

Order

Michigan Supreme Court
Lansing, Michigan

April 11, 2019

Bridget M. McCormack,
Chief Justice

ADM File No. 2015-14

David F. Viviano,
Chief Justice Pro Tem

Amendments of Rules
9.200 *et seq.* of the
Michigan Court Rules

Stephen J. Markman
Brian K. Zahra
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Justices

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following new set of rules comprising of MCR 9.200 *et seq.* are adopted, effective September 1, 2019.

[Current Rules 9.200 through 9.228 are rescinded
and replaced with the following new rules]

Rule 9.200 Construction

An independent and honorable judiciary being indispensable to justice in our society, subchapter 9.200 shall be construed to preserve the integrity of the judicial system, to enhance public confidence in that system, and to protect the public, the courts, and the rights of the judges who are governed by these rules in the most expeditious manner that is practicable and fair.

Rule 9.201 Definitions

As used in this chapter, unless the context or subject matter otherwise requires

- (A) “commission” means the Judicial Tenure Commission.
- (B) “judge” means:
 - (1) a person who is serving as a judge or justice of any court of the judicial branch of state or local government by virtue of election, appointment, or assignment;
 - (2) a magistrate or a referee of any such court; or
 - (3) a person who formerly held such office if a request for investigation was filed during the person’s term of office. If the person is no longer a judge and the alleged misconduct relates to the person’s actions as a judge, it is

not necessary that the request for investigation be filed during the former judge's term of office; nothing in this paragraph deprives the Attorney Grievance Commission of its authority to proceed against a former judge.

- (C) "respondent" is a judge against whom a request for investigation has been filed.
- (D) "chairperson" is the commission chairperson and includes the acting chairperson.
- (E) "master" means one or more judges or former judges appointed by the Supreme Court at the commission's request to hold hearings on a complaint against a respondent.
- (F) "disciplinary counsel" is the commission's executive director or other attorney appointed by the commission to act as the prosecutor in negotiating settlements, presenting evidence at the hearing on the complaint, and in proceedings in the Supreme Court other than litigating a recommendation on a complaint made after a hearing before the commission.
- (G) "commission counsel" is the attorney appointed by the commission to provide it with counsel whenever the commission appoints the executive director as disciplinary counsel, including acting in proceedings in the Supreme Court. The disciplinary counsel may not serve as the commission counsel in the same case.
- (H) "request for investigation" is an allegation of judicial misconduct, physical or mental disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.220.
- (I) "complaint" is a written document issued at the direction of the commission, alleging specific charges of misconduct in office, mental or physical disability, or some other ground that warrants action under Const 1963, art 6, § 30.

Rule 9.202 Standards of Judicial Conduct

- (A) **Responsibility of Judge.** A judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides.
- (B) **Grounds for Action.** A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by

the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

- (1) Misconduct in office includes, but is not limited to:
 - (a) persistent incompetence in the performance of judicial duties;
 - (b) persistent neglect in the timely performance of judicial duties;
 - (c) persistent failure to treat persons fairly and courteously;
 - (d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;
 - (e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and
 - (f) failure to cooperate with a reasonable request made by the commission in its investigation of a respondent.
- (2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge, whether the conduct occurred before or after the respondent became a judge or was related to judicial office.
- (3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including but not limited to the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter and whether respondent has corrected the behavior.

Rule 9.210 Judicial Tenure Commission; Organization

- (A) Appointment of Commissioners. As provided by Const 1963, art 6, § 30, the Judicial Tenure Commission consists of 9 persons. The commissioners selected by the judges shall be chosen by vote conducted by the state court administrator. The commissioners selected by the state bar members shall be chosen by vote conducted by the State Bar of Michigan. Both elections must be conducted in accordance with nomination and election procedures approved by the Supreme Court. Immediately after a commissioner's selection, the selecting authority shall notify the Supreme Court and the Judicial Tenure Commission.

- (B) Term of Office. A commissioner's term of office shall be 3 years. To achieve staggered terms, the following terms shall expire in consecutive years:
- (1) one of the appointments of the Governor, the judge of a court of limited jurisdiction, and one of the attorneys selected by the state bar;
 - (2) the other appointment of the Governor, the probate judge, and the other attorney selected by the state bar;
 - (3) the Court of Appeals judge, the circuit judge, and the judge selected by the state bar.

- (C) Oath of Office. The following oath shall be administered to all members of the Judicial Tenure Commission:

"I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of this state, and that I will faithfully discharge the duties of the office of Judicial Tenure Commission member according to the best of my ability."

- (D) Vacancy.

- (1) A vacancy in the office of a commissioner occurs:
 - (a) when a commissioner resigns or is incapable of serving as a member of the commission;
 - (b) when a judge who is a member of the commission no longer holds the office held when selected;
 - (c) when an attorney selected by state bar members is no longer entitled to practice in the courts of this state; and
 - (d) when an appointee of the Governor becomes an attorney.

The commission shall notify the appointing authority of a vacancy.

- (2) Vacancies must be filled by selection of a successor in the same manner required for the selection of the predecessor. The commissioner selected shall hold office for the unexpired term of the predecessor. Vacancies must be filled within 3 months after the vacancy occurs. If a vacancy occurs after the selection of a new commissioner but before that commissioner's term

officially begins, the commissioner-elect shall fill that vacancy and serve the remainder of the unexpired term.

- (3) A member may resign by submitting a resignation in writing to the commission, which must certify the vacancy to the selecting authority.
- (E) Commission Expenses.
- (1) The commission's budget must be submitted to the Supreme Court for approval.
 - (2) The commission's expenses must be included in and paid from the appropriation for the Supreme Court.
 - (3) A commissioner may not receive compensation for services but shall be paid reasonable and necessary expenses.
- (F) Quorum and Chairperson.
- (1) At its first meeting in odd-numbered years, the commission shall elect from among its members a chairperson, a vice-chairperson, and a secretary, each to serve 2 years. The vice-chairperson shall act as chairperson when the chairperson is absent. If both are absent, the members present may select one among them to act as temporary chairperson.
 - (2) A quorum for the transaction of business by the commission is 5.
 - (3) The vote of a majority of the members constitutes the adoption or rejection of a motion or resolution before the commission. The chairperson is entitled to cast a vote as a commissioner.
 - (4) Regular meetings at which no public hearing is scheduled may be held in person, by telephone, or by teleconference, provided that the telephone or teleconference method is a secure connection.
- (G) Meetings of Commission. Meetings must be held at the call of the chairperson or the executive director, or upon the written request of 3 commission members.
- (H) Commission Staff.
- (1) The commission shall employ an executive director or equivalent person or persons, and such other staff members as the commission concludes are

warranted, to perform the duties that the commission directs, subject to the availability of funds under its budget.

- (2) The executive director, other disciplinary counsel, or any other person who is involved in the investigation or prosecution of a respondent
 - (a) shall not be present or participate in any manner in the decision of the commission to file a complaint, or during the deliberations of the commission to recommend action by the Supreme Court with regard to that respondent, and
 - (b) shall have no substantive ex parte communication with the commission regarding a complaint that the commission has authorized.
- (3) Commission employees are exempt from the operation of Const 1963, art 11, § 5, as are employees of courts of record.

Rule 9.211 Judicial Tenure Commission; Powers; Review

- (A) Authority of Commission. The commission has all the powers provided for under Const 1963, art 6, § 30, and further powers provided by Supreme Court rule. Proceedings before the commission or a master are governed by these rules. The commission may adopt and publish internal operating procedures for its internal operation and the administration of its proceedings that do not conflict with this subchapter and shall submit them to the Supreme Court for approval.
- (B) Review as an Appellate Court. The commission may not function as an appellate court to review the decision of a court or to exercise superintending or administrative control of a court, but may examine decisions incident to a request for investigation of judicial misconduct, disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.220. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct.
- (C) Control of Commission Action. Proceedings under these rules are subject to the direct and exclusive superintending control of the Supreme Court. No other court has jurisdiction to restrict, control, or review the orders of the master or the commission.
- (D) Errors and Irregularities. An investigation or proceeding under this subchapter may not be held invalid by reason of a nonprejudicial irregularity or for an error not resulting in a miscarriage of justice.

- (E) Jurisdiction Over Visiting Judges. Notwithstanding MCR 9.116(B), the Attorney Grievance Commission may take action immediately with regard to a visiting judge who currently holds no other judicial office if the allegations pertain to professional or personal activities unrelated to the judge's activities as a judge.

Rule 9.212 Disqualification of Commission Member or Employee

- (A) Disqualification From Participation. A judge who is a member of the commission or a justice of the Supreme Court is disqualified from participating in that capacity in proceedings involving the judge's or justice's own actions or for any reason set forth in MCR 2.003(C).
- (B) Disqualification from Representation. A member or employee of the commission may not represent
 - (1) a respondent in proceedings before the commission, including preliminary discussions with employees of the commission before the filing of a request for investigation; or
 - (2) a judge in proceedings before the Attorney Grievance Commission, or the Attorney Discipline Board and its hearing panels, as to any matter that was pending before the Judicial Tenure Commission during the member's or the employee's tenure with the commission.

The law firm of an attorney member of the commission may not represent a respondent in proceedings before the commission, including preliminary discussions with employees of the commission before the filing of a request for investigation.

Rule 9.220 Preliminary Investigation

- (A) Request for Investigation. A request for investigation of a judge must be made in writing and verified on oath of the grievant. The commission also is authorized to act on its own initiative or at the request of the Supreme Court, the Chief Justice, the state court administrator, or the Attorney Grievance Commission.
- (B) Investigation. Upon receiving a request for investigation that is not clearly unfounded or frivolous, the commission shall direct that an investigation be conducted to determine whether a complaint should be filed and a hearing held.
- (C) Adjourned Investigation. If a request for investigation is filed less than 90 days before an election in which the respondent is a candidate, and the request is not

dismissed forthwith as clearly unfounded or frivolous, the commission shall postpone its investigation until after the election unless two-thirds of the commission members present or participating by telephone or teleconference determine that the public interest and the interests of justice require otherwise.

- (D) **Physical or Mental Examination.** In the course of an investigation where a respondent's physical or mental condition is at issue, the commission may require the respondent to submit to a physical or mental examination. Failure of the respondent to submit to the examination may constitute judicial misconduct. MCR 2.311(B) is applicable to the examination.
- (E) **Expediting Matters.** When the integrity of the judicial system requires, the Supreme Court may direct that the commission expedite its consideration of any investigation, and may set a deadline for the commission to submit any recommendation to the Court, notwithstanding any other provision in this subchapter.

Rule 9.221 Evidence

- (A) **Taking of Evidence During Investigation.** The commission may take evidence before it or an individual member of the commission, or before the executive director or other member of the staff for purposes of the investigation.
- (B) The commission may request that a respondent comment on any aspect of an investigation. The respondent shall have 21 days from the date of the request for comments to provide a response. The executive director may extend the response time for an additional 21 days. Any further request for additional time may only be granted by the commission or its chairperson for good cause shown. The respondent must sign the response, and that signature shall serve as the respondent's attestation as to the veracity of the respondent's response.
- (C) **Issuance of Subpoenas.** The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a respondent under investigation.
- (D) **Sanctions for Contempt; Disobedience by Respondent.**
 - (1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR 2.506(E) in the circuit court for the county in which the individual resides, where the individual is found, where the contempt occurred, or where the hearing is to

be held.

- (2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).
- (E) Cooperation With Investigation. A judge, clerk, court employee, member of the bar, or other officer of a court must comply with a reasonable request made by the commission in its investigation. Failure to cooperate may be considered judicial misconduct or attorney misconduct. No court may charge the Judicial Tenure Commission for copying costs or certification costs, whether under MCL 600.2546 or otherwise, unless the Michigan Supreme Court specifically so authorizes.

Rule 9.222 Further Investigation; the “28-day letter”

- (A) Before filing a complaint, the commission must give written notice to the respondent who is the subject of a request for investigation. The purpose of the notice is to afford the respondent an opportunity to apprise the commission, in writing within 28 days, of such matters as the respondent may choose, including information about the factual aspects of the allegations and other relevant issues. The notice shall specify the allegations and may include the date of the conduct, the location where the conduct occurred, and the name of the case or identification of the court proceeding relating to the conduct. The respondent shall sign the response and that signature shall serve as the respondent’s attestation as to the veracity of the respondent’s response.
 - (1) For good cause shown, the commission or its chairperson may grant a reasonable extension of the 28-day period.
 - (2) The Supreme Court may shorten the time periods prescribed in this and other provisions of this subchapter at its own initiative or at the request of the commission.
- (B) In the commission’s discretion, it may issue a “28-day letter” without having first requested the respondent’s comments pursuant to MCR 9.221(B).
- (C) The commission may continue to investigate until it issues a complaint, at which point the disciplinary counsel may continue investigating as needed.
- (D) If a respondent requests in response to a written notice from the commission under this rule, the commission may offer the respondent an opportunity to appear informally before the commission to present such information as the respondent may

choose, including information about the factual aspects of the allegations and other relevant issues.

Rule 9.223 Conclusion of Investigation; Notice

- (A) If the commission determines at any time in the investigation that there are insufficient grounds to warrant filing a complaint, the commission may:
- (1) dismiss the matter;
 - (2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct;
 - (3) dismiss the matter with or without a letter of explanation or caution that addresses the respondent's conduct contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring;
 - (4) admonish the respondent; or
 - (5) recommend to the Supreme Court private censure, with a statement of reasons.
- (B) Notice to Respondent. Before taking action under subrule (A)(2)-(5), the commission must first have given written notice to the respondent of the nature of the allegations in the request for investigation and afforded the respondent a reasonable opportunity to respond in writing, pursuant to MCR 9.221(B), MCR 9.222(A), or both.
- (C) On final disposition of a request for investigation without the filing of a complaint, the commission shall give written notice of the disposition to the respondent who was the subject of the request. The commission also shall provide written notice to the grievant that the matter has been resolved without the filing of a complaint.

Rule 9.224 Complaint

- (A) Upon determining that there is sufficient evidence to believe that the respondent under investigation has engaged in misconduct, the commission may issue a complaint against that respondent.
- (B) If the commission issues a complaint, it shall appoint the executive director or another attorney to act as disciplinary counsel. If the executive director assumes the role of disciplinary counsel, the commission shall appoint outside counsel to act as

commission counsel. If the commission appoints outside counsel to act as disciplinary counsel, the executive director shall serve as commission counsel.

- (C) Upon issuing a complaint, the commission shall petition the Court for the appointment of a master.

Rule 9.225 Interim Suspension

- (A) Petition.

- (1) With the filing of a complaint, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge until final adjudication of the complaint.
- (2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint. In such a circumstance, the documents filed with the Court must be kept under seal unless the petition is granted. Conviction of a felony is grounds for automatic interim suspension, with or without pay, pending action by the commission. If the respondent is suspended without pay, the respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

- (3) Notwithstanding any other provision of this rule, in a matter in which a respondent poses a substantial threat of serious harm to the public or to the administration of justice, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge without pay in response to a request for investigation, pending a decision by the commission regarding the issuance of a complaint. The respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

- (B) Contents; Affidavit or Transcript. The petition must be accompanied by a sworn

affidavit or court transcript and state facts in support of the allegations and the assertion that immediate suspension is necessary for the proper administration of justice.

- (C) Service; Answer. A copy of the petition and supporting documents must be served on the respondent, who may file an answer to the petition within 14 days after service of the petition, unless the commission has filed a motion for immediate consideration. The commission must be served with a copy of the answer.

Rule 9.230 Pleadings

Other than motions, the complaint and answer are the only pleadings allowed.

(A) Complaint.

- (1) Filing; Service. A complaint may not be issued before the completion of a preliminary investigation. Upon concluding that there is sufficient evidence to warrant the issuance of a complaint, the commission shall direct the executive director or equivalent staff member to do the following:

- (a) enter the complaint in the commission docket, which is a public record;
- (b) retain the complaint in the commission office; and
- (c) promptly serve a copy of the complaint on the respondent.

- (2) Form of Complaint. A complaint must be entitled:

“Complaint Against _____, Judge. No. _____.”

A complaint must be in form similar to a complaint filed in a civil action in the circuit court.

(B) Answer.

- (1) Filing. Within 14 days after service of the complaint, the respondent must file with the commission the original and 9 copies of an answer verified by the respondent.
- (2) Form. The answer must be in form similar to an answer in a civil action in the circuit court and must contain a full and fair disclosure of all facts and circumstances pertaining to the allegations regarding the respondent. Willful

concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action under the complaint.

- (3) Affirmative defenses, including the defense of laches, must be asserted in the answer or they will not be considered.

Rule 9.231 Appointment of Master

- (A) The Supreme Court shall appoint a master to conduct the hearing within a reasonable period of the date of the petition and shall establish a date for completion of the hearing procedure.
- (B) The master shall set a time and a place for the hearing and shall notify the respondent and the examiner at least 28 days in advance. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing. Recommendations on dispositive motions shall not be announced until the conclusion of the hearing, except that the master may refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion.
- (C) The master may conduct one or more pretrial conferences, and may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.
- (D) Unless the parties agree to waive them, closing arguments at the hearing before the master shall be oral and take place upon conclusion of the presentation of evidence. The master may not adjourn or postpone closing arguments for the preparation of a transcript or the submission of proposed findings of fact.
- (E) MCR 2.003(B) shall govern all matters concerning the disqualification of a master.

Rule 9.232 Discovery

- (A) Pretrial or discovery proceedings are not permitted, except as follows:
 - (1) At least 21 days before a scheduled public hearing,
 - (a) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, a copy of all statements and affidavits given by those persons, and any material in their possession that they intend to introduce as evidence at the hearing, and
 - (b) the disciplinary counsel or executive director shall provide to the

respondent copies of all exculpatory material in its possession.

- (2) The parties shall give supplemental notice to one another within 5 days after any additional witness or material has been identified and at least 10 days before a scheduled hearing.
- (B) A deposition may be taken of a witness who is living outside the state or who is unable to attend a hearing, or otherwise as allowed for good cause shown.
- (C) If a party fails to comply with subrules (A) or (B), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(e).

Rule 9.233 Public Hearing

- (A) Procedure. The public hearing must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court. A respondent is entitled to be represented by an attorney. Disciplinary counsel shall present the evidence in support of the charges set forth in the complaint and at all times shall have the burden of proving the allegations by a preponderance of the evidence. Any employee, officer, or agent of the respondent's court, law enforcement officer, public officer or employee, or attorney who testifies as a witness in the hearing, whether called by the disciplinary counsel or by the respondent, is subject to cross-examination by either party as an opposite party under MCL 600.2161.
- (B) Effect of Failure to Comply.
 - (1) If the respondent is in default for not having filed a timely answer or fails to attend the proceedings without being excused by the master, the commission, or the court, the allegations set forth in the complaint shall be deemed admitted, taken as true, and may form the basis for the master to make findings of fact.
 - (2) The respondent's failure to testify in his or her own behalf or to submit to a medical examination requested by the commission or the master may be considered as an evidentiary fact, unless the failure was due to circumstances unrelated to the facts in issue at the hearing.
- (C) Record. The proceedings at the hearing must be recorded by stenographic or mechanical means. If the master declines to admit evidence, a separate record shall be made so that the commission and/or the court may consider that evidence and determine whether to include it in the record.

Rule 9.234 Subpoenas

- (A) Issuance of Subpoenas. The attorneys may issue subpoenas for the attendance of witnesses or the production of documents or other tangible evidence.
- (B) Sanctions for Contempt; Disobedience by Respondent.
 - (1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR 2.506(E) in the circuit court for the county in which the individual resides, in which the individual is found, in which the contempt occurred, or in which the hearing is to be held.
 - (2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

Rule 9.235 Amendments of Complaint or Answer

The master, before the conclusion of the hearing, or the commission, before its determination, may allow or require amendments of the complaint or the answer. The complaint may be amended to conform to the proofs or to set forth additional facts, whether occurring before or after the commencement of the hearing. If an amendment is made, the respondent must be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged in the amendment. A “28-day letter” is not required to amend a complaint.

Rule 9.236 Report of Master

The court reporter shall prepare a transcript of the proceedings conducted before the master within 21 days of the conclusion of the hearing, filing the original with the commission, and serving copies on the respondent (or the respondent’s attorney) and disciplinary counsel, by e-mail. Within 21 days after a transcript of the proceedings is provided, the master shall prepare and transmit to the commission a report that contains a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and the answer. On receiving the report, the commission must promptly send a copy to the respondent, unless the master has already done so.

Rule 9.240 Objections to Report of Master

Within 28 days after the master’s report is mailed to the respondent, disciplinary counsel

or the respondent may file with the commission an original and 9 copies of a brief in support of or in opposition to all or part of the master's report. The briefs must include a discussion of possible sanctions and, except as otherwise permitted by the commission, are limited to 50 pages in length. A copy of the brief must be served on the opposite party, who shall have 14 days to respond.

Rule 9.241 Appearance Before Commission

When the hearing before the master has concluded, the commission shall set a date for hearing objections to the report. Both the respondent and the disciplinary counsel may present oral argument at the hearing before the commission.

Rule 9.242 Extension of Time

For good cause shown, the commission or its chairperson may extend for periods not to exceed 28 days the time for the filing of an answer, for the commencement of a hearing before the commission, for the filing of the master's report, and for the filing of a statement of objections to the report of a master.

Rule 9.243 Hearing Additional Evidence

The commission may order a hearing before itself or the master for the taking of additional evidence at any time while the complaint is pending before it. The order must set the time and place of hearing and indicate the matters about which evidence is to be taken. A copy of the order must be sent to the respondent at least 14 days before the hearing.

Rule 9.244 Commission Decision

(A) Majority Decision.

- (1) The affirmative vote of 5 commission members who have considered the report of the master and any objections, and who were present at an oral hearing provided for in MCR 9.241, or have read the transcript of that hearing, is required for a recommendation of action with regard to a respondent. A commissioner may file a written dissent.
- (2) It is not necessary that a majority agree on the specific conduct that warrants a recommendation of action with regard to a respondent, or on the specific action that is warranted, only that there was some conduct that warrants such a recommendation.

(B) Record of Decision.

- (1) The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the master, in whole or in part, by reference. The commission's report must include a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(5) or MCR 9.224 and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.
- (2) The commission shall undertake to ensure that the action it is recommending in individual cases is reasonably proportionate to the conduct of the respondent and reasonably equivalent to the action that has been taken previously in equivalent cases.

Rule 9.245 Consent Agreements

- (A) Consent Agreements. At any time, the respondent and the disciplinary counsel (or the executive director acting as the putative disciplinary counsel) may enter into confidential negotiations. A consent agreement may
 - (1) include stipulated facts and an agreement as to the sanction; or
 - (2) include just the stipulated facts, with no agreement as to the sanction.

The parties may present a signed consent agreement to the commission, which shall review the matter and decide whether to accept it. If the consent agreement is filed under subsection (1), the parties do not file briefs and the matter is not set on the docket for argument following the commission's decision, unless otherwise directed by the Court. If the consent agreement is filed under subsection (2), the matter proceeds pursuant to MCR 9.250 and MCR 9.251.

- (B) Commission Action. If the commission agrees to the terms set forth in the consent agreement in subsection (1), the commission shall issue a decision and recommendation as if there had been a master's report filed. If the commission agrees to the terms set forth in the consent agreement in subsection (2), the stipulated facts serve in lieu of a master's report and the matter then proceeds to a hearing before the commission, with the briefing schedule and an appearance before the commission, as set forth in MCR 9.240 and MCR 9.241. The time for filing a brief before the commission in matters filed under subsection (2) shall start with the filing of the consent agreement. A copy of the consent agreement shall be attached to the

commission's decision. The commission's recommendation must include its rationale for accepting the consent agreement as well as a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(5) or MCR 9.224 and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

- (C) Prior or pending discipline actions. As part of a proposed consent agreement, the parties shall submit a list of all pending or previous disciplinary action taken against the respondent, sufficient information to understand the context of the individual circumstances, and the disposition of each incident. For purposes of this rule, "disciplinary actions" include any disposition other than a dismissal under MCR 9.223(A)(1), including nonsanctions under MCR 9.223(A)(2)-(5). The parties also shall include information about actions initiated against the respondent in proceedings other than disciplinary actions, including court cases for superintending control, criminal proceedings, internal discipline actions, or any other allegations of judicial misconduct. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.
- (D) Action With Respondent's Consent. With the consent of the respondent and the commission, the Supreme Court may impose a sanction or take other action at any stage of the proceedings under these rules.
- (E) Confidentiality. A consent agreement submitted to the commission shall not be made public until after the commission has accepted its terms and the Court has approved it.

Rule 9.250 Filing and Service of Documents after Commission's Decision

- (A) Within 21 days after issuing its decision and recommendation, the commission must file in the Supreme Court:
 - (1) the original record arranged in chronological order and indexed and certified;
 - (2) one copy of the order; and
 - (3) a proof of service on the respondent.
- (B) The commission must serve the respondent with:

- (1) notice of the filing under MCR 9.250(A)(1);
- (2) 2 copies of the order;
- (3) 2 copies of the index to the original record; and
- (4) a copy of a portion of the original record not submitted by or previously furnished to the respondent.

If the commission files electronically, then the applicable court rules governing electronic filing apply.

Rule 9.251 Review by Supreme Court

- (A) Petition by Respondent. Within 28 days after being served, a respondent may file in the Supreme Court one copy of
- (1) a petition to reject or modify the commission's recommendation, which must:
 - (a) be based on the record,
 - (b) specify the grounds relied on,
 - (c) be verified, and
 - (d) include a brief in support; and
 - (2) an appendix presenting portions of the record that the respondent believes necessary to fairly judge the issues.

The respondent must serve the commission with one copy of the petition and one copy of the appendix and file proof of that service. If the respondent files electronically, then the applicable rules governing electronic filing apply.

- (B) Role of Commission Counsel and Disciplinary Counsel. If a respondent submits a petition under subsection (A), commission counsel shall appear on behalf of the commission, submit the brief of the commission under subrule (C), and shall advocate only for the position recommended by the commission. Filing of documents with the commission shall be deemed service on commission counsel. Disciplinary counsel's involvement in the case is ended, unless the matter is remanded for further proceedings before the commission or master.

- (C) Brief of Commission. Within 21 days after respondent's petition is served, the commission must file
- (1) one copy of a reply brief, and
 - (2) proof that the respondent was served with one copy of the brief.

The commission may file one copy of an appendix containing portions of the record not included in the respondent's appendix that the commission believes necessary to fairly judge the issues. If the disciplinary counsel files electronically, then the applicable rules governing electronic filing apply.

- (D) Review in Absence of Petition by Respondent. If the respondent does not file a petition, the Supreme Court will review the commission's recommendation on the record file. The Supreme Court may order that briefs be filed or arguments be presented.
- (E) Form of Briefs. A brief filed under this subrule is to be similar to a brief filed in an appeal to the Supreme Court.
- (F) Additional Evidence. The Supreme Court may, if cause is shown, order that further evidence be taken and added to the original record.
- (G) Submission. The clerk will place the case on a session calendar under MCR 7.313. Oral argument may be requested.

Rule 9.252 Decision by Supreme Court

- (A) The Supreme Court shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission or modify the recommendations by imposing a greater, lesser, or entirely different sanction. When appropriate, the Court may remand the matter to the commission for further proceedings, findings, or explication.
- (B) If the commission issues a decision based on a consent agreement between the respondent and the disciplinary counsel under subrule 9.245(A)(1) and the Court determines to impose a greater, lesser, or entirely different sanction, the respondent shall be afforded the opportunity to withdraw the consent and the matter shall be remanded to the commission for further proceedings.

Rule 9.253 Motion for Rehearing

Unless the Supreme Court directs otherwise, the respondent may file a motion for rehearing within 14 days after the filing of the decision. If the Supreme Court directs in the decision that a motion for rehearing may not be filed, the decision is final on filing.

Rule 9.260 Service

- (A) Respondent. When provision is made under these rules for serving a complaint or other document on a respondent, the service must be made in person or by registered or certified mail or through an overnight delivery service to the respondent's judicial office or last known residence. If an attorney has appeared for a respondent, service may be on the attorney in lieu of service on the respondent.
- (B) Commission. Service on the commission must be made by personal delivery or by registered or certified mail or through an overnight delivery service to the executive director at the commission's office.
- (C) Disciplinary Counsel. Service on the disciplinary counsel must be made by personal delivery or by registered or certified mail or through an overnight delivery service to the disciplinary counsel at that individual's address on record with the state bar.
- (D) Alternative Service. The respondent, the respondent's attorney, the executive director, disciplinary counsel, and/or commission counsel may serve one another via e-mail with a paper copy being sent via regular mail to the individual's address on record with the state bar.

Rule 9.261 Confidentiality; Disclosure

- (A) Scope of Rule. Except as provided in this rule, all papers filed with the commission and all proceedings before it are confidential in nature and are absolutely privileged from disclosure by the commission or its staff, including former members and employees, in any other matter, including but not limited to civil, criminal, legislative, or administrative proceedings. All the commission's investigative files and commission-generated documents are likewise confidential and privileged from disclosure. Nothing in this rule prohibits the respondent from making statements regarding the respondent's conduct.
- (B) Before Filing a Complaint.
 - (1) Before a complaint is filed, neither a commissioner nor a member of the commission staff may disclose the existence or contents of an investigation, testimony taken, or papers filed in it, except as needed for investigative purposes.

- (2) The commission may at any time make public statements as to matters pending before it on its determination by a majority vote that it is in the public interest to do so, limited to statements
 - (a) that there is an investigation pending,
 - (b) that the investigation is complete and there is insufficient evidence for the commission to file a complaint, or
 - (c) with the consent of the respondent, that the investigation is complete and some specified disciplinary action has been taken.
- (C) Discretionary Waiver of Confidentiality or Privilege. The commission may waive the confidentiality or privilege protections if:
 - (1) the respondent waives, in writing, the right to confidentiality or privilege;
 - (2) the grievant waives, in writing, the right to confidentiality or privilege;
 - (3) the witness whose statement, testimony, or other evidentiary item will be disclosed waives, in writing, the right to confidentiality or privilege; and
 - (4) a majority of the commission determines that the public interest will be served by doing so.
- (D) After Filing of Complaint
 - (1) When the commission issues a complaint, the following shall not be confidential or privileged:
 - (a) the complaint and all subsequent pleadings filed with the commission or master, all stipulations entered, all findings of fact made by the master or commission, and all reports of the master or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and
 - (b) the formal hearing before the master or commission, and the public hearing provided for in MCR 9.241.
 - (2) This subrule neither limits nor expands a respondent's right to discovery under MCR 9.232.

- (3) The confidentiality or privilege of any otherwise nonpublic disciplinary action is waived in any proceeding on a concurrent or subsequent complaint.
- (E) Disclosure to Grievant. Upon completion of an investigation or proceeding on a complaint, the commission shall disclose to the grievant that the commission
- (1) has found no basis for action against the respondent or determined not to proceed further in the matter,
 - (2) has taken an appropriate corrective action, the nature of which shall not be disclosed, or
 - (3) has recommended that the respondent be publicly censured, suspended, removed, or retired from office.
- (F) Public Safety Exception. When the commission receives information concerning a threat to the safety of any person or persons, information concerning such person may be provided to the person threatened, to persons or organizations responsible for the safety of the person threatened, and to law enforcement or any appropriate prosecutorial agency.
- (G) Disclosure to State Court Administrator.
- (1) The commission may refer to the state court administrator requests for investigation and other communications received by the commission concerning the conduct of a judge if, in the opinion of the commission, the communications are properly within the scope of the duties of the administrator. The commission may provide the administrator with files, records, investigations, and reports of the commission relating to the matter. Such a referral does not preclude action by the commission if the judge's conduct is of such a nature as to constitute grounds for action by the commission or cannot be adequately resolved or corrected by action of the administrator.
 - (2) The commission may disclose to the administrator, upon request, the substance of files and records of the commission concerning a former judge who has been or may be assigned judicial duties by the administrator; a copy of the information disclosed must be furnished to the judge.
- (H) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information concerning a judge's misconduct in office, mental or physical disability, or some other ground

that warrants commission action under Const 1963, art 6, § 30, to the Attorney Grievance Commission upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, either the Attorney Grievance Commission or the Judicial Tenure Commission may petition the Supreme Court for an order resolving the dispute.

- (I) Disclosure to Chief Judge. Notwithstanding the prohibition against disclosure in this rule, and except for those situations that involve a dismissal with explanation, the commission shall notify the chief judge of a court when the commission has taken action under MCR 9.223(A)(2)-(5) involving a magistrate or referee of that court. Upon the chief judge's request, the referee or magistrate shall provide the chief judge with a copy of the commission's written notice of disposition.

Rule 9.262 Record Retention

The commission shall develop a record-retention policy, which shall include a description of the materials that are to be stored, a list of the time for which specific materials must be maintained, and procedures for the disposal of records.

Rule 9.263 Immunity

A person is absolutely immune from civil suit for statements and communications transmitted solely to the commission, its employees, or its agents, or given in an investigation or proceeding on allegations regarding a respondent, and no civil action predicated upon the statements or communications may be instituted against a grievant, a witness, or his or her counsel. Members of the commission and their employees and agents, masters, disciplinary counsel, and commission counsel are absolutely immune from civil suit for all conduct in the course of their official duties.

Rule 9.264 Ethics Materials and Programs

The commission shall work with other groups and organizations, including the State Bar of Michigan, to develop educational materials and programs that are designed to assist judges in maintaining an awareness and understanding of their ethical obligations.

Further, the Court amends JTC IOP No. 9.202(G) as follows:

IOP 9.202(G)-1 – Commission Employees are “At Will” Employees. The executive director and all other Commission employees are “at will” employees, serving at the pleasure of the Commission. The Commission shall conduct an annual performance review of the executive director. No attorney employed by the Commission may engage in the practice of law outside the attorney’s employment relationship with the Commission.

Staff Comment: This new version of MCR 9.200 *et seq.* reflects a reorganization suggested by the Judicial Tenure Commission, and includes various technical changes to update and modernize the rules.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 11, 2019

A handwritten signature in black ink, appearing to read "Larry S. Royster", written over a horizontal line.

Clerk