RHODE ISLAND AFFILIATE,
AMERICAN CIVIL LIBERTIES UNION

128 DORRANCE STREET, SUITE 220
PROVIDENCE, RI 02903
401.831.7171 (t)
401.831.7175 (f)
www.riaclu.org

COMMENTS ON PROPOSED PROVISIONAL RULE B,
RETIRED JUSTICE TRIAL ACT
January, 2009

The RI ACLU greatly appreciates the Court's decision to seek public comment before adopting rules to implement the Retired Justice Trial Act. In light of the important public policy issues raised by that Act, the Court's desire for input is sincerely welcomed.

The "Retired Justice Trial Act" was enacted by the General Assembly almost 25 years ago. Since this Court is only now proposing Rules to implement that law, we assume that the statute has lain dormant for all this time. From our perspective, that is a good thing, because we have very serious concerns about the law. The notion of privatizing our judicial system is disturbing on any number of levels. Among the most serious and troubling are its creation of a two-tiered system of justice that allows for swift resolution of cases only for those wealthy enough to afford private proceedings, and its direct impact on the fundamental right of the public to have access to the courts, both as litigants and spectators.

Leaving aside these basic policy questions, we have not attempted to determine whether the statute raises any constitutional concerns – such as legal problems relating to access to the courts or separation of powers. We recognize that, in the absence of constitutional roadblocks to implementing the statute, the *wisdom* of this law is not directly relevant to the promulgation of the Court's Rules. However, concerns about the statute can guide the Court in the way it proposes to implement it.

The Act provides in full:

> **§ 8-17-1 Retired justice program. –** There is hereby authorized and established a program of litigating civil trials, including domestic relations matters, whereby the litigants, by agreement, may retain the services of any retired justice of the supreme court or superior court or retired judge of the family court or district court to hear the merits of the issues before the court, all without a jury. Such trials shall be conducted in private, the cost of the proceedings shall be borne by the parties, and any judgments issued thereunder shall have the same effect as judgments of a court of competent jurisdiction and may be appealed to the supreme court.

The RI ACLU's most significant concern is probably the most obvious one as well: this statute establishes a judicial process that is, by its very definition, secret. As the Court well knows, persons who wish to conduct legal business in private have the means to do so. Private arbitration proceedings have long been available to litigants, and mediation programs can serve the same function. It is precisely the availability of these alternative remedies that makes the process established by this Act so troubling.

The "retired justice program" has all the earmarks of regular court cases conducted under the auspices of the judicial branch of government, with one glaring difference – the proceedings are secret. Closed-door justice is, and should be, anathema to our judicial system, which has long been guided by fundamental principles of transparency.

Under the circumstances, we believe that the guiding premise behind the Court's implementation of this law should be to allow secrecy in the program only to the extent actually required by the statute. The proposed Rules should set explicit standards to address this core issue and, to the degree consistent with the law, ensure appropriate public scrutiny of these cases. Specifically, since the statute provides only that the "trials shall be conducted in private," it is the RI ACLU's position that the Rules should make absolutely clear that no other aspect of the program may be kept secret.

If the proposed Rules do not expound on this key issue, serious disputes are bound to arise about the conduct of these proceedings. Listed below are some examples of what we mean and why we believe these Rules should be much more explicit in addressing this issue.

● The proposed Rules provide no guidance on the impact of the private nature of the proceedings on third parties. For example, people may be called as witnesses or subpoenaed to testify at one of these private trials. Litigants interested in keeping the proceedings private might try to seek the imposition of "gag orders" on those individuals. This, we submit, would be quite inappropriate and raise serious constitutional questions. The Rules should specify that the judge has no authority to impose gag orders on third parties.

● The statute authorizes judgments in private trials to be appealed to the Supreme Court. The proposed Rules do not address the effect of the private nature of the proceedings on these appeals. The Rules should make clear that if an appeal is filed, all papers in the case that would otherwise be public in a regular trial and appeal shall be public, and that the appeal shall be treated like any appeal from a "regular" court in terms of public access to the docket and other related documents and, most obviously, in terms of oral argument. Otherwise, this new system of "private justice" will adversely infect the long-standing public nature of other judicial proceedings.

● Section B of the proposed Rules requires parties to file with the clerk of court a stipulation containing various specifications regarding the conduct of the trial, such as the name of the judge hearing the case, the compensation being provided the judge, and the issues to be decided. This section should make clear that the stipulation is a public document and that it will be part of the public court file.

● Similarly, the Rules should state explicitly that the records initially contained in the public file in the case (and which the parties must make copies of for the retired judge) shall remain public once the case has been submitted to the private judge pursuant to section C.

● Section B(4) appropriately requires the parties to "assume the responsibility of providing facilities, equipment, and supplies" for private trials. However, Section E somewhat ambiguously provides that the court "*is not required to"* provide the retired judge with "court or other facilities, equipment or personnel" for purposes of conducting trials under the statute. We believe the Rules should instead be amended to make clear that the court "*shall not"* provide the judge with any such assistance. A courtroom in a public building or the use of other public funds should not be allowed for a private court proceeding between private parties with a privately-compensated judge, in a case which can then be appealed through the normal public appellate process. The courts should not be directly assisting this closed system of justice in such ways.

● Section F requires that the judge "enter a judgment … in the same manner and in accordance with the rules of the court in which the case is pending." Except to the extent such a judgment might otherwise be private anyway (such as in certain Family Court proceedings), the Rules should make clear that the judgment is a public record.

● Although the proposed Rules specify that participation in the retired judge program does not constitute service after retirement pursuant to §8-3-10, we believe the Rules need to go one important step further, by stipulating that a retired judge participating in the program cannot thereafter be called back to the bench for temporary service. While the RI ACLU has no position on whether a cap on a judge's compensation for these cases should be set, we find it quite problematic for a judge to be ruling on cases in the judicial system while moonlighting as a private judge in private cases with private litigants who are paying him or her for essentially the

same services. The potentials for conflicts or for appearances of impropriety are too great to ignore (e.g., a retired judge hearing cases on the bench from attorneys in a law firm which is paying, or has paid, him or her to handle private cases).

● The Rules allow litigants to have the judge rule on only a specific issue or question in a case, as opposed to presiding over the lawsuit in its entirety. While, at first blush, this might seem to be a positive way of limiting the scope of secret proceedings, it raises all sorts of practical and policy concerns. For example, a specific issue addressed in private (e.g., considering the credibility of a witness) can affect other aspects of the case that presumably will be decided before a "public" judge.

Breaking cases up in this way would also seem to run counter to the major rationale behind private judge programs – allowing (wealthy) litigants to move to the head of the line, since cases can be decided in a much more expeditious manner than if they stayed on the civil trial calendar. But that rationale disappears if only one part of a case is considered in private.

The only rationale left – using private trials in order to cloak particular aspects of a case in secrecy – is extremely problematic. It could lead to very troubling scenarios where, for example, the parties could, on their own, essentially decide to "close" certain proceedings of what would otherwise be a public trial that a public judge could not constitutionally close. In other words, the parties could allow certain issues and certain witnesses to be heard in public, and others to be heard in private even though such private testimony would otherwise be unallowable in the public trial.

● The fact that rulings on question of law could be decided by private judges is troubling as well. Since the judgments entered by a private judge "shall have the same effect as judgments of a court of competent jurisdiction," the potentially precedential effect of such judgments is

disconcerting. Presumably, a retired trial judge could decide, in a proceeding entirely closed to the public, on the constitutionality of a state law or the interpretation of an administrative agency's regulation. In other words, these trials authorize judicial action in matters that directly affect more people than the parties themselves who have agreed to participate in the proceeding. We are not sure of the solution to this scenario, but in light of its impact on the public and its direct challenge to the expected open nature of judicial proceedings, this presents another reason for using the rule-making process to limit the reach of this statute as much as possible, and to also include as many safeguards as possible to promote public oversight of this new system.

- The Rules should require the relevant courts to print a special docket listing all cases that have been referred to private judges from that court. This would not conflict with the statute's authorization for private trials, but might, appropriately, help reduce the use of this mechanism as a way to avoid public oversight of what clearly are and should be, by any logical meaning of the term, public court cases.

We began this testimony by noting our understanding that the purpose of the Court's request for comments is not to debate the statute's wisdom. However, we would urge the Court, to the extent it believes it has the authority to do so, to consider the propriety of adopting *any* Rules that would have the effect of implementing this very questionable statute. In any event, we encourage amendments to the Rule along the lines of those noted above in order to promote the public interest in transparency in judicial matters.

The RI ACLU thanks the Court for its consideration of our concerns, and we hope they will be given careful and favorable consideration.

Submitted by: Steven Brown, Executive Director
Rhode Island Affiliate, American Civil Liberties Union