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RECOMMENDATIONS FOR PUBLISHING AND ARCHIVING INFORMATION ON BRINGING JUDGES TO DISCIPLINARY LIABILITY BY THE HIGH QUALIFICATIONS COMMISSION OF JUDGES OF UKRAINE

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INTRODUCTION

Thank you for the opportunity to be a pro bono participant in this important project, and particularly for the assistance provided by Judicial Accountability Specialist Anna Sukhova. I have approached the two tasks referenced above guided by the background and purpose: to build a foundation for a more accountable and independent judiciary, stated in the Scope of Work document for the assignment. The objectives are 1) to develop a constitutional, legislative, and regulatory framework for judicial reform which complies with European and international norms; 2) to strengthen the accountability and transparency of key judicial institutions and operations; 3) to strengthen the professionalism and effectiveness of the Ukrainian judiciary; 4) to strengthen the role of civil society organizations as advocates for and monitors of judicial reform; and 5) to implement the Law on the Purification of Government.¹ The scope of the assignments is limited to consideration of the website and maintenance of data, so I have refrained from comment on Section VI of the Law of Ukraine on Judiciary and Status of Judges. (That law, however, is the core and driver of whether the goals will be achieved, and some consideration from an international perspective would, in my opinion, strengthen the law toward achieving those goals.) I will reference that law as Section VI in this document.

I. REVIEW OF THE PROCEDURE OF PUBLISHING INFORMATION ON THE HQC OFFICIAL WEBSITE

Standardizing a procedure to publish information on the HQC official website is necessary to assure transparency and accountability, and to allow access for the public and civil society organizations to advocate for and to monitor judicial reform. Each step in the procedure should be viewed from the perspective of whether the chief goals - transparency, accountability, and accessibility - are achieved. Meaning no disrespect, I will be direct in my evaluation. The draft procedure is, for me, overly bureaucratic and cumbersome to understand, (and therefore, possibly, to execute). This style may well be the cultural inheritance of a bureaucracy which has not historically practiced transparency or accountability. In my opinion, some reassessment and reformatting is necessary to achieve the stated goals.

I have worked in the field of judicial ethics enforcement for 19 years, yet I find the draft procedure extremely difficult to follow, and the dense format is not plainly associated with a justifying rationale for that complexity. (I also shared the materials with staff in my office - both support staff responsible for maintenance of the website and our publications, and legal staff. They too considered the material dense and difficult to impossible to follow.) This information should be presented in a way that is intelligible for a non-expert member of the public. Another significant concern – and a barrier to accountability – is that there is too much undefined authority vested in the chief editor.

¹Elevating the professional qualifications of inspectors was an essential and commendable accomplishment toward realizing the objectives.

The focus of the procedure is on bureaucratic process and positions and uses complex and specialized language. This does not achieve the stated goals. The focus should instead be based in *substance* - i.e. what kind of documents must always be published; what kind of documents may sometimes be and sometimes not be published (and what are the criteria for that determination); and in what time frame should publication take place? The style should be straightforward, succinctly organized, and should use plain language.

In the current draft procedure, multiple memoranda must be generated, reviewed and approved by various people in order for anything to be posted. The steps toward publication are cross-referenced between sections of the draft procedure and are confusing to follow. Memoranda recommending publication are submitted to the chief editor. These memoranda require counter-signatures of multiple people (7.1.1). The chief editor is, according to the draft procedure, given complete discretion whether to approve or disapprove publication. This creates a structural risk of arbitrary inclusion or exclusion of materials, and there is no indication of any checks or balances on the chief editor's exercise of discretion. What if a chief editor improperly or mistakenly declines to approve the publication of information? There is no recourse, apparently, for this possibility.

The substantive heart of making judicial ethics information available is the reliable and prompt publication of judicial discipline decisions. The information about this, however, is buried deep in the draft procedure document, as Item 7.3.1, which itself cross-references Annex 3. It should be more prominent in the document.

Suggested Revision to Procedure of Publishing Information on the HQC Website

The protocol should begin with a listing of the kind of information that can or must be on the site: (1) what information is always published; (2) sometimes published (and list the criteria for what is published and what is not); and (3) never published (and the reasons it is never published. Presumably that would include information that is confidential under the law).

Examples:

1) Information that must be published on the site:

- Information on bringing a judge to disciplinary responsibility shall be published and must identify the judge, his/her court, the disciplinary measure imposed, and a copy of the decision rendering discipline. (Section VI, Article 97)
- Lists of candidates for election to the High Qualifications Commission of Judges of Ukraine, both judges and non-judges. (Section VI, Article 103)
- Notification of meetings of the High Qualifications Commission of Judges of Ukraine - *to be published no later than ten days prior to the meeting*. (Section VI, Article 105)

2) Information that may or may not be published on the site:

- Official news and events; interviews and speeches by HQC members. (May be submitted by any employee of the HQC, shall be reviewed by the division head, literary editor, and chief editor. Criteria for publication shall be whether the item accurately informs the judiciary and the public of information relevant to the charge of the HQC; does it represent the official position of the HQC or if not, does it clearly state that it is not the official position but represents the view of the author only; and whether it complies with the standards set forth in Section VI, Chapter 2, Article 102.)

3) Information that may not be published on the site:

- Information that must remain confidential by law.

Next, the protocol should describe the players and their duties - together. A reader should not need to cross-reference different sections of the text in order to learn who does what and under what level of supervision. One way to achieve this would be to write out the players in order of the process, from initiation to approval, up the responsibility ladder. Keep cross-references to a minimum for ease of comprehension. The flow chart generated in response to my request for this project is useful to include as a reference. An alphabetical list of all the titles and sections, together with their duties, would be useful as an index.

Example:

- HQC inspector generates information on disciplining a judge and the related HQC decision no later than 15 days after the decision is adopted. (42 inspectors serve within the Secretariat, under the authority of the HQC Disciplinary Chamber - Section VI, Articles 109-110. They are required to hold law degrees and to have more than five years' legal experience. They are employed exclusively by the HQC, and conduct preliminary analysis of complaints; prepare draft conclusions on whether grounds exist for initiating a disciplinary action; and perform other functions as directed by the HQC during evaluation and disciplinary proceedings under Section VI.)
- The information is submitted to the head of the inspector's responsible division for accuracy (*see Annex for description of divisions*) and to the literary editor for proofreading and stylistic editing. (The literary editor serves within the Secretariat and is responsible for proofreading and stylistic consistency of official documents for the HQC.)
- The information is submitted to the chief editor for approval. (The chief editor is appointed by the HQC Chairperson and is responsible for final proofreading and approval. All information that is required to be published shall be published. In the event the chief editor is not available within the prescribed time frame, or there is a dispute as to whether the information should be published as set forth under Section VI, the deputy head of the HQC secretariat shall perform this function.)

II. RECOMMENDATIONS FOR PUBLISHING AND ARCHIVING INFORMATION ABOUT JUDICIAL MISCONDUCT AND DISCIPLINE, INCLUDING STORING AND PROVIDING PUBLIC ACCESS TO SUCH DATA

Publishing and Archiving Information about Judicial Misconduct and Discipline

Ukraine should not have to reinvent the wheel in establishing a website protocol. There is the equivalent of an HQC organization in each of the 50 United States of America, and the District of Columbia. Each of the states has a web site designed to fulfil the goals articulated for this project - to develop a constitutional, legislative, and regulatory framework for judicial reform which complies with European and international norms; strengthens accountability and transparency of key judicial institutions and operations; strengthens the professionalism and effectiveness of the judiciary; strengthens the role of civil society organizations as advocates for and monitors of judicial reform; and to implement the laws promoting the integrity and independence of the judicial branch.

The US conduct commissions' web sites can all be accessed at this address: <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/State-Links.aspx>. Many of them have similar features and are all intended to allow the average citizen and judges to access information on the judicial accountability system. Washington State has a well-organized, accessible website at www.cjc.state.wa.us. Other particularly well-designed sites include Texas, Mississippi, and Hawaii. These resources are highly recommended for designing a successful and functioning web site for the HQC. (Note - it is outside the scope of this specific assignment, but a well-structured Code of Conduct is the basis for a functioning discipline system. Each of the 50 states has its own, substantially similar version of a Code of Judicial Conduct, all based on the ABA Model Code of Judicial Conduct, first established in 1924. This provides a strong and reliable model for articulating the ideas of a functioning judicial system, and I commend it as a resource.)

Substantively, the HQC website should include the duties of the HQC in both narrative form and with links to its governing legal authority. What is the law creating the HQC? What is the scope of its jurisdiction? What is the Code that it enforces? How does one file a complaint? What are the options for discipline and who makes those decisions? Are those decisions appealable? What are the protections against retaliation for a complainant or witness? What are the protections for a judge from publicity about unfair allegations that are unproven?

The following are the basic building blocks of a well-functioning site that publishes and archives information about judicial conduct and discipline, in a fashion that stores data and provides easy public access.

The home page section should prominently feature a clear concise statement of the purpose of the entity. There should be simple links pointing to:

- a concise narrative description of how the organization works, and what values it promotes and protects;
- clear, simple instructions on how members of the public can file a complaint;
- a search tool or tools to find discipline records based on different criteria (eg, can you search by judge name, or by level of court, by location, by date, or by type of sanction). The link to disciplinary records should disclose how information is maintained, including when it was last updated. It should disclose whether there is additional public information not included on the site, and how to obtain that information. If you purge information after a period of time, the site should disclose that. If you have a gap in time between the date discipline is imposed and the date it is posted, you should disclose that. If a finding is subject to review or appeal, you should disclose that;
- the governing authority - laws, policies, procedures, constitutional provisions, regulations;
- membership and staff of the organization - who they are, how they are appointed or elected, their terms of service, regulations governing their conduct.
- FAQs.

Storing and Providing Public Access to Data

Judicial misconduct data is not unique - data is data. However, it is particularly important that the HQC site be kept secure, updated, and well-organized. Key, specific people (with trained individuals identified as backups should those people be absent or replaced) should be charged with responsibility to assure that security is maintained and updated, even for public data. Specific people should be charged with responsibility to assure that the technology for the site is kept reasonably current.

Backups to all the data should be maintained, both for access from the central location and at a remote location in the event of a physical catastrophe affecting the main location.

III. RECOMMENDATIONS ON CONFIDENTIALITY REQUIREMENTS IN THE PROCESS OF PUBLISHING INFORMATION ON DISCIPLINING JUDGES AND DISCIPLINARY SANCTIONS

The practice of “cancelling” sanctions is not one that Washington State follows, and I don’t know of any other states that do. The closest that comes to mind is this: in some US states, commissions have the option of imposing non-public (private) sanctions on judges. In those states, some permit a judge to undergo some sort of remedial process (or to show over a period of time that they have stopped some improper practice), and then, at the conclusion of that condition, the case is dismissed, and never becomes public.

Washington does not have any form of private sanction, and, in my opinion, that is the better approach. Our structure requires that all cases under investigation be confidential, and all cases that are dismissed after investigation remain confidential. That covers the majority of our work.

Some of the policy reason behind the confidentiality of the cases during investigation is to safeguard against retaliation against complainants and witnesses by the judge or the judge's allies. Confidentiality also prevents our process from being abused as a way to harass judges for making hard decisions between parties who cannot agree. In this way our process helps protect judicial independence. Most complaints come from people who lost in court, and they are basically disagreeing with the judge's decision. We do not inform judges they are under preliminary investigation, and most cases in preliminary investigation end in dismissal, without the need to inform the judge they were ever investigated. A meritless complaint should not interfere with a judge's basic responsibility to decide cases impartially. Nor should publicity of an unsubstantiated case be allowed to unfairly tarnish the reputation of a specific judge or of the judiciary in general.

On the other hand, once misconduct has been found and discipline has been imposed, our system requires that to be done publicly and to remain public. If a judge contests an allegation of misconduct and demands a public hearing, the charges, hearing, and outcome are all public.

It is hard for me to see the benefit or rationale for cancelling a sanction once it was imposed, particularly if it once was public. Transparency dictates that the public and the judiciary be aware of sanctions against a judge. Maintaining the public record of a judge helps to ensure equality of accountability. If the misconduct is a single instance, remote in time, and relatively minor, all those things should be borne in mind by any fair person or system. One of the factors* we are obliged to consider in Washington, when determining a fair level of sanction, is whether the misconduct in question is an isolated incident or part of a pattern of behavior. We also are required to consider whether a judge has been sanctioned before. A judge with no prior record should be sanctioned for a single act of misconduct less harshly than a judge with prior sanctions (cancelled or not) who has engaged in a pattern of misconduct.

For these reasons, I believe the better practice of the options you have described is your current practice of listing prior sanctions against judges, noting that they have been "cancelled." As a practical matter, too, I note that if the sanction was ever public, there is no realistic way of ever truly deleting it from the internet.

* Here is a list of the non-exclusive aggravating and mitigating factors that Washington's commission is directed to consider when determining the appropriate level of sanction. (They derive from a State Supreme Court Case, *In re Deming*, and have been codified into our rules of procedure as CJCRP 6(c), which you can find on our website under "Governing Provisions, Rules of Procedure).

(c) Mitigating/aggravating factors. ^[1] Whenever the commission finds grounds for discipline, it shall consider the following nonexclusive factors in determining the appropriate discipline to be ordered:

(1) Characteristics of Misconduct.

(A) Whether the misconduct is an isolated instance or evidence of a pattern of conduct;

(B) The nature, extent, and frequency of occurrence of the acts of misconduct;

(C) Whether the misconduct occurred in or out of the courtroom;

(D) Whether the misconduct occurred in the judge's official capacity or in the judge's private life;

(E) Whether the judge flagrantly and intentionally violated the oath of office;

(F) The nature and extent to which the acts of misconduct have been injurious to other persons;

(G) The extent to which the judge exploited the judge's official capacity to satisfy personal desires; and

(H) The effect the misconduct has upon the integrity of and respect for the judiciary.

(2) Service and Demeanor of the Judge.

(A) Whether the judge has acknowledged or recognized that the acts occurred;

(B) Whether the judge has evidenced an effort to change or modify the conduct;

(C) The judge's length of service in a judicial capacity;

(D) Whether there has been prior disciplinary action concerning the judge;

(E) Whether the judge cooperated with the commission investigation and proceeding; and

(F) The judge's compliance with an opinion by the ethics advisory committee shall be considered by the commission as evidence of good faith.

CONCLUSION

HQC has articulated a virtuous and essential set of goals for the strengthening and maintenance of an accountable, reliable, independent judiciary. These qualities are essential to the rule of law and the maintenance of a truly free and fair society. Ukraine has endured extraordinary hardships throughout its history, and the determination to strive toward the improvement of its judicial institutions is laudable and important. Thank you again for the opportunity to participate in this project.