

# THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Suite 900  
1815 N. Fort Myer Drive  
Arlington, VA 22209-1817  
(703) 807-2100

rcfp@rcfp.org  
http://www.rcfp.org

Lucy A. Dalglish  
Executive Director

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May 14, 2004

## Via Facsimile and First-Class Mail

Mr. Stephen Townsend  
Clerk of the Court  
New Jersey Supreme Court  
Hughes Justice Complex  
POB 970  
Trenton, NJ 08625-0970

### **Re: Request for Public Comments on Rule 1:20-9**

Dear Mr. Townsend:

The Reporters Committee for Freedom of the Press ("Reporters Committee") submits these comments on Court Rule 1:20-9 in response to the request of the New Jersey Supreme Court Professional Rules Responsibility Committee (PRRC). Rule 1:20-9 imposes a gag order of broad scope and potentially unlimited duration upon those who file grievances against attorneys for alleged ethical violations.

We are grateful for the opportunity to be heard on this important subject. As discussed below, we believe Rule 1:20-9 imposes an unconstitutional prior restraint on legitimate discussion of governmental proceedings – namely, the work of the ethics committees that handle complaints against attorneys under the purview of the New Jersey Supreme Court. Free discussion of public affairs is precisely what the First Amendment to the United States Constitution is meant to protect. In addition, the blanket gag order embodied in the rule is unnecessary and counterproductive as a matter of policy. We therefore urge the PRRRC to follow the example of other states and rescind Rule 1:20-9.

### **Interest of Signatory**

The Reporters Committee is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Committee assists journalists by providing free legal information via a hotline and by filing *amicus curiae* briefs in cases involving the interests of the news media. It also produces

several publications to inform journalists and media lawyers about media law issues, including a quarterly magazine, *The News Media and the Law*, and a biweekly newsletter, *News Media Update*.

Because gag orders and other forms of prior restraint diminish the amount of publicly available information for the news media to report, the Reporters Committee has a strong interest in opposing such measures.

### **Factual Background**

In what is presumably an effort to shield attorneys from reputational damage caused by unjustified allegations of misconduct, Rule 1:20-9 provides that, with certain exceptions,<sup>1</sup> “Prior to the filing of a service of a complaint in a disciplinary matter, or the approval of a motion for discipline by consent, the disciplinary matter and all written records received and made pursuant to these rules [the rules governing ethics complaints against attorneys] shall be confidential.” R. 1:20-9(a).

Likewise, subsection (h) imposes a “Duty to Maintain Confidentiality” upon those who file attorney grievances, as well as the other participants in attorney disciplinary proceedings: “All disciplinary system officials, employees and all participants in a proceeding under these rules shall maintain the confidentiality mandated by this rule, including compliance with any protective order.” R. 1:20-9(h). In keeping with that directive, the Office of Attorney Ethics warns:

Disciplinary investigations are confidential. If a complaint is issued, the matter becomes public. Under Supreme Court Rules, once you file a grievance, you are required thereafter to keep all communications regarding the ethics matter confidential, until the filing of a complaint. You are free to complain about the lawyer to other bodies or to discuss your dissatisfaction with others. You simply may not disclose the fact that you have filed an ethics grievance against the lawyer.

“Information About Grievance Procedures and Discipline of Lawyers,” available at [www.judiciary.state.nj.us](http://www.judiciary.state.nj.us).

Thus, a person filing a grievance against an attorney must keep quiet about every aspect of the grievance proceeding, including its very existence, until and unless the District Ethics Committee to which the grievance is referred issues a complaint against the attorney.

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<sup>1</sup>The exceptions apply if, among other things, the attorney has waived confidentiality or the matter has already become “common knowledge” to the public. R. 1:20-9(a)(1)-(5).

But only a tiny minority of grievances result in the issuance of a complaint: In 2002, for example, approximately 6,900 written inquiries were submitted to the Office of Attorney Ethics in New Jersey. Of these, only 1,472 were deemed worthy of being docketed, and only 182 – less than 3 percent of the initial inquiries – led to the issuance of a formal complaint. *See* Office of Attorney Ethics, *2002 State of the Attorney Discipline System Report*, at 102. In short, if you file a grievance against an attorney in New Jersey, you should assume that you will never be permitted to speak publicly about the action.

## **Analysis**

In our judgment, the broad gag order imposed by Rule 1:20-9 both violates the First Amendment and constitutes a deeply flawed public policy. Rejecting any number of less draconian alternatives, the rule unlawfully bans all speech regarding the functioning of a certain type of governmental proceeding, essentially immunizing those bodies from criticism. The rule also effectuates a counterproductive policy that will inevitably lead to skepticism and distrust of the legal system.

### **I. Rule 1:20-9 violates the First Amendment.**

Undeniably, Rule 1:20-9 imposes a content-based restriction on speech. The rule bars people from speaking at all about a particular subject – attorney disciplinary proceedings. Every court to address the issue has agreed that this type of restriction is content-based. *See, e.g., Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004) (“A determination of what speech is subject to the confidentiality requirement [in attorney disciplinary proceedings] cannot be made without reference to the content of the speech.”); *accord* *Petition of Troy E. Brooks*, 678 A.2d 140 (N.H. 1996) (attorneys); *Baugh v. Judicial Inquiry and Review Comm’n*, 907 F.2d 440 (4<sup>th</sup> Cir. 1990) (judges); *Providence Journal v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (public officials); *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990) (attorneys).

Content-based restrictions are presumptively unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Under the strict scrutiny test, they are permissible only if the state proves that (1) the restriction is necessary to serve a compelling state interest and (2) it is narrowly tailored to achieve that end. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 198 (1992). Rule 1:20-9 meets neither standard.

#### **A. Rule 1:20-9 serves no compelling state interest.**

The only apparent purpose served by a gag order involving attorney disciplinary proceedings is to protect lawyers from frivolous or unproven allegations. But this interest, while perhaps legitimate to some degree, is hardly the type of “compelling state interest” to

justify content-based restrictions on speech.

In analogous circumstances, the U.S. Supreme Court has held that protecting the judiciary from reputational damage is not a compelling state interest: “Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (internal quotations omitted).

In the specific context of attorney disciplinary proceedings, lower courts have rejected the notion that preventing reputational damage is a compelling state interest. *See Doe v. Supreme Court of Florida*, 734 F. Supp. 981, 986 (S.D. Fla. 1990) (“If maintaining the reputation of the judiciary as an abstract end is insufficient to justify encroaching upon the robust exercise of free speech, then maintaining the reputation of lawyers or the Bar is, in our view, equally insufficient.”); *Doe v. Doe*, 127 S.W.3d at 734 (explicitly finding that protecting the reputation of lawyers is not a “compelling” state interest); *Brooks*, 678 A.2d 140, at 144-145 (same).

Further, to contend that insulating members of the bar from public criticism is a compelling state interest ignores the fact that, to our knowledge, New Jersey law accords no such treatment to other professions. Doctors, dentists, nurses, pharmacists, CPAs, engineers, architects, and numerous other occupations do not receive the benefit of a government-imposed confidentiality requirement whenever complaints are lodged against them. To suggest that it is uniquely important for the state to protect attorneys is disingenuous.

**B. The rule is not narrowly tailored to advance the purported interest it serves.**

Even if protecting lawyers from undeserved reputational damage *were* a compelling state interest, the blanket gag order imposed by Rule 1:20-9 goes far beyond what is necessary to further that goal.

First, consider cases in which an individual files a grievance that is ultimately either dismissed after an investigation; or not docketed in the first place, because the allegations, even if proven, would not result in an ethical violation. *See* R. 1:20-3(h) and 1:20-3(e)(3). As noted, more than 95 percent of grievances fell into one of these categories in 2002, the last year for which data are available.

Common sense indicates that letting people speak about grievances that have been

officially discredited will cause no significant harm to a lawyer's reputation. Thus, it is hard to see what a gag order accomplishes in such circumstances, except to prevent the grievant from criticizing the work of the ethics committee. But that is precisely the kind of criticism of government that lies at the heart of the First Amendment. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

A gag order is equally misguided – perhaps even more so – in cases in which the attorney has admitted to "minor misconduct," causing the matter to be "diverted" without the issuance of a complaint. See R. 1:20-3(i)(2). In such cases, the allegations are not baseless, and yet the grievant is still forbidden from speaking about the proceeding. The result is the suppression of *truthful* speech about misconduct by officers of the court:

The idea that the suppression of truthful criticism of lawyers would somehow enhance or protect the reputation of the bar is not persuasive. To the contrary, continuing the prohibitory effect of the Rule after a grievance against an attorney is found to be meritorious is far more likely to engender suspicion than foster confidence.

*Doe*, 734 F. Supp. at 988.

In *Doe*, therefore, the federal district court found that a confidentiality requirement in attorney disciplinary proceedings "goes too far" because it "continues to bar forever publication by the complainant, even after the Bar has found a grievance to be well founded and has reprimanded the attorney in question." *Id.* at 987. The Tennessee Supreme Court recently arrived at the same conclusion. See *Doe v. Doe*, 127 S.W.3d at 735 ("Assuming *arguendo* that protection of reputation from frivolous complaints constitutes a compelling state interest, a confidentiality provision precluding the disclosure of both frivolous and non-frivolous complaints is not sufficiently narrowly tailored to meet such interest."). The same is true of Rule 1:20-9.

Rule 1:20-9 fails the strict scrutiny test for the additional reason that there are many less restrictive options to protect attorneys from the supposed harmful effects of frivolous allegations. These include protective orders, libel and defamation law, or (in exceptional cases) gag orders of limited duration and scope. Clearly, a presumptive gag order of broad scope and potentially everlasting duration is not "narrowly drawn" to achieve its alleged ends. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

For these reasons, we submit that Rule 1:20-9 clearly violates the First Amendment.<sup>2</sup> It is a broadly-drawn, content-based prohibition on speech concerning governmental proceedings – a classic example of a First Amendment violation.

## **II. The rule is deeply flawed as a matter of public policy.**

Rule 1:20-9 also establishes an unsound, counterproductive public policy. By silencing critical speech about the work of attorney ethics committees, the rule essentially exempts those bodies from the public scrutiny to which society's institutions are usually subject. Unfair rulings cannot be criticized, good decisions cannot be praised, and the vast majority of those who file attorney grievances can never discuss the experience, even for constructive purposes.

As the Supreme Court recognized in *Landmark*, suppressing speech in the name of enhancing an institution's stature usually has the opposite effect:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

*Landmark*, 435 U.S. at 842 (quoting *Bridges v. California*, 314 U.S. 252, 270-71 (1941) (Black, J., dissenting)).

Whether Rule 1:20-9 is intended to insulate lawyers or members of the ethics committees (or both), its likely effect is simple – to foster a climate of secrecy and suspicion regarding attorney disciplinary proceedings. When all but a few ethical grievances are resolved behind closed doors, and those who bring them are told never to speak of it again, the public has little choice but to doubt the integrity of the system. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from seeing.”).

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<sup>2</sup>We do not address whether the rule also violates Article I, Paragraphs 6 and 18 of the New Jersey Constitution. We note, however, that the New Jersey Supreme Court has held that its state constitution confers free-speech rights that are “broader than practically all others in the nation.” See *Green Party of New Jersey v. Hartz Mountain Indus., Inc.*, 752 A.2d 315, 325 (N.J. 2000).

Moreover, it should be noted that a number of other states permit far greater openness in attorney disciplinary proceedings, to no apparent harmful effect. As detailed above, courts in Tennessee, New Hampshire, and Florida have struck down as unconstitutional rules imposing gag orders on grievants in such cases. *See Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004); *Petition of Troy E. Brooks*, 678 A.2d 140 (N.H. 1996); *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990). The Texas Ethics Commission has concluded that such restrictions are unconstitutional as well. *See* Ethics Advisory Opinion No. 8 (April 23, 1992) (available at [www.ethics.state.tx.us](http://www.ethics.state.tx.us)). Other states, such as Oregon and West Virginia, have established affirmative rights of public access to the records of attorney disciplinary proceedings, including during the investigate stage. *See* Oregon State Bar Rule of Procedure 1.7(b) (available at [www.osbar.org](http://www.osbar.org)); West Virginia Rules of Lawyer Disciplinary Procedure 2.6, 2.9 (available at [www.wvbar.org](http://www.wvbar.org)) (right of public access to records at the complaint stage, and to confirm or deny the existence of a proceeding at the investigative stage).

There is no reason to suspect that the state bars in these states have been somehow tarnished by the greater availability of attorney disciplinary records. To the contrary, the public will ultimately have more confidence in the integrity of the legal system if it is satisfied that the attorney disciplinary process is open and accountable.

### **Conclusion**

For the above-stated reasons, we urge the committee to rescind the blanket gag order embodied in Rule 1:20-9. The rule imposes a constitutionally offensive prior restraint on speech, it squelches legitimate debate about the merits of the attorney disciplinary system, and it fosters public distrust of the legal system. We respectfully suggest that a far better approach would be to impose no presumptive restrictions at all on the free-speech rights of grievants, with the understanding that ethics committees may craft narrow protective orders in the rare cases where it is justified. In the vast majority of cases, however, the public should be trusted to differentiate between substantiated and unsubstantiated allegations of misconduct, as it does in virtually all other facets of our legal system.

Respectfully submitted,

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Lucy A. Dalglish, Esq.  
Executive Director

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James A. McLaughlin, Esq.  
McCormick Tribune Legal Fellow

The Reporters Committee for Freedom of the Press  
1815 North Fort Myer Drive  
Suite 900  
Arlington, VA 22209  
(703) 807-2100