”⁶ Without any public participation in the process, the system fails to be perceived as fair and independent.

To help ensure impartiality in the discipline process and restore public trust in the federal judiciary, we urge the Judicial Conference to amend Rule 12 to require qualified lay persons to serve with judges on the special committees that investigate complaints and recommend discipline against dysfunctional federal judges.

Conclusion

HALT respectfully requests that the Judicial Conference’s Committee on Judicial Conduct and Disability amend the proposed rules to reflect modern concerns about transparency and accountability in our judicial system.

We urge the Judicial Conference to revise its rules to replace private censures and reprimands with formal public discipline, to clarify that complainants and witnesses are not

⁴ See, e.g., Alaska Judicial Conduct Committee Rule 1(e) (2007); Arizona Commission on Judicial Conduct Committee Rule 3(d) (2007); Maine Committee on Judicial Responsibility and Disability Rule 2(c) (2007); Maryland Rule 16-804(e) (2007); New Hampshire Supreme Court Rule 39(2)(a)(4) (2007); and South Carolina Appellate Court Rule 502, Part 2(u) (2006).

⁵ See [*Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*](#), 239 F.R.D. 116 (September 2006) (“Breyer Committee Report”), page 1.

⁶ Mikva, Abner J., *Nothing For Free*, Forward (Community Rights Counsel, July 2000).

subject to the discipline system's confidentiality requirement, to provide complainants with the unfettered right to attend judicial discipline proceedings and to require public participation on the special committees that investigate and decide complaints against federal judges.

In making these important amendments, the Judicial Conference can instill the Rules Governing Judicial Conduct and Disability Proceedings with guidelines that restore public confidence in the impartiality and integrity of the federal judiciary.

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