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State of Michigan
Judicial Tenure Commission

October 10, 2016

Via E-mail and Regular Mail

Ms Anne M. Boomer, Esq.
Administrative Counsel
Michigan Supreme Court
P.O. Box 30052
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**RE: ADM FILE NO. 2015-14; PROPOSED AMENDMENTS OF THE
JTC RULES (SUBCHAPTER 9.200)**

Dear Ms Boomer:

The Judicial Tenure Commission (“Commission”) thanks the Michigan Supreme Court for the opportunity to comment on the proposed amendments to MCR 9.200 *et seq.* The Commission has comments regarding the proposed court rule changes as follows.

SUBSTANTIVE REVISIONS

The following proposed court rule amendments contain substantive revisions which the Commission believes would impede the Commission in carrying out its duties as set forth in the Michigan Constitution under Article 6 Section 30.

MCR 2.202(B)(2)- Definitions- judge

Proposed MCR 9.202(B)(2) limits the Judicial Tenure Commission from acting on violations of the Code of Judicial Conduct or the Michigan Rules of Professional Conduct as to conduct of judges while in office or campaigning for office. The Commission opposes this change as it creates a gap for misconduct by

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sitting judges that occurred while they were attorneys prior to taking office. MCR 9.116(A) bars the Attorney Grievance Commission from acting against a sitting judge. Under this proposed revision the Judicial Tenure Commission also could not act.

If MCR 9.116 is revised to include jurisdiction over sitting judges for conduct while they were attorneys, the judges may appear before panels of the Attorney Disciplinary Board which include attorneys that practice in their courts (creating recusal issues). These issues are avoided if the revisions are not adopted and the current language is retained.

MCR 9.210(H)(1)- Judicial Tenure Commission; Organization- Commission Staff

The Commission strongly opposes the proposed revisions, other than the inclusion of the at-will provision (the Internal Operating Procedures of the Commission already specify that Commission employees, including the Executive Director, are at-will employees). Including a six-year term for the Executive Director is confusing. If an employee is subject to dismissal by being at-will, there is no need to express a term. Further, the Commission was created as an independent entity by an amendment to the Michigan Constitution. The Commission should be able to independently hire and fire its employees and perform specific management tasks such as the evaluation of the executive director.

MCR 9.210(H)(2)(b)- Judicial Tenure Commission; Organization- Commission Staff

The Commission strongly opposes the proposed revision of adding the phrase prohibiting ex parte communication regarding “an investigation” as it would bring the investigative operations of the Commission and its staff to a halt. The Commission regularly communicates with the executive director to authorize the investigation undertaken by the staff (beyond preliminary matters such as interviewing a grievant or a grievant’s attorney). The staff issues reports to the Commission to request authority for investigations, and the Commission in turn determines the course of the investigations. That process is used to authorize a request for respondent’s comments, 28-day letters, and the issuance of complaints. If ex parte communications between the Commission and the executive director regarding “an investigation” were eliminated, the Commission could not receive information regarding any of those matters.

MCR 9.211(B)- Judicial Tenure Commission; Powers; Review- Function of Commission

The Commission understands that it is not an appellate court and does not seek to function as such. The Commission submits that the current rule is satisfactory and strongly opposes the proposed revision adopting the phrase “and may not” before the phrase “review the decision of a court.” Michigan Code of Judicial Conduct Canon 3A(1) states that “a judge should be faithful to the law and maintain professional competence in it.” Canon 3A(1) specifically allows the Commission to “review the decision of a court.” The Supreme Court, in *In re Morrow*, 496 Mich 291 (2014), and *In re Church*, 499 Mich 936 (2016), recently issued sanctions against judges based on the Commission’s review of court decisions in light of MCJC Canon 3A(1). Respondents currently submit regular challenges to Commission investigations and formal complaints by asserting that they were engaging in legal or factual decisions subject to appellate review, and therefore their actions cannot constitute misconduct. The proposed language would diminish the effectiveness of MCJC Canon 3A(1).

MCR 9.220(C)- Preliminary Investigation- Limitations period

The Commission strongly opposes the proposed revisions. The language is unclear, as the proposed limitation period refers to the filing of a “complaint” while a grievant starts the process by filing a “Request for Investigation” (only the Commission may authorize a “complaint” under proposed MCR 9.224). Many investigations [particularly those with many allegations, such as *In re Justin*, 490 Mich 394 (2012)], take a significant amount of time to investigate. In addition, the aggrieved parties in some cases (such as some involved in *Justin*) are subject to actions of the respondent judge which delay their cases without being aware that the judge is engaging in misconduct (for example, Respondent Justin mandating probation reporting over periods far longer than allowed by law).

The phrase “after the grievant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation” also raises a number of unresolved issues. Those include:

- When the period begins to run is undefined. It unclear if it begins when the grievant knew of the underlying facts of the case, or when he knew he could file with the Commission. The Commission anticipates frequent evidentiary hearings to determine when the Grievant “knew or should have known” about the underlying facts.

- Litigants often want to wait until the case is over to file, as they do not want to complain about a judge who is presiding over their case. They should not be barred from filing for making that choice.
- Practically speaking, the Commission is not a well-known entity to the public, and attorneys frequently do not want to advise clients about the Commission as they do not want their cases being the subject of Commission proceedings (even if the attorneys do not initiate the grievance). Litigants should not be barred from filing based on actions of their counsel.

Other general issues raised by the proposed amendment:

- The procedure for addressing “good cause” is unclear and will create unnecessary litigation when a respondent’s conduct is older than three years. The rule states the Commission makes the “good cause” assessment, but is silent as to the master’s or the Supreme Court’s involvement on the issue.
- At times, misconduct can be hidden for extended periods (particularly by the respondent). A specific example occurred in *Justin*, when the respondent dismissed tickets for himself and his wife more than three years before the complaint was filed. The conduct was discovered by the Commission staff during the investigation of other allegations against the respondent, and would be barred under the proposed court rule. The Supreme Court stated in its opinion that such misconduct alone warranted the respondent’s removal from office.
- In the provision addressing “pattern” cases, the language is vague, as “pattern” is not defined. This provision would open the door to substantial hearings regarding that issue to address what conduct is and is not included in the pattern, and therefore can be included in the complaint.
- The rule is not clear as to investigations that do not reach the complaint stage. If a judge feels that the Commission has improperly issued a caution (or the Supreme Court issues an admonishment under the proposed revision) that may be barred under the new statute of limitations, it is unclear if there is recourse. Although the rule refers to “complaints,” respondents may assert that a limitation period should apply in *all* investigations as the provision is included in the “preliminary investigation” rule.
- Respondents may also assert that the limitation period should apply to sanctions. In any event, the rule appears to conflict with proposed MCR 9.231(B), 9.244(B)(1), and 9.245(B) & (C).

MCR 9.220(F)(2)- Expediting Matters; Disposition Time Frame

MCR 9.220 is labelled “Preliminary Investigation” but subparagraph 9.220(C) and (F)(2) refer to the “complaint” which by definition under these proposed rules is distinct from “preliminary investigations.”

The Commission opposes the revisions. The terms “disposed of” and “disposition” as stated in (F)(2) are not defined. “Disposition” could mean submission to the Supreme Court (as the matter is out of the Commission’s hands), or a final resolution of the case by the Supreme Court. Based on the reference to “complaint” in MCR 9.220(C), the reference could be to the request for investigation or to the complaint authorized by the Commission. Further, the rule as written is mandatory, and does not allow for any discretion of the Supreme Court. The Commission anticipates that some circumstances may arise where the 18-month period would be extended for some reason other than a request by the respondent, so that the dismissal of the complaint with prejudice would not be warranted. If some “disposition” rule is adopted as proposed by the Supreme Court, some discretion should be included.

MCR 9.223(A)- Conclusion of Investigation; Notice

The Commission opposes the proposed revisions. They remove the Commission’s authority to admonish judges and limit the authority of the Commission to discipline judges short of the issuance of a formal complaint. Many requests for investigations allege conduct that does not rise to the level of a formal complaint but still require a strong response from the Commission.

The omission of the Commission’s authority to admonish judges creates several issues. It is unclear what the difference is between an admonishment and a private censure, and why both sanctions are necessary options. There are also due process issues, as the rule does not allow the opportunity for the respondent to challenge the recommendation of an admonishment to the Supreme Court (or for the respondent’s comment to be submitted to the Court). The current rule allows the respondent to challenge the admonishment issued by the Commission in the Supreme Court. In the proposed rule there is no provision for notice to the respondent other than to obtain a comment or 28-day letter before submitting the matter to the Supreme Court for consideration of an admonishment, as required by MCR 9.207(B).

The admonishment provision in current MCR 9.207(D)(5) is satisfactory, and the Commission urges the Supreme Court to retain that rule.

Confidentiality of complaint until respondent answers¹

- MCR 9.230(A)- Pleadings- Complaint
- MCR 9.261(D)- Confidentiality; Disclosure- After Filing of Complaint

MCR 9.230(A)(1)(a) refers to MCR 9.261, which addresses confidentiality. Sub-paragraph (D) of MCR 9.261, contrary to current practice, requires the complaint to remain confidential until the respondent files an answer.

The Commission opposes any withholding of the complaint from the public for any period after it is “issued.” The Commission is aware of no other type of legal proceeding where a complaint is issued and then withheld from the public for some period waiting for an opposing party to answer (which appears to be the intent of the rule). Either the filing is public or it is not. Respondents could file motions challenging the proceedings prior to filing an answer to the complaint which would delay the public release of the complaint. It is unclear who would rule on such a motion before the complaint is released and what appellate recourse is available. If a respondent files a motion, it would likely have to be done under seal (which is not addressed in the rules). At that point one would question whether the public’s right to know is being served. These considerations would also impact the resolution of the case under the proposed disposition rule, MCR 9.220(F)(2).

Under current procedure, when the Commission issues a formal complaint, it is filed with the Commission and becomes public immediately. The complaint is not filed with the Supreme Court. The Commission files a petition for a master with the Supreme Court, and attaches the complaint as an exhibit.

¹ These court rules are addressed together as the issues are closely related.

Rules addressing prior disciplinary action²

- MCR 9.231(B)-Appointment of Master; List of Prior Disciplinary Action-
Prior Disciplinary Action
- MCR 9.244(B)(1)- Consent Agreements- Commission Action
- MCR 9.245(B) & (C)-Commission Action & Prior or Pending Discipline
actions

The Commission opposes the proposed revisions. MCR 9.231(B) requires both parties to submit prior disciplinary history to the master. The master makes findings of fact and conclusions of law and does not recommend sanctions, and providing prior or pending disciplinary action to the master is not relevant to the current allegations against the respondent.

MCR 9.224(B)(1) and 9.245(B) and (C) require the parties to provide prior and pending disciplinary action with the Commission's decision and recommendation to the Supreme Court and in any consent agreements. The rules include any disposition other than dismissal and address other disciplinary actions, superintending control, criminal proceedings, and internal disciplinary proceedings. There are issues regarding the proposed revisions.

- The rule raises due process issues, as "internal discipline actions" are not subject to *any* type of adjudicated proceedings.
- The definition of an "internal discipline action" and "any other *allegations* of judicial misconduct" are not provided. For example, the relevance of an "internal discipline action" when it involves a judge's failing to file administrative reports on time, when the Commission's investigation concerns demeanor, is questionable.
- The rule is unclear as to whether "criminal proceedings" includes acquittals, and provides no time frame. A minor in possession as a teen is not relevant regarding a 50-year-old respondent.
- The rule does not address how it relates to the three-year statute of limitations under proposed MCR 9.220(C). Although that provision is included in the "preliminary investigation" rule, a respondent may argue (as it is not specifically addressed) that as allegations could not be made that are older than three years, disciplinary actions older than three years should not be considered for sanctions.

² These court rules are being addressed together as the amendments are similar.

- The rule requires the “parties” to submit all prior and pending disciplinary actions. The Commission has no knowledge as to superintending control actions, criminal proceedings, and internal disciplinary proceedings, and no means to discover that information.

MCR 9.245(D)- Consent Agreements- Supreme Court Action

The Commission strongly opposes this proposed revision. The proposed rule states: “The Supreme Court may impose a sanction or take other action at *any stage* of the proceedings under these rules.” (Emphasis added.) Though this sub-rule is under the rule for consent agreements, the language of the rule appears to read that the Supreme Court can take any action at any time after the Commission has opened an investigation. The Commission has serious due process concerns regarding any exercise of comprehensive authority under such a rule, and concerns regarding the Supreme Court potentially usurping the Constitutional role of the Commission.

If the intent of the rule is that the Supreme Court could impose a sanction or take any other action (beyond that to which the respondent consented) at any stage *only* in a consent agreement referred to the Supreme Court by the Commission, the language of the rule should clearly specify it applies only to consent agreements. The proposed language implies the Supreme Court can take any action any time after the Commission opens an investigation.

MCR 9.251(B)- Review by Supreme Court- Role of Disciplinary Counsel

The Commission opposes the proposed revision, and suggests an alternative rule to the Supreme Court. The advocacy role of Disciplinary Counsel to prove the allegations in a complaint ends after the matter is argued and submitted to the Commission for its decision and recommendation. The Disciplinary Counsel has no role or input in the Commission’s decision and recommendation. The Disciplinary Counsel may not object to the decision and recommendation under these rules. The Commission Counsel assists the Commission in preparing the decision and recommendation and is privy to its deliberations. Therefore, the Commission Counsel, rather than the Disciplinary Counsel, should advocate for the Commission’s decision before the Supreme Court. The following language is proposed:

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(B) Roles 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 sub-rule (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.

PROCEDURAL REVISIONS

The Commission suggests that the proposed court rule amendments listed below need more clarification or warrant further revision.

MCR 9.222(A)- Further Investigation; the "28-Day letter"

Redacting information from the 28-day letter is unnecessary. The respondent knows the identity of the grievant in almost all of the underlying cases as it involves litigation where the grievant is a party, so redaction is futile. Further, the judicial disciplinary system in Michigan is established to allow the respondent to be aware of his or her accuser. Under the current system, the Commission attaches the request for investigation when a grievance is sent to the judge for a request for comment, so that the respondent becomes aware of the identity of the grievant at that time. The Commission has rarely granted anonymity to grievants who are concerned about retaliation by judges (for example, by court employees).

MCR 9.246(B)(2)- Costs and Sanctions- Amount and Nature of Costs Assessed

The Commission suggests that the phrase "actual costs, fees, and expenses" be amended to add "transcript expenses regarding the formal hearing" as that is a substantive cost the Commission incurs.

MCR 9.252(A)- Decision by the Supreme Court

If the Supreme Court will not disbar a respondent upon removal from office, the Commission requests that the Supreme Court consider adopting a provision

that if a respondent is removed from office, the respondent's license to practice law will be suspended upon referral of the case to the Attorney Grievance Commission.

RULE AMENDMENTS WHICH THE COMMISSION SUPPORTS

The Commission is strongly in favor of the following proposals contained in the revised court rules:

MCR 9.220(E)- Physical or Mental Examination

MCR 9.221(B)- Evidence (particularly as to the requirement that respondents sign comments, and that the signature attests to the veracity of the respondent's response)

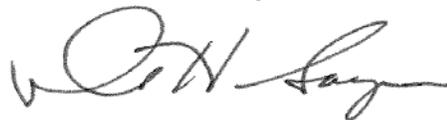
MCR 9.225(A)(2)- Interim Suspension- Petition (particularly as to a suspension *without pay*, if a judge is convicted of a felony)

MCR 9.233(B)(1)- Public Hearing- Effect of Failure to Comply

MCR 9.234(A)- Subpoenas- Issuance of Subpoenas

Once again, the Commission thanks the Supreme Court for providing it with this opportunity to provide input into these important proposals. The Commission is pleased to work with the Supreme Court in promoting the integrity of the judicial process and preserving public confidence in the courts, thus contributing to the effectiveness of the judicial disciplinary system in the Michigan legal community.

Sincerely,



Hon. David H. Sawyer
Chair
For the Commission