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3034 WEST GRAND BLVD., SUITE 8-450
CADILLAC PLACE BUILDING
DETROIT, MICHIGAN 48202
TELEPHONE: (313) 875-5110
FAX: (313) 875-5154
WEBSITE: jtc.courts.mi.gov

Judicial Tenure Commission

June 24, 2020

Via Email and Regular Mail

Anne M. Boomer, Esq.
Administrative Counsel
Michigan Supreme Court
PO Box 300552
Lansing, MI 48909

**RE: ADM File No. 2019-33: Administrative Order No. 2020-X
Proposed Adoption of a Mandatory Continuing Judicial
Education Program**

Dear Ms. Boomer:

I write to the Court on behalf of the Judicial Tenure Commission.

On March 11, 2020, the Supreme Court issued Administrative Order No: 2020-X, which outlines a proposed Mandatory Continuing Judicial Education program. The Court invited comment on the proposed rule by July 1, 2020.

Toward that end, I thank the Court for the opportunity to comment on the proposed rule. In addressing issues related to violations of the Judicial Canons, and seeking ways to educate judges to avoid violations of the Canons, the Judicial Tenure Commission fully appreciates the benefits of a well-educated judiciary. Whether such education should be mandatory, we leave to the discussion of the Supreme Court, the judicial associations, and various other stakeholders.

I write today to express concerns about one relatively small section of the rule, namely the compliance section outlined in 12(C)(vi).

I begin my analysis by noting the Constitutional provisions related to discipline of a judge, in Article 6 § 30.¹ The Constitution restricts judicial sanctions to those imposed by the Supreme Court on recommendation of the Judicial Tenure Commission.

One part of the proposed court rule related to mandatory education establishes the State Court Administrator as being able to sanction a judge. A sanction is discipline. The proposed rule suggests that the Administrator can sanction a judge irrespective of what the JTC does. The relevant section reads as follows:

(vi) Sanctions by State Court Administrator. Upon receiving notice from the Board of a judge's noncompliance, the State Court Administrator may impose an appropriate sanction, separate from any judicial sanction recommended by the JTC.

The proposal would essentially create a second judicial discipline system, separate and distinct from the JTC, for a violation of the mandatory education rule. There are a few issues that present themselves if such a provision is implemented.

First, such a provision may well be unconstitutional. Article 6 § 30 section 2 of the Constitution begins, "On **recommendation of the judicial tenure commission**" the Supreme Court may discipline a judge. It has long been recognized that this language confines the Court's ability to independently discipline a judge, i.e., it may only do so upon recommendation of the JTC.²

¹ In pertinent part, that section states:

(2) On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his/her duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

² In a July 22, 2015, editorial in The Detroit News, then Chief Justice Young noted,

I am frankly shocked by Nolan Finley's call that somebody, anybody remove Judge Christopher Easthope from office, because I am quite sure that the Detroit News Editorial Board should have been aware that there are constitutional procedures in place for removal of a judge. Allow me to offer the following lesson on the Michigan Constitution's provisions for removing a judge.

In Michigan, a judge can be removed from office in three ways:

(1) by *impeachment* (Art. 11, sec. 7 of our constitution) for corrupt conduct in office or for

Second, under the proposed rule, one person (the Administrator), who is an employee of the Supreme Court and subject to the direction of the chief justice and/or Supreme Court, would decide a sanction. Contrast that with the independent screening and deliberative function provided by the JTC. The JTC affords all members of the judiciary the protection offered by review of any alleged misconduct by 9 commissioners, who consist of 1 probate judge; 1 district judge; 2 circuit judges; 1 court of appeals judge; 2 attorneys; and 2 lay people. In short, at the JTC several eyes and vantage points review allegations of misconduct. Further, the JTC reviews misconduct independently of the Court, according to the procedures required by MCR 9.200 et seq. Discipline that is decided and implemented by one person, lacking comparable procedures, affords judges much less due process than is the case with a JTC review.

Third, the proposal is unnecessary, because there is already a mechanism in place that can sanction a judge's failure to obtain required education. If the Supreme Court orders that judges attend training, a judge who willfully violates such an order would appropriately be the subject of review by the JTC. The Commission has addressed judges' failures to follow orders in the past, and this would be no different.

Fourth, this provision would put the State Court Administrator in the role of disciplinarian, which is a role she/he should likely not be in. There is a varied history of SCAO's interactions with the judiciary over the last couple of decades. At times, SCAO has had the approach of "how can we help you do your jobs better?" At other times, SCAO's approach has *not* been helpful and has actually hindered trust between judges and SCAO, to the detriment of the judiciary. To make the Administrator a disciplinarian seems to run counter to the current SCAO theme of focusing on helping judges do their job better, and would have a negative effect on the still-fragile rapport that SCAO has been able to build with judges in recent years.

committing crimes and misdemeanors that requires a majority of the members of the House to impeach and the Senate to convict (remove) upon vote of two-thirds of all senators elected and serving;

(2) by *removal* (Art. 6, sec. 25) by the governor for reasonable cause (which would not be sufficient to justify impeachment) upon a concurrent resolution of two-thirds of the members of the House and Senate;

(3) Removal by the Michigan Supreme Court. Although Art. 6, sec. 4 specifically provides that the "supreme court shall not have the power to remove a judge," Art. 6, sec. 30 provides that, upon investigation and recommendation of the Judicial Tenure Commission, the court may remove **or otherwise discipline a judge.** [emphasis added].

However, in the Judge Easthope case, the JTC has lodged no complaint with the court asking for his suspension (pending resolution of a JTC trial) with or without pay. Until the court gets such a request, we have no constitutional power to remove Judge Easthope.

Fifth, adoption of this provision may have the unintended consequence of creating an undesired or unfounded precedent that may instill in the State Court Administrator a sanctioning power. Further, implementation would naturally prompt the question: if the Administrator can sanction a judge for non-attendance, what would stop the Administrator from sanctioning judges for other matters, once this door is opened?

Sixth, the proposed rule does not define what it means by a “sanction.” Nor is a structure outlined for deciding what sanction/discipline is appropriate. This raises additional due process concerns.

Seventh, does the proposed rule create something akin to a Double Jeopardy concern? The rule permits the Administrator to “sanction” irrespective of what the JTC does. What happens if the Administrator and the JTC both pursue sanctions against the judge for the same conduct? Does the Supreme Court simply disregard one of the requests? If so, there is a waste of resources in terms of two groups pursuing the same infraction. On the other hand, if the Court sanctioned a judge twice for the same conduct, is that fair and does it appear fair?

Whether an intentional addition, or an unintentional oversight, section (vi) of the proposed rule essentially allows for sidestepping the Judicial Tenure Commission’s review role, and the exercise of that constitutionally established body’s discretion, in deciding whether a claim of misconduct should be elevated to review by the Supreme Court. That is a significant change to the current judicial discipline system.

For all of the reasons outlined above, I would recommend that if a mandatory education rule is adopted, subsection (vi) as noted above should be removed from that rule.

Thank you again for the opportunity to present my thoughts on the proposed rule.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. J. Burmeister".

Hon. Monte J. Burmeister
Chairperson