MICHIGAN SUPREME COURT

PUBLIC HEARING
January 17, 2017

ITEM NO. 3 (ADM File No. 2015-14)

CHIEF JUSTICE MARKMAN: Good afternoon, this is our first public administrative hearing of the Court in 2017. This a process designed to make our administrative procedures as transparent as possible and to afford an opportunity to the bench and the bar and, importantly, to any member of the public the chance to offer comments on pending administrative matters being considered by the Court. I'd like to thank each of you in advance for taking the time to share your perspectives, they will be carefully considered. Each speaker will have three minutes, so I urge you to move directly to your point. Item No. 1, 2014-29, concerning the prompt entry of consent judgments, we have no scheduled speakers. Is there anyone who would like to speak? [PAUSE] Item No. 2, 2015-02, whether to retain certain amendments that establish the Court of Appeals mediation program. Is there anyone who would like to testify or speak on that? [PAUSE] Item No. 3, 2015-14, and this pertains to broad reforms in our state judicial disciplinary rules, and we do have a number of speakers on this. The first one would be the Honorable Bradley Knoll, Judge of the 58th District Court in Ottawa County, on behalf of the Michigan District Court Associations. Judge Knoll, thank you for coming.

JUDGE KNOLL: Thank you, Mr. Chief Justice and Justices of the Supreme Court. I am Bradley Knoll, the Chief Judge of the 58th District Court located in Ottawa County, and I was- When I was asked by Judge Boyd, the president of the District Judges Association to prepare the written commentary to these proposed changes, I agreed without looking at the changes, and they are very broad in scope and comprehensive, and the limited time that I have would prevent me from addressing all of those issues, so I'll rely on the written commentary that was previously submitted. I'm confining my commentary to follow up then with the proposed changes to MCR 9.223(a), regarding the authority of the Judicial Tenure Commission to close an investigation with a nonpublic admonition. I believe that present and proposed rules work well with judges whose abuse of power or corruption has rendered them unfit to retain their office. But I would like to think that those numbers are small. I think an equal or greater

threat to the proper function of the courts, however, is posed by those judges who's ability to operate have been impaired as a result of substance abuse, mental health issues, or the co-occurrence of those disorders. In last March's Michigan State Bar Journal, Tish Vincent alerted us to the disturbing findings of the research project co-sponsored by the American Bar Association's Commission on Lawyer Assistance and the Betty Ford-Hazelden Foundation. That survey of over 12,000 lawyers showed rates of problematic substance abuse and mental health disorder much higher than the general population or higher than educated professionals. There's no reason to believe those figure would not also apply to the judiciary. In fact, I have reason to believe that those numbers might be greater among the trial judiciary. The current punitive disciplinary model does not work well with those judges. Not surprisingly, the study showed that the obstacles to treatment were the fear of publicity and confidentially issues, those concerns would arguably prevent a judge from seeking help voluntary or prevent a chief judge or other supervising party for seeking an intervention on their behalf. The availability of nonpublic resolutions, conditioned upon compliance with a program of therapy and accountability, would encourage the judges, their staff, or the supervising judges from coming forward- To come forward to address those issues. This Court has championed the treatment model involved drug, sobriety, mental health, and veteran's treatment courts, and it would seem that the same non-punitive model might also apply in those situations involving impaired judges.

JUSTICE YOUNG: What is the system you're proposing?

JUDGE KNOLL: What I would propose is that when we take these rules – and obviously the Court will make its ruling – I would see that as the end of the beginning of the process. I think that it will be very helpful if the State Court- Supreme Court took a leadership role with the Judges Association with the-

JUSTICE YOUNG: You're talking about a remedy now.

JUDGE KNOLL: I'm sorry?

JUSTICE YOUNG: You're talking about a remedy now, right?

JUDGE KNOLL: I am talking about a remedy.

JUSTICE YOUNG: Alright. Well here's how the system works: You don't become a target of the JTC until you have arguably done something to call attention to yourself.

JUDGE KNOLL: True.

JUSTICE YOUNG: And it seems to me, once you become- Come to the attention of the JTC, there are some options for you. You can admit liability and say, "I'd like to have a possibility- I think I have a problem I need to work on," or you can take the litigation approach, prove it. So I'm not sure that there's anything that- In the current regime that needs to be changed other than, perhaps, the JTC meaning amenable, perhaps more than you think it is now, to amicably resolving complaints against sitting judges where a therapeutic regime would work better. But what's broken in this system that doesn't permit that kind of process, assuming the respondent judge is amenable to that?

JUDGE KNOLL: Well, with all due respect, your argument is premised on something coming to the attention to the JTC, and I'm suggesting that there are a lot of judges out there right now who are struggling with matters that aren't coming to the attention of the JTC.

JUSTICE YOUNG: But that- But- I don't even understand what, then, you're proposing. Are you proposing we start ferreting out people who have drug or alcohol abuse who wear robes?

JUDGE KNOLL: No, I'm suggesting that those people be encouraged to come forward, that their supervising judges be encouraged to intervene in those situations, and the availability of a nonpublic resolution or remedy is something that would encourage them to do that.

JUSTICE YOUNG: Well there is the Bar's program. All the judges, I think, at least I'm aware of that's an option, right?

JUDGE KNOLL: Yeah, it's- I'm not sure how many judges are aware of the Lawyers and Judges Assistance Program-

JUSTICE YOUNG: So that's an advertising problem?

JUDGE KNOLL: I think so. I think-

JUSTICE YOUNG: Okay. But I'm trying to figure out what, structurally, you think needs to change in order to have more

therapeutic intervention. And the JTC process is not a therapeutic intervention. It is a disciplinary intervention.

JUDGE KNOLL: I think that the disciplinary process should be capable of making the distinction between the corrupt power abuses and those who are impaired as a result of substance or alcohol or mental health issues. And that eliminating the private resolution or nonpublic resolution of matters that are brought to the Judicial Tenure Commission would provide a hindrance to either the affected judge coming forward or the supervising judge seeking to intervene, knowing that if it comes to the attention of the JTC, that there's going to be this level of disciplinary public shaming. And public shaming doesn't work well with respect to the impaired population as far as alcohol and mental health issues.

CHIEF JUSTICE MARKMAN: Do you think the chief judges of the state lack the authority to identify colleagues who do suffer from some kind of problem and urge some kind of therapeutic relief or impose some kind of therapeutic remedy of some sort?

JUDGE KNOLL: No, I don't think the judges- Chief judges lack the authority, but I don't think that they are properly motivated to intervene. Court staffs are great enablers to the impaired judges, and it's-

JUSTICE YOUNG: You're talking about a cultural change that's required.

JUDGE KNOLL: It might. It just an encouragement that could be championed by the Supreme Court that would allow the distinction to be made between the bad judges and the judges who are struggling with alcohol and/or mental health issues that are causing them to not do their job.

JUSTICE YOUNG: In my experience, when I was Chief, I had a lot of these calls from chiefs who were dealing with impaired colleagues. In my experience, it was the- The problem was that the impaired colleague did not see of the need for a change of any sort.

JUDGE KNOLL: Mhmm. Right.

JUSTICE YOUNG: So I'm not sure that your premise is actually accurate. I think it's the same for everybody. If you need help, you have to get to a point where you're willing to receive it.

JUDGE KNOLL: I think your comments suggest the structural change that might be necessary where you have in place some kind of encouraged and formal intervention process, where the supervising judge can intervene, where the affected judge is encouraged to come forward, without the fear that it is going to become a public matter to his or her embarrassment, his family's embarrassment, the court's embarrassment, the court staff's embarrassment.

JUSTICE YOUNG: Maybe you should make a proposal that's outside the context of the JTC then.

JUDGE KNOLL: I think that would be appropriate. My only reason for bringing it up here is in the context of the proposed rule change that would eliminate the resolution of cases with a nonpublic admonition. That could be the carrot that's dangled before the judge who's being intervened upon to engage and be compliant with some sort of program of accountability and therapy.

JUSTICE BERNSTEIN: Well why- Why do you think- I mean, this is a fascinating conversation. Why do you think that the numbers are so high? I mean, I'm just kind of asking out of my own kind of curiosity.

JUDGE KNOLL: Sure.

JUSTICE BERNSTEIN: What would your- How would- Why do you feel that it's as high as it is?

JUDGE KNOLL: I don't know why it's as high as it is among the practicing bar, my suggestion was that it might be higher among the trial judges or as high among the trial judges not because people of less character, but just because of the nature of the work that they do. The experts call it vicarious trauma. And we deal with situations where raped and strangled teenagers have their autopsy photos arrayed before us, we have forensic pediatricians describe the process by which an infant's bones are broken by crushing a Styrofoam cup. Last week, a 12-year-old girl testified in my court that she had endured years of sexual abuse by her stepfather because her stepfather made her mom happy, and she wanted her mom to be happy, and she also added that since her life was worthless anyway, she was willing to endure that abuse. These are the sort of issues that trial judges deal with on a regular basis. They're the sort of issues that – and, like I say, it's called vicarious trauma – that can

cause substance abuse issues to arise, mental health issues to arise, so that's why I think it's at a higher level than we suspect among our trial judiciary.

JUSTICE BERNSTEIN: That does kind of create like a two-prong situation, because judges are public. The idea of coming forward can be seen as a career ended to so many people, so, you know, I think your proposal is a good one because the idea is is that if you do come forward on this, it could really be a problem in terms of your reelection or, you know, whatever the circumstance. So it really does create a real challenge for the sitting judge, doesn't it?

JUDGE KNOLL: It does. When- I'm a recovering alcoholic. When I ran for judge, my alcoholism was an issue in the campaign. But because I was- Had several years of successful recovery before I ran for election, it was approved, but yes, those issues do become public issues. And the tendency to avoid that sort of thing coming to the public light would prevent people from coming forward or prevent interventions and that's why I'm suggesting that in the limited context of these proposed rule changes, that the nonpublic admonition remain in the quiver of possible resolutions as an encouragement to people to come forward. But I agree with you, Justice Young and Justice Markman, that it would entail more than just retaining this particular aspect of the rules, that it would involve some sort of development of protocols or policy or procedures that could encourage us from [sic] going forward, and I would like to see that happen.

CHIEF JUSTICE MARKMAN: Well thank you very much for your comments, Judge Knoll. We appreciate you being here with us today.

JUDGE KNOLL: Thank you, Mr. Chief Justice.

CHIEF JUSTICE MARKMAN: Our next witness will be Glenn Page, who is the Interim Executive Director of the Judicial Tenure Commission. Mr. Page, we appreciate what you've done.

MR. PAGE: Thank you very much, Your Honor. May it please this Honorable Court. Mr. Chief Justice, Justices, I am Glenn Page, P-31703, I have had the privilege of being the Interim Executive Director for the past few months of the Judicial Tenure Commission. The Commission posted its rules- I mean, its comments upon these rules, and did so early so that everyone would have the opportunity to see them. I would like to

highlight just a couple of the rules that I think are going to create some major problems. First would be MCR 9.202(B)(2). This rule would limit the Tenure Commission's authority over sitting judges for attorney misconduct. Court rule MCR 9.116(A) says that the Attorney Grievance Commission cannot do misconduct for a sitting judge, even if it occurred when they were an attorney. This will create a gap that basically once you've become a judge, what you've done, any misconduct you may have done as an attorney, there will be jurisdiction [INAUDIBLE @ 16:00]-

JUSTICE YOUNG: Maybe we should eliminate 9.116(A).

MR. PAGE: I'm sorry?

JUSTICE YOUNG: Maybe we should eliminate that barrier.

MR. PAGE: You could eliminate that. You could give the Attorney Grievance Commission authority over sitting judges. That may create its own problem-

JUSTICE YOUNG: No. No. You give them jurisdiction over the conduct of lawyers when they are lawyers.

MR. PAGE: When they are lawyers, but after they become judges, that's the question.

JUSTICE YOUNG: Yes.

MR. PAGE: Okay, and if they-

JUSTICE YOUNG: Okay. And your point is what?

MR. PAGE: The point is-

JUSTICE YOUNG: If I lose my license for conduct I did as a lawyer, it may have a sequela for the JTC, but I don't understand why there is a problem if we eliminate the barrier to acting on conduct that the judge performed as a lawyer.

MR. PAGE: No. If you eliminated MCR 9.116(A), that would solve the problem.

JUSTICE YOUNG: Okay.

MR. PAGE: But, as 9.202(B)(2) proposed would create that gap where there is no jurisdiction.

JUSTICE YOUNG: Okay.

MR. PAGE: The second one I want to highlight is 9.220(C), that creates the three year statute of limitations. That will create a number, I think, of unnecessary litigation issues. First of all, when the grievant knew or should have known, what is a pattern, that's not described. What is good cause for the JTC to go beyond the three years? The current rules say the JTC can take into account the age of the allegations, and I think that's worked well, and we've had cases that have come before us-

JUSTICE YOUNG: You don't know what good cause is?

MR. PAGE: I'm sorry?

JUSTICE YOUNG: The JTC is unaware of what good cause might be?

MR. PAGE: Well, right now it's undefined. It will be defined by what JTC says, and then, ultimately, what this Court says.

JUSTICE YOUNG: It's a perfectly common term-

MR. PAGE: It is.

JUSTICE YOUNG: -in our court rules, is it not?

MR. PAGE: Yes, it is. And it will be litigated by every judge who is dealing with misconduct that may be older than three years.

JUSTICE MCCORMACK: Mr. Page, can I ask- Would you give me your best argument for why we shouldn't bifurcate the roles, you know, between investigatory and decision-

MR. PAGE: Much as the AGC does?

JUSTICE MCCORMACK: Just like the AGC does. What's- Why should we think about it differently in this context?

MR. PAGE: You could. You certainly could-

JUSTICE MCCORMACK: Well I know we could, I'm asking what you think about it.

JUSTICE YOUNG: Why in the JTC proposal?

MR. PAGE: The JTC, I think, has worked well the way it has been. There is- While it is a unitary system, there is a bifurcation, of course, once formal complaints are issued where the investigation role that they assumed is over with and they become an adjudicative body, ultimately to make a recommendation to this Court. At that point, the executive director's role switches, but-

JUSTICE YOUNG: We know how it works. The question, though, is why is the bifurcated a superior way of proceeding?

MR. PAGE: I think bifurcation may be a superior way.

JUSTICE YOUNG: Well, I gather the successor executive director will be arriving shortly-

MR. PAGE: Yes.

JUSTICE YOUNG: Maybe it would be a good idea to ask the executive director as he discusses with the Commission his views on these rules, whether it might not be advisable to consider the bifurcation or at least explain why that is inadvisable.

MR. PAGE: I think this Court could consider it-

JUSTICE MCCORMACK: We are considering it, that was-

JUSTICE YOUNG: I'm asking- I'm asking you to have your Commission consider it and explain to us its position on that question.

MR. PAGE: Yes.

JUSTICE YOUNG: Not that we- We can do it without the benefit of their counsel. I'm asking you to get their counsel.

MR. PAGE: I understand. I think that's a very good idea.

JUSTICE MCCORMACK: Can I- Can I go back to your question about which agency has jurisdiction on lawyers who become judges? Help me with this: For the part-time magistrates who still practice law and sit as magistrates, do both agencies have jurisdiction if they, you know, disserve a client in their private practice, does the agency have jurisdiction, or does-

MR. PAGE: As I understand the rule, and I believe its 9.11(B)-

JUSTICE MCCORMACK: Yep.

-covers magistrates who may have a private practice, if it is unrelated to their job as a magistrate, the ADC [sic] has jurisdiction.

JUSTICE MCCORMACK: Yeah.

MR. PAGE: If it's related to their judicial functions as a magistrate, the JTC would have jurisdiction.

JUSTICE MCCORMACK: Okay.

JUSTICE YOUNG: Now why isn't that same rule reasonably applicable to judges?

MR. PAGE: Well-

JUSTICE YOUNG: If my conduct as a lawyer is unrelated to my functioning as a judge, why shouldn't the AGC, and not the JTC, have jurisdiction over that claim?

MR. PAGE: They should. They could. But that's not the way these rules are written currently.

JUSTICE YOUNG: I understand.

MR. PAGE: Or the proposal.

JUSTICE YOUNG: But I'm- I'm trying to figure out if there's-

JUSTICE MCCORMACK: But that would make sense.

MR. PAGE: Yes.

JUSTICE YOUNG: -some policy justification for preempting the AGC from having jurisdiction over the complaints of the person who was, at the time, a lawyer, and who has since become a judge. Is there any policy justification you can think of for why the current rule, 9.11- Whatever it was, makes sense?

MR. PAGE: I don't think there is justification for it.

JUSTICE YOUNG: Okay.

CHIEF JUSTICE MARKMAN: Okay, thank you again, Mr. Page. And thank you, again, we appreciate what you're doing as the interim director.

MR. PAGE: Thank you very much.

CHIEF JUSTICE MARKMAN: Our next speaker will be Tom Ryan, who is a commissioner on the Judicial Tenure Commission. Former head of our State Bar.

MR. RYAN: Good afternoon, ladies and gentlemen. Congratulations ot Chief Justice Markman for being selected Chief, and thank you, Justice Young, for your excellent six years of service to the justice system.

CHIEF JUSTICE MARKMAN: Thank you.

MR. RYAN: We are here today pursuant to your administrative hearing regarding the court rules which affect the Judicial Tenure Commission, MCR 9.200 and following. The Commission has had an excellent relationship with the Michigan Supreme Court, and these latest rules have emanated out of discussions between Former Chief Justice Young and Justice Markman, who was our liaison, and the purpose of these rules is to improve the Judicial Tenure Commission's constitutional responsibilities under Article 6, Section 30 of the Michigan Constitution of 1968, stating "the Supreme Court shall make rules implementing this section" – Section 30 – "and providing for confidentiality and privilege in these proceedings." For matters involving judicial discipline, the Michigan system is a unitary system, i.e. is one body. And to your comments relative to a bifurcation, which I think is appropriate, I mean, these rules do not provide for that, but we're happy to take back to the Commission that issue and discuss it. I know that's been a commentary in the system for 48 and a half years, since the constitution of '68, so there's no reason why we shouldn't have that conversation, and we will have that conversation.

CHIEF JUSTICE MARKMAN: Mr. Ryan, as Justice Young made clear, we're aware that you have a new executive director coming imminently. Even though the Commission itself is obviously unchanged in substantial respects, would it make any sense for this Court to determine whether or not your new executive director has any new thoughts or perspectives that he might wish to share with this Court before we undertake a final decision?

MR. RYAN: I believe it would, Your Honor. I believe it would. It makes a lot of sense. And I think we should have that discussion with him. He starts February 6, so we can have that discussion next month with him [INAUDIBLE @ 23:51] for that fact.

CHIEF JUSTICE MARKMAN: And could that be expedited in some way?

MR. RYAN: It depends on your def- I mean, he starts on the sixth. Because of other commitments he had with his current employer, he couldn't start until February 6th. So we have a meeting on the ninth, I believe, so we could begin that discussion at our first meeting.

JUSTICE YOUNG: It sounds like expedition after the ninth is a good idea.

MR. RYAN: Right. We can do that, Your Honor. Absolutely.

CHIEF JUSTICE MARKMAN: That would be appreciated if it was possible.

MR. RYAN: No, no, we appreciate that very much.

JUSTICE YOUNG: What's the most concerning thing that the Court did to the rules that you guys sent over here?

MR. RYAN: Well, I have three.

JUSTICE YOUNG: Okay.

MR. RYAN: If I may. The first is- It's the Michigan Court Rule- Proposed Court Rule 9.210(H)(1), and this is where the [INAUDIBLE @ 24:40] has requested that you be involved in the hiring of our executive director. Now, for 48 and a half years, we have been able to wend our way through the employment issue with our executive director and staff without-

JUSTICE YOUNG: Do you think your current state is reflective of any change or need for change?

MR. RYAN: No, I think that that being in litigation with a former employee, as this body knows, can happen in this modern time and it's just reflective of the day and time and not

reflective of how we've been operating or how any other employer's been operating.

JUSTICE YOUNG: Are you sure of that?

MR. RYAN: I am, Your Honor. I believe so.

JUSTICE YOUNG: I'm less sure than you are.

MR. RYAN: Okay. I respect your opinion, but you're asking mine, and I believe we're in good shape. In an event-

JUSTICE MCCORMACK: [INAUDIBLE @ 24:29]

[LAUGHTER]

MR. RYAN: -we- The rule, respectfully, is inconsistent in that it sets forth a six year period for- Term for an executive director, but states that that person's an at will employee. So, I mean, that's just inherently- Is in conflict, and I think that our employee manual, our internal operating procedures-

JUSTICE YOUNG: Excuse me. Why is it- Why is it internally in conflict? Yes, an at will employee may be terminated for any legitimate reason at any legitimate time, but a term requires a formal commitment to renewal. Why is that incompatible?

MR. RYAN: Well because an at will- People have an expectation if they get a term, and we believe it's more appropriate to have it be at will, leave the at will and-

JUSTICE YOUNG: That's one thing. You said it was internally, and I assumed then logically, inconsistent to have both.

MR. RYAN: Right.

JUSTICE YOUNG: I challenge that premise.

MR. RYAN: I appreciate that, Your Honor. But, respectfully, if someone's an at will employee, they should be left an at will employee, and not given some kind of expectation that they're going to have a term. Right now, we don't have a term for our executive director, and we believe that's appropriate. They should be treated as at will, and that comports with the state rules of employment as well, so-

JUSTICE YOUNG: Do you object, also- Does the Commission object to required annual evaluation?

MR. RYAN: Well, we don't need the Court to do that, Your Honor. We do that ourselves. We will do that ourselves. We object to the Court- We should be an independent body, especially the way the system is now. We believe that as much- If you folks get- Since you're the final decision makers, if you get involved in picking our executive director, and having input and whatnot about that person, you look like you're trying to figure out and force how this- These investigations are going to go with your handpicked person. We are an independent constitutional body. We should respectfully be allowed to operate our own shop under your auspices. But the way it is now, it's going to look like this whole thing is rigged if you're going to interfere and pick our person, and then that person's going to come and argue in front of you relative to what the recommendation is, I just think that's a bad policy decision.

JUSTICE YOUNG: Okay. That's a policy point.

MR. RYAN: Right.

JUSTICE YOUNG: I have a concern about the employment hygiene that the Commission has been exercising-

MR. RYAN: The employment what, Your Honor?

JUSTICE YOUNG: Hygiene.

MR. RYAN: Okay.

JUSTICE YOUNG: Something an old employment lawyer might be concerned about.

MR. RYAN: Okay.

JUSTICE YOUNG: Which I am.

MR. RYAN: Alright.

JUSTICE YOUNG: So you make a policy argument that is not one that we should treat lightly. The argument that a term is incompatible with at will I don't think is legally accurate-

MR. RYAN: Okay.

JUSTICE YOUNG: -but let me ask you: Do you think being required by the court rule to give annual evaluations, written out evaluations of the executive director is a problem for you?

MR. RYAN: I think- I think that you're, respectfully, inter- Interfering or incur- This incursion into our employment situation [INAUDIBLE @ 28:48] the director is unnecessary and unwarranted. We are going to be doing annual reviews of our employment- Of our executive director. We did that for a while, then the Commission changes and it didn't occur. But it's a good-

JUSTICE YOUNG: Yeah. Yeah, that's a hygiene problem for me.

MR. RYAN: Alright.

JUSTICE YOUNG: If you're not- The executive director is one of the most important non-commission employees in this process.

MR. RYAN: No question.

JUSTICE YOUNG: Because people in the Commission rotate off, that is the one constant. And if the Commission isn't performing its fiduciary responsibility to annually review the performance of an executive director, things go South. And I think they have. [INAUDIBLE @ 29:29] recently.

MR. RYAN: Well, I would say this, Your Honor: Respectfully, you approve our IOPs, our internal operating procedures. I don't have a problem if we put that in our IOP that we conduct that evaluation. That's a good employment practice, I agree with that.

JUSTICE YOUNG: Are you suggesting that we think that you- Are you thinking that this rule says the Supreme Court's going to conduct the evaluation?

MR. RYAN: No, no, it doesn't, Your Honor. I agree that an evaluation should occur on an annual basis, from what we've learned.

JUSTICE YOUNG: Okay.

MR. RYAN: Okay. But let us do that in our IPOs, and if we have an issue, then we'll take whatever action we take. The Court doesn't need to be involved in that employment issue, respectfully.

JUSTICE VIVIANO: Do you object-

MR. RYAN: As long as we do get-

JUSTICE VIVIANO: Mr. Ryan, do you object to the last part of the proposed rule changed that says the JTC shall solicit input from our Court on the executive director's performance?

MR. RYAN: I think we can do that through the liaison function, rather than do it formally, personally. I-

JUSTICE YOUNG: It doesn't prescribe how that gets done.

MR. RYAN: I'm sorry?

JUSTICE YOUNG: The provision doesn't prescribe how that get the feedback, it just says you shall.

MR. RYAN: Well, I understand that, but when it's written in a rule like this, then people are going to know that you folks are all over this issue. And I just don't think - again, going back to policy and independence - as a constitutional organization, we need to have that much scrutiny, respectfully.

JUSTICE YOUNG: Understood.

MR. RYAN: Okay. Any more on that issue? That first- That was my first one.

[LAUGHTER]

CHIEF JUSTICE MARKMAN: How many points did you have, Mr. Ryan?

MR. RYAN: I had two. I had two more. But I appreciate your time is valuable-

CHIEF JUSTICE MARKMAN: If I can ask you again to expedite things, I would appreciate it.

MR. RYAN: I will. So, just- My second point is we would like you not to take the admonishment- We would like you not to change the current admonishment procedure. Currently-

JUSTICE YOUNG: What does admonishment mean?

JUSTICE MCCORMACK: The private admonishment, is that what you're saying?

JUSTICE YOUNG: Yeah. Private.

MR. RYAN: Correct.

JUSTICE YOUNG: What does an admonishment mean that's different from the other so-called non-sanctions?

MR. RYAN: Well, admonishment can be used- If there's another issue with that judge, that can be used as a disciplinary enhancement if another problem occurs, number one. Number two is when you changed the rules a few years ago, leaving it private but giving the judge a chance to appeal to you if they disagree with the admonishment, that has not happened in the years that this court rule has changed. And three, as a practical matter, it gives us a level of compliance. We can do things with admonishment because it's more serious than a caution or a letter of dismissal, we can do things with that judge-

JUSTICE YOUNG: It sounds like you have an escalating series of non-sanctionable events.

MR. RYAN: I'm sorry, Your Honor?

JUSTICE YOUNG: It sounds like you have an escalating series of non-sanctioned events here.

MR. RYAN: Well we have dismissal- I mean, under the court rule, we have a-

JUSTICE YOUNG: Yeah.

MR. RYAN: The only thing you've changed is is you've made admonishment in some fashion, now it has to come to you folks to approve or disapprove an admonishment.

JUSTICE YOUNG: Correct. That's why I'm trying to understand is what is the authority of your Commission to give out something that seems a lot like a sanction to me?

MR. RYAN: Well-

JUSTICE YOUNG: Except that we don't call it a sanction. We have the dismissal-

MR. RYAN: Right.

JUSTICE YOUNG: -which is an obvious one. Then we have a letter of-

MR. RYAN: Caution.

JUSTICE YOUNG: -caution.

MR. RYAN: Correct.

JUSTICE YOUNG: And I'm not sure what the function of an admonishment is. If you're saying to somebody, "you shouldn't do this," or "you're close to the mark, but it isn't sanctionable," that's one thing. But what does an admonishment add to that equation?

MR. RYAN: Well, as I said, admonishment gives us more teeth relative to the particular-

JUSTICE YOUNG: Teeth to do what?

MR. RYAN: Well, for instance, we could get- We get compliance, we can work with that judge relative to compliance if there's issues. Secondly, if there's a subsequent formal complaint-

JUSTICE YOUNG: And you can't do that with a letter of caution?

MR. RYAN: We can, but it's not- The judge knows it's not as serious, because admonishment puts that person one step away from a formal complaint, and one step away from if there's a formal complaint that subsequently happens, that admonishment can be brought before this body and the Master relative to that issue.

CHIEF JUSTICE MARKMAN: But there's nothing that can be compartmentalized as an admonition and therefore have some public aspect that can't be repackaged as a lesser sanction that would not have a public component to it, is that correct?

MR. RYAN: Right. Right now, the admonishment, the only way the current rules say admonishment is a public component is if the judge appeals that admonishment to you folks, and you folks

act on it. But that's never happened because no one's ever appealed, so we don't really know what that process looks like.

CHIEF JUSTICE MARKMAN: But you have essentially plenary authority, as I understand it, to say "we don't wish to make this particular conduct the subject of an admonition, and instead we're going to put it in something that will be less public."

MR. RYAN: Yes, here. That's correct, Your Honor.

CHIEF JUSTICE MARKMAN: Okay.

JUSTICE BERNSTEIN: Counsel, I was very moved by our first speaker, I think that he made some very profound points about people who are struggling, and I would like to give you an opportunity to kind of speak a little bit more about that. If we were to remove the ability to do a private admonishment, what do you think the impact would be as it pertains to judges who are struggling with certain disability or struggles or challenges, that if this was to be removed, would have really no vehicle to be able to assess that or work on those issues, because ultimately they could run the risk of being public and losing their positions.

MR. RYAN: Right. And we have limited resources- Not every issue- Not every issue of judicial misconduct rises to the level that requires a formal complaint. So we have- We probably issue three or four a year, maybe. Most of the judges in the state do an excellent job and act ethically, but if you force us to make this admonition now, to have you involved in the process, to probably make it public, then that's going to- I mean the line between an admonition which could be public and a formal complaint seems to narrow, and it doesn't make sense, unless it's really egregious behavior, that we'll issue an admonition. We may just issue a caution.

JUSTICE YOUNG: Right. I want you to stay within your constitutional authority to make only recommendations of sanctions. If it's not sanctionable, you can do anything you want to work with- Cooperatively with the respondent judge, short of something that seems an awful lot like a sanction.

MR. RYAN: Okay, but if you've allowed us, for these years, to do a caution and [INAUDIBLE @ 36:18] an admonition, I mean, I think the system is working-

JUSTICE YOUNG: Because I think that's unconstitutional, that's why.

MR. RYAN: Okay. I respectfully-

JUSTICE YOUNG: It has happened. I'm concerned about why it has happened and whether it should continue.

MR. RYAN: Okay. I appreciate that. I'm just saying I think it's worked. From our side of things, it's worked. Because we don't have to issue, you know, 20 formal complaints or 15 a year, we can-

JUSTICE YOUNG: You just issue more caution. And put on other strings on 'em you want to put on a caution. We think this is really close to the line, we think you ought to do x, y, and z, don't do it again.

MR. RYAN: Okay.

JUSTICE YOUNG: How do you phrase an admonition any differently?

MR. RYAN: Well because we can indicate that if a). the judge can appeal, and b). that if there's another issue of misconduct, we can raise this issue of admonition with the powers that be, relative to the *Brown* factors.

JUSTICE ZAHRA: You had a third point?

[LAUGHTER]

MR. RYAN: I did. We don't understand- We respectfully request that you, on MCR 2.45(D), we talk about a consent agreement, and you're changing the rules. Before, it had to be with the concurrence of the JTC and the respondent. Now, you folks can reach down into any stage of the proceedings, and yank this matter out, which, I think that we have a procedure in place, and I think for you folks, before the matter gets fully vetted and we're done with doing our due diligence, to take this out without the approval of the judge and/or us-

JUSTICE YOUNG: I think there might have been a typographical problem with that one.

MR. RYAN: Good. I hope- I'm glad to hear that. I think it should stay the way it is. It still gives you folks the power to

do that, but only if the respondent judge and we agree, otherwise we have no problem with that.

JUSTICE YOUNG: I think there was an inadvertent-

MR. RYAN: Great. I appreciate that.

CHIEF JUSTICE MARKMAN: Okay, are you done?

MR. RYAN: Thank you very much for your time. I appreciate it.

CHIEF JUSTICE MARKMAN: Thank you very much for being here. Our next speaker will be Mr. Bruce Timmons. Mr. Timmons, you've been long of the legislature, are you testifying on anyone's behalf today?

MR. TIMMONS: No, I am not.

CHIEF JUSTICE MARKMAN: Okay. Please go ahead.

MR. TIMMONS: May it please the Court. My name is Bruce Timmons. For 45 years, I served in various legal capacities with the Michigan legislature, retiring four years ago. I'm particularly interested in this issue because, as an intern back in '67 and '68, I was asked to draft the substitute for the proposal that was HGRPP. And what you have in front of you is largely the proposal that I drafted at that time. The first- The composition of the Commission was changed by floor amendment. It would have had- As I had drafted it, it would have had three judges appointed by the Supreme Court. That was changed by floor amendment to have four judges picked by their counterparts. But the second [INAUDIBLE @ 39:29] is basically what I had submitted to Representative Traxler in lieu of a statute in California language about this law. There are several issues, I will try and limit given the time available. But I believe the proposed statute of limitations of ill advised. As others have noted, attorneys, litigants, public, and staff are reluctant to file complaints against judges. The latest disciplinary action on the JTC website, a consent settlement, involves allegations of sexual harassment that began four years before a complaint was filed with the JTC. An arbitrary statute of limitations effectively thwarts JTC involvement. How will the system respond upon revelation of judicial misconduct – quote – "that is clearly prejudicial to the administration of justice" – end quote. That's the constitutional language. To whom will the Supreme Court and the public turn for a remedy? This Court

cannot remove a judge or take other discipline without the recommendation of the JTC. Please don't tie its hands or yours. The authority of the Supreme Court to implement Section 30 by rule does not allow an expansion of offices and officials that are not judges. Quasi-judicial officers like referees and magistrates are not judges, and fall outside the clear line reach of Section 30. The Supreme Court should not have any say in the selection of the executive director of the JTC. That the rules provide that Justices are included within the JTC's purview, which is actually an open question. Any Supreme Court involvement in the selection process, puts the Court in the position of the fox in the henhouse. Bad cases make bad laws, we have often heard. Given the displeasure of this Court and certain recent matters, it may be that bad cases also make bad rules. Please clarify the use of the term "complaint." The proposed rules in your own website use "complaint" with great imprecision. In a common public parlance that the public generally understands or as a word of art, specialized word of art, even on your own website. At least use distinct language or make a distinction between a complaint and a formal complaint.

CHIEF JUSTICE MARKMAN: Can I ask you please to bring your comments to an end if you would?

MR. TIMMONS: Almost every proposed change in these rules favors judges, not the public. They are designed to- As much to discourage legitimate complaints of misconduct as they are supposedly intended to ward off unfair or frivolous claims. Ultimately, rule making authority that you have, has no checks and balances. You [INAUDIBLE @ 42:13] Justices with their wisdom and good judgement are the ones who make that decision. Nobody else can counter it. I would hope in this instance that all seven of you would take a position in favor of the public and to understand that this Commission was created to discipline not insulate errant judges.

CHIEF JUSTICE MARKMAN: Thank you, Mr. Timmons.

MR. TIMMONS: Thank you.

JUSTICE ZAHRA: Well, let me just- On the limitation period, it's not- I mean, almost everything, with the exception of a few criminal acts, have a limitation period under Michigan law. And it's with good purpose that we have limitation periods. To put an end to stale claims. Memories fade, people see things and then years later, recount them differently and it creates what appears to be questions of fact. We have limitation periods in

all of the civil arenas. Why shouldn't there be some limitation period, especially when judges go out in the world and run for office- And we know when you run for office and you're a political figure, you have a tendency to make some enemies. People can drudge things up. I found one thing in the Michigan Reports that had claims against a judge from when he was an attorney 12 years prior to the date that they were actually brought. And this judge had to defend them. And as I read the case, it came out that some of the key witnesses were dead. So if it's not three years, why not four years, or five years? We have limitation periods in everything, why should judges be exempt from that?

MR. TIMMONS: Judges have a high ranking position in our society, and maybe given the fact that people are very reluctant to bring complaints against judges. We've seen that in cases before the Tenure Commission. In the whole history of the Tenure Commission, almost 50 years, there have been, what, 98 formal complaints. Two a year. It's pretty unusual for complaints to raise to that level. And I think you have to be very careful of putting the limitations on in this context given the history and the cases that have come before-

JUSTICE YOUNG: The question asked was is there no limitation if it's acceptable under these circumstances?

MR. TIMMONS: I think the extent to which past conduct goes years back, I think that goes to the remedy and the sanction that may apply.

JUSTICE YOUNG: It also goes to the ability to defend the claim, too, does it not?

MR. TIMMONS: I understand the rationale for statute of limitations.

JUSTICE YOUNG: So that's why I'm asking. Is there no range- No limitation that is acceptable to you?

MR. TIMMONS: Let's put it this way: I hope this never happens, but if it does, think of Larry Nasser in this county. Sexually abused young women going back 10, 15 years. I don't expect that that's going to happen here, but if it does, you will have tied your hands and you won't be able to take action.

JUSTICE YOUNG: No, there's a good cause exception.

MR. TIMMONS: What is- Good cause is-

JUSTICE YOUNG: I can't imagine how many lawyers cannot, in light of all the times we use "good cause" in our rules, cannot figure out how to implement a good cause exception. Are you one of those people?

MR. TIMMONS: I suspect that if you had ten people in the room on good cause, you would probably have ten different answers.

JUSTICE YOUNG: Yeah, but we know how to implement and operationalize it in our court rules, don't we?

MR. TIMMONS: I would disagree with that, respectfully.

JUSTICE YOUNG: Good.

MR. TIMMONS: I think you have a problem here, and I think it will come back to haunt you if you put a limitation in.

JUSTICE YOUNG: Okay.

CHIEF JUSTICE MARKMAN: Thank you very much, Mr. Timmons.

MR. TIMMONS: Thank you.

CHIEF JUSTICE MARKMAN: Our next witness will be Donald Campbell from the firm of Collins Einhorn Farrell.

MR. CAMPBELL: Thank you Mr. Chief Justice, Justices. May it please the Court. Donald Campbell, P-Number 43088-

CHIEF JUSTICE MARKMAN: Can you repeat that please?

[LAUGHTER]

MR. CAMPBELL: I'm always happy-

JUSTICE YOUNG: This is the second time that's happened. In my 18 years, nobody's ever done the P-Number thing.

MR. CAMPBELL: Well somebody did it earlier, and I'm just happy to say I can remember mine. So it's 43088.

JUSTICE YOUNG: You're better than I am. I can't remember mine.

JUSTICE ZAHRA: When I first started, I was embarrassed that my number was so high, now I'm embarrassed that my number is so low.

[LAUGHTER]

JUSTICE ZAHRA: I don't know when that changed.

JUSTICE YOUNG: About 40 years ago.

[LAUGHTER]

MR. CAMPBELL: As this Court is aware, my firm submitted a letter signed by individuals in my firm who had practiced in the area of representing judges as well as lawyers, but primarily judges in Judicial Tenure Commission matters, and without- I've chosen one aspect of that to address and if permitted I would comment on maybe one or two others that have been raised. The one that I've selected is MCR 2.220(E), and that has to do with the presumption that a refusal to submit to a physical or mental examination is evidence of disability, and of course it also shifts the cost, and that's a primary part of the amendment. We have within our written submissions suggested to the Court that it should review that provision in its entirety and consider an adoption that mirrors the address of mental and physical disability that is used in attorney discipline matters, and that rule is MCR 9.121(B)1(a)i. And in the attorney discipline matter, what happens is it- It's the regulator who has to make the allegation that there is a diminution, there is an issue related to physical or mental disability, and have some proof of it. That then shifts the burden to the attorney - in this case I'm suggesting it would be the judge, judicial officer – who would have to now, then, deal with the issue of showing that that disability- submitting to the examination at their discretion.

JUSTICE YOUNG: Let me-

MR. CAMPBELL: Yes.

JUSTICE YOUNG: -make sure I understand how that would work here. Alright. In this judicial system, who would be the originator of the claim that the respondent judge has some emotional or a physical condition?

MR. CAMPBELL: It would be the regulator of the Judicial Tenure Commission. It could come through an individual filing a complaint-

JUSTICE YOUNG: Most of the persons who would know would be the people who are working with the judge. Wouldn't they?

MR. CAMPBELL: Presumably it is a member of the- The same way that any other-

JUSTICE YOUNG: The chief judge might say, "my colleague is crazy. He's acting out-"

JUSTICE MCCORMACK: The technical, legal term we use here.

JUSTICE YOUNG: Yeah. Usually preceded by "bat."

JUSTICE MCCORMACK: Yeah.

[LAUGHTER]

JUSTICE YOUNG: Right?

MR. CAMPBELL: Often times-

JUSTICE YOUNG: Okay, so-

MR. CAMPBELL: I would expect that those are the people who have the best evidence or experience-

JUSTICE YOUNG: It wouldn't be the JTC, they're the referral of somebody who's saying I think this guy, or woman, who is a judge has a performance problem or behavior problem that requires your attention.

MR. CAMPBELL: That's true. There are other sources. In fact-

JUSTICE YOUNG: I don't even understand where the JTC, other than as a referent of the [INAUDIBLE @ 49:27] would be able to make that- Assume that responsibility.

MR. CAMPBELL: Well, again, if I'm understanding the question, I agree, it is the JTC that is going to get information that is going to lead it to make the conclusion that there is a mental or physical disability, and sometimes it will

come with that direct accusation, sometimes it will be a series of pieces of evidence.

JUSTICE YOUNG: So how is what- It says mental or- In the course of an investigation where a respondent's physical or mental condition is at issue, isn't that sufficient?

MR. CAMPBELL: I don't think it's sufficient enough, sir, to say that it's at issue for purposes of the JTC, and that requires then the judge to submit to a mental or physical examination.

JUSTICE YOUNG: What do you think more specificity is required here than to say it's at issue?

MR. CAMPBELL: I think there has to be an allegation that directly links the allegation of judicial misconduct with a claim that it is due to a physical or mental disability. And as we identify from the attorney rule that there has to be a relevant condition of respondent shown to be in controversy-

JUSTICE YOUNG: Okay. So the issue is relevance.

MR. CAMPBELL: Yes.

JUSTICE YOUNG: Lack of specificity, saying a relevant condition at issue.

MR. CAMPBELL: Yes.

JUSTICE YOUNG: Okay.

MR. CAMPBELL: Thank you.

CHIEF JUSTICE MARKMAN: Thank you, Mr. Campbell.

MR. CAMPBELL: Thank you.

ITEM NO. 4 (ADM File No. 2016-24)

CHIEF JUSTICE MARKMAN: You needn't move, however. We move to Item No. 4, which involves an amendment of MCR 9.115 that would clarify the rule regarding proposed consent judgements in attorney discipline proceedings. And I believe you want to testify on that, as well.

MR. CAMPBELL: Thank you.

CHIEF JUSTICE MARKMAN: Although you need not repeat your P-Number.

[LAUGHTER]

JUSTICE MCCORMACK: I can't remember [INAUDIBLE]

[LAUGHTER]

JUSTICE YOUNG: I'm at a loss.

MR. CAMPBELL: I will say it again, because I can remember it, which is 43088.

[LAUGHTER]

MR. CAMPBELL: On this issue - and I believe I'm the only one who has asked to address it – it's a case of rule that isn't broke and I don't understand why it's being fixed. And I want to suggest to this Court that it might have implications that are not designed. In other words, currently- And I represent respondents in attorney misconduct matters. Currently, I know when I go to the Attorney Grievance Commission and I make a proposal under 9.115(F)(5), that I have to make my best proposal, because if the AGC doesn't agree to me, we never get any chance to get to my hearing panel, in order for it to be considered, it has to be joint. And I know that once we have arrived at an agreement between ourselves, it has to be the best proposal because there's an up or there's a down vote. It is the gladiatorial decision of the hearing panel on our agreement. That puts a lot of pressure on the parties to that agreement, I have found in 25 years - 10 of that with the Attorney Grievance Commission, 15 representing respondents – that that has produced results that are generally either accepted or rejected. And I believe the number of cases rejected is very, very small. One or two a year.

JUSTICE YOUNG: I've been advised that the Commission is actually operating in this fashion now, is that wrong?

MR. CAMPBELL: Well-

JUSTICE YOUNG: That they have conformed their conduct-

MR. CAMPBELL: I will say that-

JUSTICE YOUNG: -to what this rule requires.

MR. CAMPBELL: I will say that the practice of the Attorney Discipline Board and the hearing panels is consistent with this rule. To a certain degree. I don't think most panelists – and I don't know if- I know some of the Justices have served as panelists before – I don't know that they understood that there was a practice out there that was inconsistent with the rule, which is to come in and have parties mediate on a disposition. And from that standpoint, Your Honors, you've raised, it really is outside the rule. It doesn't happen a lot, is my experience. It's very rare. In my private practice, in 15 years, it's happened once. In my public years – 10 years with the Attorney Grievance Commission – it happened three times. I handled 200 cases when I was at the Grievance Commission that would have been subject to this, I've handled maybe 20 or 30 since-

JUSTICE YOUNG: Tell me what happens if the rule that I understand conforms to the practice is accepted by the Court. What part of the suit will fall apart?

MR. CAMPBELL: Well it's not that it would fall apart, but I do think what's going to happen is you're going see that both respondents, through their counsel, and the AGC will have a sense that there's one more chance. There's one more chance. I will tell you, when I go to my clients and I advise them now, I don't say, "we might get another chance, we might be able to do a little bit better." If their willing to take 45 days, maybe the panel will think it's worth 30 days. If they're willing to take disbarment, maybe they'll believe it's worth four years. None of that calculation-

JUSTICE YOUNG: So the threat of going to the panel is a sufficient threat to make everybody give their last best offers?

MR. CAMPBELL: I would not describe it as a threat, I think it's a sufficient reality, yes.

JUSTICE YOUNG: Well if it weren't a threat, if it weren't a danger, they wouldn't give their last best offer, correct?

MR. CAMPBELL: If you only have one shot, you pick your best. I have one rule to talk about in the last, I had a lot more that I would have loved to talk about if I could have controlled it-

[LAUGHTER]

MR. CAMPBELL: -and I’m just suggesting in the system now, that I don’t see as broken, I don’t understand how this is a fix.

CHIEF JUSTICE MARKMAN: Okay. Thank you very much, Mr. Campbell. And thank you everyone for speaking today. We stand adjourned.