COMMENTS OF
HALT – *AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM* TO
NEW JERSEY SUPREME COURT
PROFESSIONAL RESPONSIBILITY RULES COMMITTEE
RE: PROPOSED CONFIDENTIALITY RULE 1:20-9

Pursuant to a request from the New Jersey Supreme Court's Professional Responsibility Rules Committee, HALT – *An Organization of Americans for Legal Reform* hereby submits comments urging the PRRC to issue clear guidance in the rules' commentary and instruct that the confidentiality provision of Supreme Court Rule 1:20-9 should be construed to apply strictly to disciplinary officials, not to grievants.

Unfortunately, Rule 1:20-9(a) is currently being construed to prohibit all individuals, including grievants, from speaking publicly about the fact that they have filed a complaint against an attorney. This application poses a prior restraint on speech, in violation of both the First Amendment of the United States Constitution and the first article of the New Jersey Constitution.

The confidentiality requirement, as applied to grievants, fails to serve a compelling state interest and even if the asserted interest were compelling, the rule is not narrowly tailored to accomplish that purpose. In addition, a gag rule imposed on the general public undermines New Jersey's long-established reputation of openness and government oversight.

In view of these concerns, we urge the PRRC to add commentary with clear instructions that Rule 1:20-9(a) is not intended to silence grievants from disclosing information about their complaints against attorneys.

Although we believe that additional commentary would be sufficient to correct any misapplication of the rule, we urge the PRRC to consider amending Rule 1:20-9(a) so that the scope of the confidentiality requirement is completely clear. An amendment stating that Rule 1:20-9(a) strictly applies to disciplinary personnel would achieve an important balance between ensuring thorough investigations and permitting grievants to exercise their constitutional right to free speech.

I. As Currently Construed, Rule 1:20-9(a) Intrudes on the Right of Free Speech Guaranteed by the Constitutions of the United States and New Jersey.

The PRRC must issue clear guidance that Supreme Court Rule 1:20-9(a) should not be construed to support a gag rule that deeply offends the right to free speech. Rule 1:20-9(a) provides:

> Confidentiality. Prior to the filing and 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 shall be confidential . . . .

On its face, the rule appears to simply require that disciplinary officials keep information about a disciplinary matter classified unless and until the matter reaches a particular stage. However, as applied, the rule is currently also operating to silence *grievants* during this period. Indeed, on its grievance form, the Office of Attorney Ethics indicates that Rule 1:20-9(a) should be construed as prohibiting citizens from telling anyone that they have filed a grievance:

> **INVESTIGATIVE CONFIDENTIALITY**: Under Supreme Court Rule 1:20-9(a), once you file this grievance form you are REQUIRED thereafter to keep all communications about this ethics matter CONFIDENTIAL during the investigation until and unless a complaint is issued and served. Only at that time does confidentiality end and the matter become public. This investigative confidentiality does not prevent you from discussing the facts underlying your grievance with, or reporting them to, any other person or agency. However, during the investigation you may not disclose the fact that you have filed an ethics grievance to persons other than members of the attorney disciplinary system, except to discuss the case with other witnesses or to consult an attorney. [capitalization in original]

Although the confidentiality rule on the books appears to apply to internal disciplinary officials, the grievance form clarifies that the rule should be construed to apply to grievants as well. If anything, disciplinary officials appear to have wider latitude than individual citizens to divulge information. Under five circumstances, the Director of the Office of Attorney Ethics may, at his discretion, disclose information related to the "pendency, subject matter, and status of a grievance," yet the current construction of Rule 1:20-9(a) dictates that *under no circumstances* may a grievant disclose any information about a grievance that he or she has filed.

A. As a content-based restriction on speech, the current construction of Rule 1:20-9(a) is "presumptively invalid" and subject to strict scrutiny.

Prohibiting a citizen from disclosing the fact that she has filed a disciplinary grievance against an attorney infringes upon the right of free speech guaranteed by both the Constitution of the United States and the Constitution of New Jersey. The First Amendment of the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech . . . ." The first article of the New Jersey Constitution provides, "Every person may freely speak, write and publish his sentiments on all

subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

A determination of what speech is subject to the 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 complaints. 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). Content-based restrictions are presumptively invalid and subject to strict scrutiny. See *Horizon Health Ctr. v. Felicissimo*, 135 N.J. 126, 140 (1994).

B. The current construction of Rule 1:20-9(a) fails to serve a compelling state interest and is not narrowly tailored to meet asserted interests.

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

Like many disciplinary authorities in the past, New Jersey's disciplinary body presumably justifies the broad application of its confidentiality requirement by asserting the following four interests: (1) maintenance of the integrity of the disciplinary system; (2) protection of lawyers from injuries stemming from frivolous complaints; (3) facilitation of investigations; and (4) encouragement of the filing of complaints and cooperation of witnesses.

These interests are not sufficiently compelling to pass muster under the First Amendment. In an analogous case related to judicial discipline complaints, the United States Supreme Court struck down a disciplinary gag rule similar to the one still on the books in New Jersey because it found that the same grounds did not constitute "compelling interests." See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). 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." *Id*. at 839. 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." *Id*. at 842. Facilitating investigations and encouraging complaint-filing are certainly worthy goals, but they do not justify muzzling grievants and depriving them of their right to free expression.

Even if the disciplinary authority'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 disciplinary system, an enforced muzzle on

disciplinary matters is more likely to engender resentment, suspicion and contempt for the Office of Attorney Ethics than to promote confidence and respect.

Assuming arguendo that protection of reputation from damage caused by frivolous complaints may justify restriction of a grievant's right to expression, broad construction of Rule 1:20-9(a) prohibits more speech than is necessary by preventing disclosure of well-founded complaints as well. In the same way that the United States Supreme Court held that a confidentiality requirement does not improve the reputation of judges, a rigid gag rule does nothing to ameliorate a longstanding American distrust of lawyers. See "Lawyers and the Legal Profession," Columbia Law Survey (2002) (showing that two-thirds of Americans do not believe lawyers are even "somewhat" honest).

In addition, the construction of Rule 1:20-9(a) is not narrowly drawn to facilitate investigations; in fact, forcing a grievant to keep information secret may actually hinder an investigation because it may limit access to third-party witnesses unknown to the grievant—individuals who may have come forward if they only knew that a complaint had been filed.

Finally, application of the rule to grievants does not necessarily encourage complaint-filing or protect witnesses. In fact, a complainant may be less inclined to file a grievance against his lawyer if he knew that in doing so he may be forever barred from speaking publicly about the grievance. When an individual files a complaint against an attorney, he does not do so to receive monetary compensation—indeed, disciplinary rules do not provide for reimbursement. Rather, part of the incentive to file a complaint against an unethical attorney is to be able to protect future consumers. A grievant is unable to do this if he lacks the power to inform others that he has filed a complaint. In addition, the unclear application of the rule likely causes complainants to refrain from discussing any aspect of the complaint, including the underlying misconduct. Broad application of the gag rule is far more prone to deter, rather than encourage, complaint filing. An expansive construction of Rule 1:20-9(a) is not justified by compelling interests, and the asserted interests are not narrowly tailored by the language of the rule.

C. The vast majority of states place no restrictions on complainants' speech.

To our knowledge, no state supreme court has upheld a disciplinary gag rule upon a grievant's challenge. In fact, the modern trend has seen several states, including Tennessee, Florida and New Hampshire, strike down their confidentiality requirements on free speech grounds.

As recent as three months ago, a state supreme court held that a gag rule violated the guarantee to free speech. On its face, Tennessee's confidentiality rule—like New Jersey's confidentiality rule—appeared to merely gag disciplinary officials from

disclosing information about a grievance. Section 25 of rule 9 of Tennessee Supreme Court Rules provided:

> All proceedings involving allegations of misconduct by or the disability of an attorney, including all information, records, minutes, files or other documents of the Board, Hearing Committee Members and Disciplinary Counsel are deemed to be non-public records. All such information, records, minutes, files or other documents shall be kept confidential and privileged until and unless: (a) a recommendation for the imposition of public discipline is filed with the Supreme Court by the Board . . . . Tenn. Sup. Ct. R. 9 § 25.

In *Doe v. Doe*, 127 S.W.3d 728, 731 (2004), the Tennessee Court interpreted section 25 to mean that:

> [a]ttorney disciplinary proceedings are confidential until and unless a recommendation for the imposition of public discipline is filed with the Supreme Court by the Board. Public discipline means public censure, suspension or disbarment . . . . Thus, section 25 prohibits a complainant from disclosing that he or she filed a complaint with the Board against the attorney. *Id.*

The Tennessee Court did not find the disciplinary body's asserted interests—protecting the complainant from recriminations, protecting attorneys from unsubstantiated charges prior to an investigation, and protecting public confidence in the judicial system—to be sufficiently compelling and did not conclude that the disciplinary authority's asserted interests were narrowly drawn. *Id*. at 732-33. As a result, the Court overturned Tennessee's gag rule and is currently accepting comments from the public on how to reframe a constitutionally permissive confidentiality rule.

New Hampshire also recently struck down its disciplinary gag rule. See *Petition of Brooks,* 678 A.2d 140, 143 (N.H. 1996). New Hampshire's rule prohibited grievants from disclosing information until the disciplinary body publicly filed an attorney's response to allegations. R. S. Ct. N.H. 37(20)(a)(2). The New Hampshire Supreme Court held that the gag rule reached "speech traditionally accorded the most solicitous protection of the first amendment; namely, criticism of the government's performance of its duties." *Id*. Relying on the United States Supreme Court's ruling in *Landmark*, the New Hampshire Court found the asserted interests of "protecting an attorney's reputation" and "maintaining the integrity of the profession" less than compelling. *Id.*

While the New Hampshire Court recognized that attorneys were not public officials to the same degree as judges, the Court noted that "the fundamental importance of the First Amendment, combined with the role of attorneys as officers of the court,

compels the application of similar principles…with respect to the issues in this case." *Id.* at 144-45. Even if the asserted interest in "protecting the anonymity of complaints" were compelling, the Court concluded that the same interest "'could be advanced by permitting, rather than requiring, confidentiality.'" *Id.* at 145 quoting *Butterworth v. Smith*, 494 U.S. at 633. In addition, the Court noted that breaches of proper confidentiality provisions could be deterred through defamation statutes. *Id.*

In *Doe v. Supreme Court*, the Florida Supreme Court also struck down a gag rule that admonished all parties for disclosing information concerning disciplinary proceedings. See *Doe v. Supreme Court*, 734 F. Supp. 981, 985 (S.D. Fla. 1981). The Florida Court rejected the bar's argument that its confidentiality requirement merely amounted to a content-neutral time, place and manner restriction because the restriction forbids the very "nature" of the complaint. In addition, the Court held that the "absolute bar" on communications regarding grievances did not leave alternative avenues in which the information could be disseminated. *Id.* at 985. As a result, the Florida Supreme Court overturned a gag rule that closely resembles New Jersey Rule 1:20-9(a).

Upon challenges by grievants, state supreme courts across the country have struck down a variety of confidentiality requirements that bar complainants from disclosing information related to their grievances. Furthermore, most jurisdictions, including California, the District of Columbia and Massachusetts, have never barred citizens from speaking publicly about complaints against attorneys. For example, California Business and Professions Code section 6086.1(b) provides: "All disciplinary investigations are confidential until the time that formal charges are filed . . . ." On its face, the rule appears similar in nature to New Jersey Rule 1:20-9(a). However, California's confidentiality requirement only applies to disciplinary officials; an individual who files a complaint may disclose any truthful information about a complaint to whomever she chooses.

New Jersey is one of only a tiny remaining handful of states that continues to deprive grievants of their right to free expression by prohibiting them from speaking publicly about their complaints. During this period of disciplinary rule review, the PRRC should take the opportunity to rectify this significant constitutional violation by providing clear instructions that Rule 1:20-9(a) does not apply to grievants.

II. The Current Construction of Rule 1:20-9(a) Undermines New Jersey's Long-Established Traditions of Fairness and Sunshine.

In addition to intruding on the constitutional right to free speech, the current application of Rule 1:20-9(a) chips away at the very principles of evenhandedness and openness for which New Jersey has established a longstanding reputation.

A. Application of Rule 1:20-9(a) to grievants fosters a perception of bias in the disciplinary process.

As applied, Rule 1:20-9(a) prohibits grievants from disclosing information about a disciplinary matter unless and until formal charges are filed, but the rule allows the respondent lawyer to waive confidentiality. See N.J. Supreme Court R. 1:20-9(a)(1). If a lawyer chooses to waive confidentiality, the Director of the Office of Attorney Ethics has the discretion to disclose the "pendency, subject matter, and status of a grievance." *See id*. However, under no circumstances may a grievant disclose information about her grievance. A lawyer has every right to air his side of the story, but the grievant is barred from ever saying anything about the complaint unless and until the disciplinary agency decides to issue formal charges. This unbalanced policy promotes a perception of bias and favoritism in the disciplinary process and discourages victims from filing complaints.

The self-regulated nature of New Jersey's disciplinary body further promotes a public perception of the discipline system as unfair and complainant-adverse. HALT's 2002 Lawyer Discipline Report Card reveals that two out of every three members of a panel presiding over a lawyer discipline hearing are lawyers themselves. HALT's members inform us that they feel they face a long set of odds when their case against an attorney is heard by a lawyer-controlled panel. For thirty years, American Bar Association commissions, headed by former Supreme Court Justice Tom Clark, leading scholar Robert McKay and other nationally renowned ethics experts, have found that self-regulation often leads to an inherent, and certainly a perceived, bias in the disciplinary decision-making process.

If there is any bias in the system, a grievant is without options under New Jersey's rules. When a district ethics committee rejects a grievance, the grievant has no appeal. Without the opportunity for an appeal, a grievant has no forum for redressing what she believes to be a legitimate infraction of the disciplinary rules. She may not submit a letter to the editor of a local newspaper, nor may she inform her local representative about the fact that complaints have been filed against a particular law firm. She may not even tell a family member or friend about her situation, unless the family member or friend also happens to be a witness to the misconduct. As a result, the complainant has no alternative forum for airing her grievance. Broad application of Rule 1:20-9(a) fosters the perception that the disciplinary system favors lawyers and offers up only lip service to consumer protection.

B. Application of Rule 1:20-9(a) to grievants undermines public confidence by imposing an unnecessary shroud of secrecy on disciplinary proceedings.

Broad application of the disciplinary gag rule runs contrary to New Jersey's history which favors principles of sunshine and participation in government affairs.

Notably, New Jersey was one of the first states to enact an Open Public Meetings Act, which provides in part:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society . . . . N.J.S.A. 10:4-7 (2004).

By preventing people from speaking candidly about their experiences with the Office of Attorney Ethics, broad application of Rule 1:20-9(a) has insulated the disciplinary authority from public criticism and adopted a policy that is diametrically opposed to the legislature's strong preference for open government.

As applied to grievants, Rule 1:20-9(a) also conflicts with the principles behind New Jersey's whistleblower statute. New Jersey's Conscientious Employee Protection Act (CEPA) prohibits employers from taking retaliatory action against an employee for internally or publicly disclosing an unlawful or improper activity or policy of an employer. See N.J. Stat § 34:19-3 (2004). The New Jersey Supreme Court has held that the purpose of CEPA is to protect and encourage individuals to report illegal or unethical activities and "to discourage public and private sector employers from engaging in such conduct." *Mehlman v. Mobil Oil Corp.,* 153 N.J. 163 (1998).

In silencing grievants, New Jersey's confidentiality requirement disregards the goals set forth in CEPA. When grievants are barred from telling anyone whether their complaints are being reviewed, the public loses its watchdog on the attorney disciplinary system. There is simply no way of knowing whether the Office of Attorney Ethics is routinely dismissing cases, favoring a particular lawyer or law firm, giving short shrift to legitimate complaints or regularly making secret pleas with unethical lawyers rather than implementing meaningful discipline. Broad application of Rule 1:20-9(a) effectively obviates the purpose behind New Jersey's whistleblower statute.

Considerations of fairness and New Jersey's tradition of sunshine and government oversight demand that grievants be permitted to speak publicly about complaints they have filed against New Jersey attorneys.

III. HALT's Recommendations to the Professional Responsibility Rules Committee

Rule 1:20-9(a) demands clear commentary by the PRRC. As construed, the rule currently applies to all individuals, including grievants. Because this application infringes on the right to free speech and conflicts with New Jersey's tradition of openness and government oversight, the PRRC should issue precise guidance that Rule 1:20-9(a) is only intended to reach internal disciplinary staff.

Although we believe that additional commentary would be sufficient to correct any misapplication of the rule, we urge the PRRC to consider also amending Rule 1:20-9(a) so that the scope of the confidentiality requirement is completely apparent.

A. Provide clear instruction in the Commentary that Rule 1:20-9(a) does not bar grievants from disclosing information about a complaint.

Unfortunately, Rule 1:20-9(a) is being construed to deprive grievants of their right to free speech. To clarify that the rule applies strictly to disciplinary officials, the PRRC should provide the following instructions in the commentary to Rule 1:20-9:

> *Subparagraph (a), which requires confidentiality during the investigatory stage of a disciplinary matter, applies to members of the Office of Attorney Ethics. Staff members may not disclose information about a disciplinary matter or related written records until the filing and service of a complaint in a disciplinary matter, or a motion for final or reciprocal discipline, or the approval of a motion for discipline by consent. All other individuals, including grievants, witnesses and respondents, may freely discuss the matter, including information related to the alleged underlying misconduct and the fact that an individual has filed a grievance. This represents a change in the application of Rule 1:20-9(a).*

This proposed commentary achieves a fair balance between ensuring that disciplinary staff has the opportunity to conduct thorough investigations before reporting on attorney misconduct and guaranteeing that all other individuals are not denied the right to disclose information about a grievance. In addition, the commentary positions grievants and respondents on an even playing field, allowing each party to speak freely and convey his or her own side of the story.

With this important change in the commentary to the rules, the public will have a clear understanding of the Supreme Court's confidentiality requirement. With this clarity, grievants will likely feel much more at ease to discuss their complaints against lawyers and will have the opportunity to report on the efficiency and fairness of the

disciplinary process. We believe that this increased oversight would help foster needed public confidence in New Jersey's disciplinary authority.

B. Amend the current rule so that it explicitly clarifies that grievants may speak freely about their complaints.

To further protect against future misapplication of Rule 1:20-9(a), we recommend that the PRRC consider amending the requirement with the following provision:

> (a) Confidentiality. Prior to the filing and service of a complaint in a disciplinary matter, or a motion for final or reciprocal discipline, or the approval of a motion for discipline by consent, the disciplinary matter and all written records received and made pursuant to these rules shall be confidential. *This requirement strictly applies to employees of the Office of Attorney Ethics. All members of the public, including grievants, are permitted to disclose any information they wish, subject to common law defamation actions.* [italicized to indicate proposed amendment]

This amendment clarifies that New Jersey's confidentiality requirements apply to internal disciplinary officials. An explicit amendment would achieve an important balance between continuing to protect the classified nature of the investigative process and permitting grievants to exercise their constitutional right to speak freely.

We urge the Professional Responsibility Rules Committee to issue clear guidance in the rule commentary and instruct that Rule 1:20-9(a) should not be construed to apply to grievants. With this important change, New Jersey can replace a disciplinary body once tarnished by secrecy with a system characterized by openness and integrity.

Respectfully Submitted:

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