

## SPECIAL REPORT: POLICING THE BENCH

### Little public airing of abusive judges

Reforms may not fix the problem.

**Pamela A. MacLean** / Staff reporter  
February 25, 2008



U.S. District Judge Jon McCalla of Memphis  
Image: A.J. Wolfe / Commercial-Appeal

A federal judge in Fort Worth, Texas, so terrorized lawyers that the 5th U.S. Circuit Court of Appeals hired two psychiatrists to sit in his court and observe without his knowledge what was described as a disturbing pattern of accusing lawyers of deceit and bad faith.

The discipline case against that judge, U.S. District Judge John H. McBryde, is one of the rare examples of formal discipline proceedings triggered solely on the basis of temperament.

Also, McBryde's case is the only one that carried to the U.S. Supreme Court a constitutional challenge of the 1980 statute that created the first federal judicial discipline system. It was ultimately unsuccessful.

About two dozen trial judges around the country have come in for severe criticism as abusive and temperamental, according to the Almanac of the Federal Judiciary. But only two cases — McBryde's and that of a Tennessee district court judge, Jon Phipps McCalla — have drawn public reprimands in the past nine years.

Although existing discipline procedures permit punishment of intemperate or abusive behavior on the bench, these procedures have rarely been employed in public discipline.

Nothing in the [29 draft rule reforms](#) up for a vote on March 11 by the Judicial Conference of the United States — the policymaking body of the federal courts — would alter the current standards, including proposed Rule 3(h)(1)(d), which states that misconduct includes "treating litigants or attorneys in a demonstrably egregious and hostile manner." The rule merely spells out a standard that already exists.

Other proposals range from mandatory standardized national rules to making clear that chief judges have authority to initiate complaints against judges.

Ultimately, McBryde was suspended for a year, beginning Dec. 31, 1997, and ordered not to preside for three years over cases that included any of 23 lawyers who testified, including 18 federal prosecutors and public defenders. *McBryde v. Committee to Review Circuit Conduct and Disability Orders*, 264 F.3d 52 (D.C. Cir. 2001).

McBryde declined to comment. But he claimed in published rulings that his discipline stemmed from an alleged vendetta by U.S. District Judge Jerry L. Buchmeyer of Dallas, who stripped McBryde of two cases and wrote a derogatory song about him that circulated among the local bar. *Hagan v. Coggins*, 77 F. Supp. 2d 776 (N.D. Texas 1999). Buchmeyer declined to comment through a clerk.

Years after the actions, passions still run high.

"Some of the things done to [McBryde] were pretty outrageous," said Arnon Siegel, who represented the judge in his 1999 constitutional attack on the discipline process. Siegel, counsel to Dechert's New York office, found the hiring of psychiatrists to sit in the judge's court "shocking."

The 5th Circuit later restored the two cases to McBryde.

### **A need to stand up**

Confidentiality provisions more often keep the public from learning whether judges engaging in egregious conduct on the bench are called to account. Also, few lawyers are willing to file formal complaints. Since the public is shut out of the process and attorneys wish to remain silent, that leaves the chief judges to deal with misconduct.

But they don't — at least not enough, critics charge.

"I wish, very frankly, chief judges would be tougher with their colleagues," said former Chief U.S. District Judge Terry Hatter of the Central District of California in Los Angeles.

Hatter, who currently serves on the 9th Circuit's Judicial Council reviewing discipline complaints, declined to comment on the proposed rule changes.

"For whatever reasons, [chief judges] are not able to deal with that problem. I tried to deal with it. It was not a happy thing to do," he said.

"Circuit councils have to stand up in that regard," Hatter said. "If we could get bar associations to let chief judges know and the public know when they occur. If it is public, something will be done about it," he said.

Stephen Gillers, a professor of legal ethics at New York University School of Law, said that "[I]ntemperance always has to be handled, but it has to be handled right.

"Some conduct is intolerable," he said. "Sexist or racist behavior is intolerable; losing one's temper excessively is intolerable. But in evaluating judicial demeanor, a disciplinary body has to consider whether the judge was goaded."

Former 6th Circuit Chief Judge Boyce F. Martin Jr. said he had six major cases involving intemperance complaints while he was chief judge from 1996 to 2003. Three involved senior district judges who had blown up at lawyers issuing irregular orders or who were showing signs of dementia.

Martin hired geriatric psychologists to meet with the senior district judges about the situation and all three voluntarily stepped down, Martin said. In two other cases, investigative committees found no basis for the claims and dismissed the cases.

The last was a success story, and one of the only other public discipline cases involving intemperance.

McCalla, a U.S. district judge in Memphis, Tenn., agreed to a six-month suspension and counseling in 2001 as a result of complaints of lengthy harangues of lawyers and once grabbing an attorney by the coat lapels.

McCalla is back on the bench and is now receiving high praise.

"He complied completely and returned to the bench in a fashion that has been greatly admired," Martin said.

McCalla did not return a call seeking comment.

In some instances, appeals courts order cases reassigned to a new judge if relations between bench and bar become strained in litigation.

For some judges it happens repeatedly without sanctions.

A misconduct investigation of U.S. District Judge Manuel L. Real of Los Angeles found 23 cases that had been remanded to him multiple times by the 9th Circuit or reassigned to new judges.

He failed to follow appellate directions and engaged in a pattern of failure to provide rationales for his decisions as required, according to a report by the Judicial Conference's Conduct Committee released in January. The Conduct Committee returned Real's case to the 9th Circuit Judicial Council for further investigation and reconsideration.

## Rhode Island clash

In other areas, judicial courtroom treatment of the bar can be testy.

Clashes between judges and attorneys in Rhode Island illustrate the tensions, as well as bench resistance to review and discipline up to the present time.

In a 2004 report on the Rhode Island bench, Carl T. Bogus, professor at Roger Williams University School of Law, found federal judges Mary M. Lisi (now chief judge) and Ronald R. Lagueux thin-skinned and abusive toward lawyers who challenged them. He wrote that Rhode Island lawyers were afraid to criticize the bench for fear of retaliation.

Nothing has changed about the Rhode Island culture of quiescence, Bogus said. If lawyers are critical, they fear their criticism may be used to make a menacing threat against their right to practice in a particular court, he said.

"It is critically important that the judiciary be independent. But there is a tension between the need for an independent judiciary and the problem of a judge who is misbehaving in a fashion that doesn't warrant impeachment," he said.

## Jousting with Dershowitz

Lagueux, who spent 18 years on the Rhode Island state bench, famously swore never to allow Harvard Law School Professor Alan M. Dershowitz to practice in his federal courtroom after Dershowitz criticized the state's judiciary as an "incestuous and corrupt system" in a book about the Claus von Bulow murder trial. Lagueux did not have Dershowitz in his court, but the dispute eventually did result in a private reprimand of Lagueux.

When Dershowitz's attorney, Harvey Silverglate, now of Boston's Good & Cormier, asked the basis of Lagueux's ban, he received no response.

But a year later, Silverglate's partner, Andrew Good, came in for severe criticism by Lagueux for his handling of a drug case. The judge included Silverglate as part of an effort to "set up" an informant, according to Bogus' 2004 law review account.

Good withdrew prior to the 1987 drug trial, and Norman S. Zalkind, a Boston attorney at Zalkind Rodriguez Lunt & Duncan, stepped in. Zalkind asked Lagueux to recuse himself after the judge's strenuous criticism of lawyers before him in a drug case.

Lagueux called Zalkind's recusal motion a "scurrilous" personal attack and threatened a perjury action. Dershowitz filed a misconduct complaint.

The 1st Circuit eventually issued the private reprimand, which Lagueux said he chose to make public. Lagueux transferred the drug case to a new judge, but used his opinion to again lash out at Dershowitz.

In a recent interview, Lagueux said he would not revisit the Dershowitz issue, but he questioned the constitutionality of the 1980 law giving circuit judicial councils the power to discipline federal judges, particularly in the area of temperament.

"I don't know how you define it. Each judge has his or her own personality," Lagueux said. "I run a tight courtroom and I want lawyers to live by the rules. I call them on it, even before a jury. Would that be intemperance?" he asked. "That's one of the problems."

He added: "Frankly I don't think the council has the constitutional power to do that and I know other judges feel that way."

Lisi, the Rhode Island chief district judge, has a long-standing rule that bars the public from taking notes in her court and to demand identification from journalists if they take notes, according to her court.

Lisi's jousting with lawyers included booting New York lawyers Barry Scheck and Nick Brustin off a 2003 civil rights suit nine days into trial. Lisi accused Scheck of "misrepresentation" in a dispute about stipulated evidence in the suit, which was brought by the mother of a slain police officer. *Young v. City of Providence*, No. CR 01-288ML (D.R.I.).

Lisi's action drew the attention of Bogus, who found it part of what he called a "troubling pattern" on the Rhode Island federal bench of revoking permission to practice for the slightest criticism by counsel.

Lisi did not return a call to her chambers seeking comment about the matter.

In a 1990s study of the federal judiciary's discipline system, Indiana University School of Law — Bloomington Professor Charles Geyh said he found that informal methods of discipline were developing.

"I thought it was good. One thing to keep in mind, informal action is taking place [in the federal judiciary]. Formal discipline was the shotgun behind the door," he said.

"Since then I have come to the view that the federal judiciary is more independent and ought to pay for that with behavioral accountability," Geyh said.