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6478 General Diaz Street
New Orleans, LA 70124

March 12, 1999

Charles R. Fulbruge III
Clerk
United States Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, LA 70130



In Re: Judicial Misconduct Complaint 99-05-372-0118

Dear Mr. Fulbruge:

I hereby petition the Judicial Council for review of the Chief Judge's order concerning the above-referenced complaint and offer additional arguments and exhibits in support of this complaint.

Argument

Rule 1(E)(1) of the Rules Governing Complaints of Judicial Misconduct or Disability states that complaint procedures may not be used to have a judge disqualified or recused from a case. In compliance with this rule, the complainant merely requested censure for a serious breach of ethical conduct and nowhere asked the Court to disqualify the subject judge. A request for recusal was never raised as an issue.

Nevertheless, the Court raised and incorrectly attributed to the complainant issues related to disqualification, which it then proceeded to strike down. Thus,

"...recusal would not have been required for Judge Berrigan's participation in an externship program..." and,

"...Bernofsky has not alleged that any facts existed that would have required Judge Berrigan to recuse herself."

Concerning the externship program, it is the exceptional judge that would deny law students access to his or her chambers for educational purposes. Most of the federal district judges are known to participate in Tulane's externship program, and this is an issue raised by the Court, not the complainant. In contrast, there is a genuine inference of affinity when a judge goes through the effort of preparing lecture materials and then travels to a university campus in order to teach formal classes, all without financial compensation.

Concerning Tulane's Amistad Research Center, the Court's view is that Amistad is not related to Tulane in any way other than being located on the Tulane campus. This view is erroneous because it fails to recognize Tulane's initial investment, Tulane's annual budgeting for the Center, Tulane's board appointments, and Tulane's control over the Center's key personnel, as documented in the complaint.

Further, the objective facts of Judge Berrigan's Tulane professorship, board membership, and her failure to disclose her association with the defendant to the plaintiff cannot be made to disappear through the mere denial of their existence or relevance, although Judge Berrigan appears to be sensitive to these issues and would minimize their impact.

For example, Judge Berrigan recently altered her curriculum vitae by removing three years from the time she previously claimed to serve on the board of Tulane's Amistad Research Center. The altered vitae shows board membership only through 1994, whereas her previous vitae showed membership through 1997 [compare Exhibits 1 & 2]. This change creates a new record indicating that Judge Berrigan did not serve on the board of a Tulane research center at any time from January 31, 1995, onward, when she presided in the plaintiff's lawsuits against Tulane. This alteration by Judge Berrigan implies that she believed there was something improper about her relationship with Tulane during that period.

Conclusion

For the reasons presented here and in the initial complaint, Judge Berrigan's failure to disclose her previous and present association with the university-defendant during the past four years as presiding judge in the complainant's lawsuits against Tulane must be seen as a breach of judicial conduct that warrants censure and/or discipline.

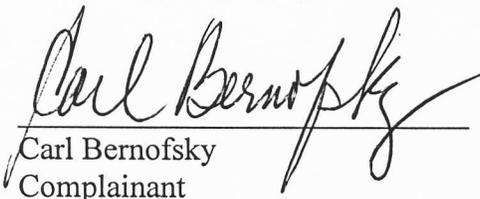
Exhibits

1. *Almanac of the Federal Judiciary, 1997*, Vol. 1, 5th Circuit, p. 3.
2. *Almanac of the Federal Judiciary, 1998*, Vol. 1, 5th Circuit, p. 3.

Certificate

The undersigned declares, under penalty of perjury that, to the best of his knowledge, the statements in the above petition are true.

New Orleans, Louisiana, this 12th day of March, 1999.



Carl Bernofsky
Complainant

mirrors that, but he's evenhanded with cases that get to court." "He is middle of the road in civil matters."

Most criminal defense lawyers said Sear is fair. "In criminal matters he's not inordinately pro-government." "He is better than some regarding being too pro-government." "He's pro-government, but not terribly so." "He often takes sides, and sometimes he takes sides depending on the lawyers and sometimes depending on the issues, but he's better than some about not being too pro-government."

Criminal defense lawyers said Sear sentences in the middle of the guidelines and is not likely to grant a downward departure from the guidelines. "In sentencing, he's not the heaviest hand. He's middle of the road in sentencing." "He's down the middle in sentencing." "You wouldn't expect a downward departure from him." "He might depart if the government urges departure because of cooperation, but he won't otherwise."

Helen Ginger Berrigan

District Judge; Louisiana, Eastern
500 Camp Street
Room 556
New Orleans, LA 70130
(504) 589-7410
Fax: (504) 589-2643

Born 1948; appointed in 1994 by President Clinton

Education Univ. of Wisconsin, B.A., 1969; American Univ., M.A., 1971; Louisiana State Univ., J.D. 1977

Private Practice Gravel Brady & Berrigan, New Orleans, 1978-94

Clerkships Law Clerk, Louisiana Department of Corrections, 1975-77

Government Positions Staff Attorney, Governor's Pardon, Parole and Rehabilitation Commission, 1977-78; Legislative Aide Senator Joseph E. Biden, 1972-73; Staff Researcher, Senator Harold E. Hughes, 1971-72; Member, Louisiana Sentencing Commission, 1987-1994

Other Employment Assistant to Charles Evers, Mayor of Fayette, Miss., 1973-74; Graduate Assistant, Department of Communications, American Univ., 1971; Administrative Secretary, Boston College; Staff Assistant, Univ. of Wisconsin

Professional Associations Louisiana State Bar Assn., 1977-present; Bar Assn., Federal Fifth Circuit, 1986-present; Louisiana Assn. of Criminal Defense Lawyers, 1985-1994; New Orleans Assn. for Women Attorneys, 1987-1994; Louisiana Capital Defense Project, 1986-88

Other Activities Committee of 21, 1989-1993; American Civil Liberties Union of Louisiana, 1989-1993; Forum For Equality, 1990-1994; Amistad Research Center, Tulane Univ., 1990-present

Media Coverage 1996: Berrigan was assigned to oversee a class-action lawsuit against the nation's largest tobacco companies. Berrigan replaced Okla. B. Jones 2d, who died in January of leukemia. Berrigan's appointment to the case had no immediate effect because the class-action status was before a Federal appeals court in New Orleans at

the time of Jones' death. Berrigan said of her assignment, "This is certainly a challenge, and I expect to work very hard." *New York Times*, January 18, 1996

Lawyers' Evaluation Lawyers with a limited number of appearances before Berrigan since her 1994 appointment are very impressed with her ability and willingness to work hard. "She is always well-prepared." "She is very bright and very thorough." "In terms of ability, she's the best." "She's very bright and very hard-working." "Her legal ability is excellent." "She has a brilliant legal mind." "She is very involved in the legal aspects of the case. She reads the briefs and the cases—the authorities, and is very prepared." "She's very good."

Litigators familiar with Berrigan said she is extremely cordial to lawyers. "She is the nicest judge to members of the bar. She has juice and coffee and donuts." "She's very cordial." "She is very courteous." "She talks to defendants—she is very cordial, she will greet them and wish them good luck." "She is the most pleasant judge. She is very lawyer-friendly." "She's extremely friendly to members of the bar. She makes you feel at home in her courtroom and chambers."

Berrigan keeps control of her courtroom, but lets attorneys present their cases, according to those familiar with her. "She takes her time to listen to everyone and doesn't interrupt like some of the other judges." "She really wants to hear your argument." "She is very involved in the courtroom." "She conducts her courtroom fairly. She knows how to rein in lawyers and when to do it." "She is very good. She lets the lawyers do some *voir dire* and that is rare anymore." "She lets you try your case." "She lets you do your thing, so being in her courtroom is really easy, in that you get to present your case." "She's very informal. She's not a prima donna and she isn't taking herself too seriously."

Most lawyers said it is too early to see any leanings in either civil or criminal cases, but indicated that she is more likely to listen to a good criminal defense argument and more likely to grant downward departures in sentencing than most judges.

Civil litigators said Berrigan referred their cases to magistrates for settlement.

Miscellany Berrigan's private practice focused almost entirely on criminal defense work, mostly in state court. She served as co-counsel to Louisiana Governor Edwin Edwards in the mid-1980's after he was indicted along with several others for alleged fraud in connection with the awarding of so-called "certificates of need" for construction of privately owned, for-profit medical facilities. Governor Edwards was eventually acquitted of all charges. Berrigan also writes and annually updates *Louisiana Criminal Trial Practice*, a 600-page compilation of the statutory and jurisprudential law of criminal procedure in Louisiana, upon which criminal practitioners in the state rely. *Inside Litigation*, Feb./March, 1994.

Exhibit 1

Carl Bernofsky

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Noteworthy Rulings 1996: Berrigan presided over a double death penalty case involving a New Orleans police officer accused of hiring a drug dealing friend to kill a woman who had filed a police brutality complaint against him. It was the first trial in the country for civil rights violation capital murder since Congress broadened the federal death penalty jurisdiction in 1994. Both defendants

were convicted and sentenced by the jury to death. *United States v. Len Davis, et al.*

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Exhibit 2

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