

**ADVISORY MEMORANDUM  
TO  
THE SUPERIOR COUNCIL OF THE MAGISTRACY  
ON A PROPOSAL FOR ESTABLISHING DISCIPLINARY  
GUIDELINES**

**DR. MARKUS B. ZIMMER**

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**ADVISORY MEMORANDUM TO THE  
SUPERIOR COUNCIL OF THE MAGISTRACY  
ON A PROPOSAL FOR ESTABLISHING DISCIPLINARY GUIDELINES**

**QUESTION: HOW SHOULD THE SUPERIOR COUNCIL OF THE MAGISTRACY (SCM) FULFILL ITS OBLIGATION TO IMPOSE SANCTIONS ON JUDGES AND PROSECUTORS FOR ACTS THAT ENTAIL DISCIPLINARY LIABILITY UNDER ROMANIAN LAW IN A MANNER THAT IS CONSISTENT, PREDICTABLE, AND FAIR?**

**SECTION ONE : INTRODUCTION**

The primary law in Romania for guidance on judicial and prosecutorial discipline and sanctions is the Law on the Statute of Magistrates (LSM). The Law on the Superior Council of the Magistracy (LSCM) also includes some references to judicial liability. For the Romanian magistracy, disciplinary liability falls into four categories by status of official.

- A. **CATEGORY I:** A prospective judge or prosecutor first becomes subject to disciplinary liability during the initial training period in the National Institute for Magistrates (NIM). While enrolled there in the capacity of justice auditors,<sup>1</sup> they are subject to sanctions for the disciplinary transgressions set forth in Article 18(2).<sup>2</sup> The applicable sanctions are set forth in Article 18(3). The administration of discipline in this category is the responsibility of the NIM and its Scientific Council.<sup>3</sup>
- B. **CATEGORY II:** A sitting judge or prosecutor is subject to disciplinary liability during his or her career. This applies both to military and to civilian judges and prosecutors. The authority establishing such liability is set forth generally in LSM Article 98(1) for civilian magistrates and Article 98(2) for military magistrates. The specific types of offenses that trigger disciplinary liability are set forth in Article 99(a-n). The sanctions that generally attach to these offenses are set forth in Article 100 of the LSM. Pursuant to the LSCM, SCM Sections or Boards

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<sup>1</sup> See LSM Article 16(1)

<sup>2</sup> Article numbers in the text refer to the Romanian version of the laws as published on 13/09/2005 in the Official Journal of Romania.

<sup>3</sup> See LSM Article 18(4-5)

(SCMB) are responsible for determining which disciplinary sanctions to apply.<sup>4</sup>

- C. **CATEGORY III:** A magistrate who is in a leadership position in a court or prosecutor's office, may have his or her leadership role revoked for, among other reasons, application of a sanction for disciplinary violations. Thus, taking on leadership position entails a risk of incurring an additional disciplinary sanction. The body responsible for ordaining such revocation is the Superior Council of the Magistracy (SCM).<sup>5</sup>
- D. **CATEGORY IV:** Service on the SCM also entails an additional disciplinary risk. An elected member of the SCM may have his or her membership revoked for, among other reasons, application of a sanction for a disciplinary violation.<sup>6</sup> The body responsible for ordaining such revocation is the SCM.<sup>7</sup>

This memorandum focuses on Category II. As noted, the LSM includes a list of specific types of offenses, commission of which may trigger disciplinary liability. The LSM also includes a list of specific sanctions that may be applied to judges and prosecutors once disciplinary liability has been established. What the LSM does not include is specific guidance, either for the SCMB or for judges and prosecutors on what disciplinary sanctions attach to what types of disciplinary offenses. The only guidance in the LSM is in Article 101 which states that "The disciplinary sanctions provided under Article 100 shall be decided by the sections of the Superior Council of the Magistracy, under its organic law." Guidance provided in the LSCM is a bit more helpful. Article 47(3), referring to SCM review of a charge of disciplinary violation, directs that "If they find the notification to be well-founded, the sections of the Superior Council of the Magistracy shall apply one of the disciplinary sanctions provided in the law, according to the seriousness of the disciplinary offense committed by the judge or prosecutor and *to his or her personal circumstances.*" (Emphasis added.) This provision that the personal circumstances of the offender should be considered removes the mechanical elements and permits the SCM to take into consideration the particular context of any disciplinary violation and to weigh that context in

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<sup>4</sup> See LSCM Article 45(1) and Article 47(3)

<sup>5</sup> See LSM Article 51(2) & (7)

<sup>6</sup> See LSCM Article 52(1)

<sup>7</sup> See Law on the Superior Council of the Magistracy (LSCM) Article 52

determining the appropriate sanction. That context may have the potential either to mitigate or to aggravate the seriousness of the violation and to be considered when determining which sanction best fits the violation. This is an important consideration for developing a fair and flexible approach to the disciplinary process.

Because little guidance is provided, judges and prosecutors have little basis, other than researching how the SCMB applied sanctions to offenses in past cases, for anticipating what sanctions they may face for committing one of the offenses listed. In addition, the lack of guidance leaves open the question of the extent to which application of the disciplinary sanctions is consistent from one case to the next.

This memorandum proposes how the SCM might associate particular types of offenses with particular types of sanctions in a systematic and predictable manner. The proposal recommends that the SCM adopt a two-step review process for determining the appropriate sanction for each type of offense set forth in the LSM.

In Step One, the SCMB review process would evaluate the offense from the perspective of two or more *factors* designed to assist the reviewers to assess the relative seriousness of the offense. These factors would be used to assess both the “personal circumstances”<sup>8</sup> attending a particular occurrence of the offense as well as the offense itself. The results of this factor-based assessment could render the offense more or less serious than other instances of the same type of offense. Section II of this memorandum describes how this factor-based system would work.

In Step Two, the SCMB determination of what type of sanction is appropriate would take into account the results of the factor analysis. That analysis may lead the SCMB to conclude that for a particular offense, the sanction called for should be either more or less severe than what is called for in other instances of the same offense.

This two-step proposal is an effort to ensure that each type of disciplinary offense set forth in the LSM is not simply linked to one sanction that automatically is triggered when a determination has been made that that disciplinary liability has been established, regardless of the circumstances or context of the offense. Human behavior and the elements that motivate it

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<sup>8</sup> LSCM Article 47(3)

frequently are complex, and the imposition of what can be serious disciplinary sanctions, as noted in LSCM Article 47(1) should be based on a careful review process that takes into account the circumstances of the offense. The upshot is that any single type or category of offense may have several levels of possible sanctions attached to it. The SCM section's determination of the appropriate level of sanction becomes a function of its determination as to the seriousness of the offense and the relevance of the personal circumstances that attend it.

This second step of the process is set forth in greater detail in Section III of this memorandum.

## SECTION II: THE USE OF FACTORS

This section proposes some of the factors that the SCM might consider using in Step One. For each factor, there may be several categories that reflect the different circumstances or context that inform that factor. Where the factor's circumstances or context are such that a particular offense emerges as less serious than other instances of the same offense, we might refer to it as a *mitigating* factor. A mitigating factor typically entails less culpability and supports the imposition of a lesser sanction than what ordinarily would be appropriate for the same offense without the mitigating factor.

Alternatively, where the factor's circumstances or context are such that a particular offense emerges as more serious than other instances of the same offense, we might refer to it as an *aggravating* factor. An aggravating factor typically entails greater culpability and supports the imposition of a greater or more severe sanction than what ordinarily would be appropriate for the same offense without the aggravating factor.

Where the factor's circumstances or context are such that the circumstances of a particular offense are relatively common to other instances of the same offense, no mitigating or aggravating factor would attach to it.

For purposes of illustration, some examples follow:

- A. OFFENSE: REPEATED FAILURE WITHOUT JUSTIFICATION TO PROMPTLY RESOLVE CASES PURSUANT TO LEGAL PROVISIONS (LSM 99(E)). We conceive of three variations of this offense:

- a. **VARIATION 1:** Judge X, a relatively young judge, is charged with this offense. The circumstances indicate that she has an acceptable history of resolving in a timely manner cases that are relatively straightforward and do not entail difficult evidentiary problems or complex legal issues. Where she has failed is in resolving on a timely basis complicated cases that present challenging and convoluted problems. She has a reputation as a hard worker who works long hours and sometimes comes to the office on weekends, but appears to be unable to keep up with her randomly allocated allotment of difficult and complex cases. In the first three months of her second year in this evaluation period, the random case assignment system dealt her an unusually high number of such cases, and her recent evaluation indicated that she has failed to process most of them in a timely manner. Indeed, litigants in several of these complex cases have complained to the court president about the slow progress their cases are making.
  
- b. **VARIATION 2:** Judge Y, an older and experienced judge who is nearing retirement, is charged with the same type of offense. In his case, the records reflect that he received an oral warning in his last evaluation three years ago that his caseload statistics reflected inexcusable delay in processing some cases and that he needed to address the problem promptly and effectively. The evaluation also noted reports that on occasion he arrived for court late in the morning and left early in the afternoon; he was warned about the need to be more punctual. In the past three years, his case processing statistics indicate that problems with delay have increased in all categories of cases assigned to him. Moreover, the court president has received complaints from litigants about delay in how even the simplest cases are adjudicated. Attorneys also have complained that he is difficult to find at the courthouse during normal business hours.
  
- c. **VARIATION 3:** Judge Z, a charismatic man who formerly was a successful private lawyer and a politician, is charged with the same offense. He has been a judge for two years, and this is his first evaluation. A careful analysis of his caseload productivity by the SCMB reveals a curious dichotomy. Approximately 40% of his assigned cases in all case categories are processed in a very timely manner. By contrast, the other 60%, in all categories of cases, are languishing from lack of attention and reveal significant delay

that exceeds the limits provided for in the law. The SCMB is baffled by the differences and cannot explain why some cases are processed so much more quickly than others. Eventually, one inspector conducts an analysis of litigant names in the cases assigned to this judge and discovers, almost by accident, that the cases that were promptly processed all involve litigants with whom the judge was acquainted – legal colleagues or their friends and relatives, ranking government officials or their friends and relatives, and former business clients or their friends and relatives. Cases not promptly processed all involve litigants the judge either did not know or with whom he formerly had adversarial relationships.

Useful factors for this type of offense might be (i) *duration* or *length of time* the failure to process cases in a timely manner has continued, (ii) the *types of cases* that are not being processed in a timely manner, and (iii) whether conscious *intent* played any role in the offense.

In Variation 1, the judge is unable to effectively process difficult and complex cases in a timely manner. Although this constitutes an offense, her timeliness with less complex cases suggests that she may need additional training in effectively managing and processing complex and difficult cases. In Variation 1, then, the fact that her offense is limited to difficult and complex cases might be considered as a personal circumstance that plays out as a mitigating factor that should be taken into consideration in determining what the appropriate sanction should be. Moreover, it appears that her intent is to process all of her caseload in a timely manner, but that she lacks the ability to do so with complex and difficult cases. To that extent, intent would be a mitigating factor.

In Variation 2, the circumstances indicate that the judge over time is losing his motivation and interest in performing the case processing functions of his position in a prompt and effective manner. The delay problem does not appear to involve lack of ability as much as lack of incentive and, perhaps, weariness and boredom. Here, too, the factors of duration/length, types of cases, and intent help the evaluators to focus on the problem and, for purposes of identifying the appropriate sanction, the seriousness of the offense. The attendant circumstances suggest that Variation 2 is more characteristic of this type of offense than either Variation 1 or Variation 3. To the extent that Variation 2 reflects the more common instance of this type of offense, the SCMB might

conclude that neither mitigating nor aggravating factors should affect its determination of sanctions.

In Variation 3, the circumstances suggest that the judge, in exercising his authority, is selectively favoring the interests of those with who are his friends, current and former colleagues or government officials, and their relatives and acquaintances at the cost of the interests of those with whom he either (i) has no relationship or (ii) has or at one time had an adversarial relationship. Here, too, the factors of length/duration, types of cases, and intent help the evaluators to focus on the issues. That there was no difference in case type led them to look at other possible reasons for the discrepancy in case processing timeliness. Moreover, because the duration of the practice extends back to when the new judge initially was appointed, the SCMB might consider duration as an aggravating factor. Given that the discrepancy in case processing timeliness appears to be based on acquaintance or the lack thereof, intent also would be considered as an aggravating factor.

- B. OFFENSE: PARTICIPATION, DIRECT OR THROUGH INTERMEDIARIES, IN PYRAMID-TYPE GAMES, GAMBLING, OR INVESTMENT SYSTEMS WHOSE FUNDING TRANSPARENCY IS NOT ENSURED UNDER THE LAW LSM 99 (N). We conceive of three variations of this offense:**
- a. VARIATION 1 : Prosecutor A is a senior member of the Prosecutor’s Office attached to the High Court of Cassation and Justice. He has 25 years experience as a prosecutor, and his evaluation ratings during his tenure have always been very good. He has never been subject to disciplinary sanctions. His routine evaluation was started last week. At the end of the week, a story in one of Bucharest’s leading newspapers identified him as one of a number of individuals involved in an unregistered high-risk coastal real estate investment scandal based in Bulgaria on the shores of the Black Sea. He was listed as one of the victims of the scheme, having invested and lost the equivalent of €20,000, a quarter of his life’s savings. When interviewed by the evaluation team, he readily confessed to making the investment in the hope of building up his retirement savings. He readily swore under oath that he did not know that the business in charge of the scheme was affiliated with an international organized crime syndicate. When asked how long he had been involved in the scheme, he produced records and receipts showing that he made the**

investment nine months ago. He realized no gain; it was a complete loss.

- b. **VARIATION 2:** Prosecutor B has ten years' experience in the office attached to a first instance court and has applied for promotion to a position in the office attached to the regional second-instance court. As the SCM section prepares for his evaluation, they receive a confidential letter sent to the SCM from a private citizen. The citizen explains that for the past two years, Prosecutor B has been frequenting a discrete private gambling casino late in the evening several times a month. The letter notes that the prosecutor has sustained some serious financial losses at the casino and that he has borrowed money on a number of occasions from a close friend, a wealthy businessman, to cover his gambling debts. His previous evaluations have been good and he has never been charged with any disciplinary offenses. Office statistics confirm that his productivity does not appear to have suffered from these late night gambling adventures.
- c. **VARIATION 3:** Judge C has served on the intermediate court of appeals for 12 years. For the past 15 years, she has been married to a prominent lawyer who comes from a wealthy family whose fortune was made in precious stones, particularly diamonds imported from several West African states. The recent capture of Charles Taylor, the former Liberian president, has spawned criminal investigations into Taylor's role in the illegal diamond trade in Liberia where the commercial trade in diamonds was embargoed by the United Nations Mission in Liberia in 2003. Taylor had been in exile for several years in Nigeria under the protection of Nigeria's president. His extradition to the custody of Sierra Leone's International Criminal Tribunal in March 2006 was followed by the Nigerian government turning over to tribunal prosecutors a number of files seized from the villa Taylor occupied in Nigeria. The investigators have found evidence in the files documenting illegal exports of diamonds mined in Liberia and funneled through Sierra Leone to precious stones dealers in a number of countries, including Romania. The Romanian dealer is the brother of Judge B's husband. He was arrested last week in Bucharest on charges relating to illegal diamond imports. Confidential financial records seized by Romanian investigators from the dealer's company vault show that Judge B and her husband invested the equivalent of €100,000 in the dealership over the past ten

years and, in turn, received more than €1,300,000 in profits for their investment. Judge C is due for her next evaluation in a few weeks, and the news reports of the investigation have just been aired on Romanian television.

Useful factors for this type of offense might be (i) the *duration* or *length* of the prohibited activity; (ii) the *frequency* of participation in the activity; and (iii) the *amount* or *level* of participation including both investment and, where appropriate, return.

In Variation 1, Prosecutor A's participation in the investment scheme was nine months in a career that spans 25 years. The duration factor might be viewed as mitigating because the nine-month participation was largely passive after the initial investment. The frequency of participation appears to have been a one-time investment decision which also might be viewed as a mitigating factor. The amount or level of involvement was an investment of €20,000 of his life's savings, all of which was lost. Because there was no return on the investment, the review team may consider the amount as a mitigating factor as well.

In Variation 2, Prosecutor B's participation appears to have spanned two years of a ten-year career. The frequency over these two years is several times per month or 40-60 visits per year. The amount or level is likely to be insignificant for any particular visit, but over the course of two years, his losses represent a significant amount. The loss is complicated by the compromising position in which he now finds himself, that of having accrued a substantial personal debt that he is unlikely to be able repay in the immediate future. The attendant personal circumstances suggest that Variation 2 is more characteristic of this type of offense, for example, a psychological weakness for compulsive gambling, than Variation 1 or Variation 3. To the extent that the circumstances of Variation 2 reflect the more common instance of this type of offense, the SCMB might conclude that neither mitigating nor aggravating values should be attached to the factors.

In Variation 3, Judge C's family participation, even though she may maintain that the illegal investment activity was undertaken by her husband and that she had little knowledge of it, extends over a ten-year period with regular investments having been made and regular payments having been received. Moreover, the return on the illegal investment was substantial, reflecting enormous gains typically not

available to investors engaged in lawful speculation. Under the circumstances, the review team might be inclined to add an aggravating value to all three of the factors for this type of offense.

*The above examples suggest how a factor-based system might be used to categorize particular offenses within the same offense category. Clearly, the different circumstances presented in the six examples suggest that the evaluation process should be sufficiently flexible to permit review teams to ascribe mitigating and/or aggravating factors to particular offenses. Some offenses will include both mitigating and aggravating factors.*

### **SECTION THREE : THE USE OF PROGRESSIVE SANCTION LEVELS FOR EACH OFFENSE TYPE**

Use of a factor-based system would provide the SCMB with the flexibility to attach varying levels of responsibility to particular offenses within the same offense category. For such a disciplinary model to function well, it should feature a sanction-based system that also offers the SCMB some flexibility in determining which sanction is appropriate to a particular offense. Article 100 provides the basis for such flexibility by setting forth four categories of disciplinary sanctions that may be applied to judges and prosecutors "...according to the seriousness of their transgressions..." The four categories are:

1. Warnings;<sup>9</sup>
2. Reduction of salary by up to 15% for a period ranging from one to three months;
3. Disciplinary transfer for one to three months to a court or prosecutor's office in the jurisdiction of the same court of appeal or the prosecutor's office attached to it; and
4. Termination of one's position in the magistracy.

Categories two and three offer additional flexibility by providing ranges in duration and amount.

To provide the SCMB with the flexibility necessary to impose a range of sanctions for particular offenses within each type of offense set forth in Article

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<sup>9</sup> For purposes of maintaining records, all formal warnings should be in writing.

99, we recommend two to four levels of prospective sanctions for all but one<sup>10</sup> of the offense types. To illustrate these levels, we return to the two categories of offenses considered above and what disciplinary sanctions might be appropriate for each variation.

**A. OFFENSE: REPEATED FAILURE WITHOUT JUSTIFICATION TO PROMPTLY RESOLVE CASES PURSUANT TO LEGAL PROVISIONS (LSM 99(E)).** We recommend four progressive levels of sanctions here that are the same as the sanctions set forth in Article 100. The progression is intended to reflect (i) the increasing seriousness of the sanction, with L1 signifying the least serious, and (ii) the need to take into account, when imposing a sanction, any prior sanctionable offenses. For purposes of illustration as to how the sanctions may be applied to particular offenses, we review the three variations.

**a. VARIATION 1:** If the SCMB attached mitigating values to each of the three factors suggested earlier, the appropriate first-level sanction for a first disciplinary violation might be either a stern warning or a modest salary reduction for Judge X, such as five percent, for a one-month period. If this were the second sanctioned offense in any offense category, the appropriate sanction might be a three-month transfer. If this were the third sanctioned offense in any offense category, the appropriate sanction would be a recommendation for termination.

**b. VARIATION 2:** Assuming that the SCMB attached no values, either mitigating or aggravating, to this particular offense, the appropriate sanction for the first offense might be a three-month reduction of 15% in salary to stimulate Judge Y to seriously reconsider the deterioration in his performance. If this is a second sanctioned offense in any category, the appropriate sanction may be to transfer Judge Y to another court for the full three months with a warning that an additional offense in any category may result in a recommendation for termination. If this is a third sanctioned offense in any offense category, the appropriate sanction would be a recommendation for termination.

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<sup>10</sup> The exception is Article 99(B) Intercessions for the resolution of requests, requesting, or accepting the resolution of one's personal interests or those of one's family or of other persons, other than within the legally regulated framework for all citizens, as well as interference with the activity of another judge or prosecutor.

- c. **VARIATION 3:** Assuming that the review team attached aggravating values to each of the three factors, the appropriate sanction for Judge Z for this first but very serious offense might be a combination of a three-month reduction of 20% in salary and a three-month transfer to another court or termination from office. If this were a second sanctioned offense in any offense category, the appropriate sanction may be a recommendation for immediate termination from office.
- B. OFFENSE: PARTICIPATION, DIRECT OR THROUGH INTERMEDIARIES, IN PYRAMID-TYPE GAMES, GAMBLING, OR INVESTMENT SYSTEMS WHOSE FUNDING TRANSPARENCY IS NOT ENSURED UNDER THE LAW LSM 99(N).** Here we again recommend the four levels of sanctions but, given the seriousness of this type of offense, would urge that the use of a warning be limited to those cases in which there are strong mitigating factors.
- a. **VARIATION 1:** If the SCMB attached mitigating values to each of the three factors for this particular offense, the appropriate disciplinary sanction might be either a stern warning or a salary reduction in the 10% range for two months. If this were Prosecutor A's second sanctioned offense for any type of violation, the SCMB might impose a more severe sanction by transferring him to another prosecutor's office for a three-month period with a stern warning that a third sanctionable offense of any type may result in a recommendation for termination.
  - b. **VARIATION 2:** Assuming the SCMB attached neither mitigating nor aggravating value to any of the three factors, it might impose a sanction it deemed appropriate for the more common instances of disciplinary violations of this type. In this case, the SCMB might impose on Prosecutor B a three-month transfer to a prosecutor's office in a smaller city that has no casinos. If this is a second sanctionable offense, the SCMB might impose, *in addition* to the transfer, a salary reduction in 15% for three months. If this is a third sanctionable offense for any disciplinary violation, the appropriate response may be a recommendation for termination.
  - c. **VARIATION 3:** For this very serious disciplinary violation, which might well include separate criminal charges, the SCMB is likely to attach aggravating values to all factors. A minimally

appropriate response might be to combine the maximum reduction in salary for a three-month period with a transfer to another court for three months. Alternatively, the SCMB may conclude that the nature of the disciplinary violation warrants a recommendation that Judge C be terminated from office, even though this is an initial disciplinary offense.

The one offense to which we recommend no graduated levels of sanctions be attached is that set forth in Article 99(B): "Interceding or requesting intercession to resolve personal, family or other affiliated party interests outside of the legal framework; interference in the work of another magistrate." Where the evidence of a violation of this prohibition is clear, we recommend that the sanction be termination from office. Such types of offenses are sufficiently serious that they serve notice on the community of magistrates that the offending individual has compromised him- or herself and shown a deficit in sound judgment sufficiently significant to preclude him or her from being entrusted with the authority of the state to officiate in the administration of justice.

#### SECTION FOUR: SUMMARY TABLE OF VIOLATIONS, FACTORS, AND SANCTION LEVELS

This evaluation protocol, comprising (i) various factors associated with each type of offense with separate categories within individual factors, and (ii) several potential sanctions for each type of offense, may be difficult for some reviewers to conceive. In anticipation of such difficulty, we have devised a table that lays out the protocol in a fairly straightforward manner. If the SCM adopts the model set forth in this memorandum, the table should serve as a useful reference tool that can easily be amended and enhanced to reflect SCM preferences and sequences.

## ILLUSTRATIVE MATRIX OF DISCIPLINARY SANCTIONS

<u>CATEGORY</u>	<u>OFFENSE</u>	<u>FACTORS</u>	<u>SANCTION</u>
OFFICIAL DUTIES	REPEATED FAILURE WITHOUT JUSTIFICATION TO PROMPTLY RESOLVE CASES PURSUANT TO LEGAL PROVISIONS LSM 99(E)	1. DURATION/LENGTH 2. TYPES OF CASES <sup>11</sup> 3. INTENT/PURPOSE	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
OFFICIAL DUTIES	UNJUSTIFIED REFUSAL TO RECEIVE APPLICATIONS, CONCLUSIONS, MEMORANDA, OR DOCUMENTS FILED BY ONE OR MORE PARTIES TO A TRIAL LSM 99(F)	1. DURATION/LENGTH 2. FREQUENCY 3. BASIS <sup>12</sup>	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
OFFICIAL DUTIES	UNJUSTIFIED REFUSAL TO FULFIL A SERVICE DUTY LSM 99(G)	1. DURATION/LENGTH 2. FREQUENCY 3. TYPES OF DUTY <sup>13</sup>	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
OFFICIAL DUTIES	BAD FAITH OR AGGRAVATED NEGLIGENT EXERCISE OF OFFICE SHORT OF QUALIFYING FOR AN OFFENSE LSM 99(H)	1. DURATION/LENGTH 2. FREQUENCY 3. INTENSITY <sup>14</sup>	L1: SALARY REDUCTION L2: TRANSFER L3: TERMINATION

<sup>11</sup> This factor reflects what types of cases were left to languish without timely judicial or prosecutorial attention:

Category A: Primarily complex and difficult cases with which magistrate struggled: mitigating factor

Category B: Indiscriminate: Most or all types of assigned cases; no factor.

Category C: Discriminate on the basis of relationship with litigants or counsel: aggravating factor.

<sup>12</sup> This factor reflects whether there was a specific basis for the refusal and whether it counts as mitigating or aggravating.

Because the performance failure is unjustified, the use of basis as a mitigating factor will be rare.

<sup>13</sup> This factor reflects what types of duties the magistrate refused to fulfill.

Category A: Insignificant service duties with minor consequences: mitigating factor.

Category B: Indiscriminate/no pattern of selectivity: no factor.

Category C: Significant service duties with major consequences: aggravating factor.

<sup>14</sup> This factor reflects the extent to which the exercise of office was corrupted by bad faith or aggravated negligence.

<u>CATEGORY</u>	<u>OFFENSE</u>	<u>FACTORS</u>	<u>SANCTION LEVELS</u>
OFFICIAL DUTIES	UNJUSTIFIED DELAY IN COMPLETING ASSIGNED DUTIES LSM 99(i)	1. DURATION/LENGTH 2. FREQUENCY	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
OFFICIAL DUTIES	FAILURE TO HONOR THE CONFIDENTIALITY OF JUDGES' DELIBERATIONS, SECRET JUDICIAL ACTS, AND PROTECTED DOCUMENTS LSM 99(d)	1. FREQUENCY 2. GRAVITY <sup>15</sup> 3. INTENT/PURPOSE <sup>16</sup>	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
OFFICIAL DUTIES	RECURRING & UNJUSTIFIED ABSENCE FROM WORK LSM 99(j)	1. FREQUENCY	L1: SALARY REDUCTION L2: TERMINATION
OFFICIAL DUTIES	FAILURE TO OBSERVE RANDOM CASE ASSIGNMENT PROVISIONS LSM 99(m)	1. INTENT/PURPOSE 2. FREQUENCY	L1: WARNING L2: SALARY REDUCTION
IMPARTIALITY	VIOLATION OF LEGAL PROVISIONS ON DECLARATIONS OF WEALTH AND INTERESTS, INCOMPATIBILITIES, AND INTERDICTIONS LSM 99(A)	1. DISCREPANCY <sup>17</sup> 2. INTENT/PURPOSE	L1: SALARY REDUCTION L2: TRANSFER L3: TERMINATION

Category A: Minor in that bad faith and/or aggravated negligence affects only minor areas of performance with minimum consequences: mitigating factor.

Category B: Medium in that bad faith and/or aggravated negligence indiscriminately affected some but not all areas of performance with mixed consequences: no factor.

Category C: Major in that bad faith and/or aggravated negligence extended to all areas of performance with serious consequences: aggravating factor.

<sup>15</sup> This factor reflects the relative gravity of the failure.

Category A: The disclosure is inconsequential and resulted in no serious problems: mitigating factor

Category B: The disclosure has consequences that resulted in some problems: no factor

Category C: The disclosure has serious and harmful consequences that cause significant problems: aggravating factor

<sup>16</sup> This factor reflects the relative intent or purpose of the official disclosing the protected information

Category A: The disclosure was not intended and can be characterized as accidental: mitigating factor

Category B: The disclosure was intended but prompted by negligence: no factor

Category C: The disclosure was intended to result in harm or damage: aggravating factor

<sup>17</sup> This factor reflects the comparative level of the deception.

Category A: Small discrepancy with minimum consequences: mitigating factor

<u>CATEGORY</u>	<u>OFFENSE</u>	<u>FACTORS</u>	<u>SANCTION LEVELS</u>
IMPARTIALITY	INTERCEDING OR REQUESTING INTERCESSION TO RESOLVE PERSONAL, FAMILY, OR OTHER AFFILIATED PARTY INTERESTS OUTSIDE OF THE LEGAL FRAMEWORK; INTERFERENCE IN THE WORK OF ANOTHER MAGISTRATE LSM 99(B)	NO TOLERANCE	L1: TERMINATION
IMPARTIALITY	ENGAGING IN PUBLIC POLITICAL ACTIVITY AND/OR EXPRESSING POLITICAL OPINIONS WHILE PERFORMING OFFICIAL FUNCTIONS LSM 99(C)	1. GRAVITY 2. INTENT/PURPOSE	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
DIGNITY OF PROFESSION	UNACCEPTABLE ATTITUDE WHEN INTERACTING WITH COLLEAGUES, LAWYERS, EXPERTS, WITNESSES, & LITIGANTS WHILE ENGAGED IN FORMAL DUTIES LSM 99(K)	1. DURATION/LENGTH 2. FREQUENCY 3. GRAVITY	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
DIGNITY OF PROFESSION	FAILURE TO OBSERVE AS REQUIRED BASIC OFFICE NORMS IN COURT OR PROSECUTION OFFICES WHERE EMPLOYED LSM 99(L)	1. DURATION 2. FREQUENCY 3. GRAVITY	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION
INCOMPATIBLE ACTIVITIES	PARTICIPATION, DIRECT OR THROUGH INTERMEDIARIES, IN PYRAMID-TYPES GAMES, GAMBLING, OR INVESTMENT SYSTEMS WHOSE FUNDING TRANSPARENCY IS NOT ENSURED UNDER THE LAW LSM 99(N)	1. DURATION 2. FREQUENCY 3. AMOUNT/LEVEL <sup>18</sup>	L1: WARNING L2: SALARY REDUCTION L3: TRANSFER L4: TERMINATION

Category B: Moderate discrepancy with moderate consequences: no factor

Category C: Severe discrepancy with significant consequences: aggravating factor

<sup>18</sup> This factor reflects the comparative amount of money invested into the illegal schemes.

Category A: Small amounts with negligible gains and/or losses: mitigating factor

Category B: Moderate amounts with moderate gains and/or losses: no factor

Category C: Large amounts with significant gains and/or losses: aggravating factor

## SECTION FIVE : SUPPLEMENTING SANCTIONS WITH REHABILITATIVE ENHANCEMENTS

As the SCM develops a protocol that links disciplinary violations to sanctions, it might consider adding another element to that protocol. Human resource management systems include disciplinary sections which outline procedures for dealing with inappropriate actions and behavior and which prescribe specific action to take when dealing with substandard performance issues. The most effective HR systems include in such sections not only disciplinary measures but, in addition, more positively oriented remedial and corrective measures that assist those who are willing to take advantage of them to improve their performance, strengthen their skills, and modify their thinking, beliefs, behavior, and self-harming or -destructive habits.

We recommend that the SCM give careful consideration to including such measures. The process of vetting, appointing, training, and otherwise preparing candidates for positions in the magistracy is a fairly lengthy and presumably costly one for the government and for the taxpayer. Arguments can be made that it is in the interest of the magistracy to invest some resources in rehabilitating or helping to restore judge and prosecutors who successfully complete that process and who serve honorably in those positions if they make a mistake or veer off course during their careers. Although a few disciplinary violations with severely aggravating factors might require termination from office, most conceivably would qualify for corrective or remedial options such as additional training, therapeutic treatment, counseling, permanent transfer to a different venue, etc.

For example, an otherwise capable judge who is charged with a disciplinary violation relating to failure to process cases in a prompt and timely manner as specified by law may be suffering from alcohol abuse and would profit from a short but intensive treatment program. A highly rated prosecutor who has developed a gambling addiction conceivably could be helped through a program of psychological counseling. A highly experienced judge who treats her colleagues, litigants, and lawyers in an increasingly abusive manner may be suffering from depression and would profit from counseling and, possibly, a regimen of therapeutic drug treatment.