

MICHIGAN PROBATE JUDGES ASSOCIATION

November 14, 2016

EXECUTIVE COMMITTEE

HON. DAVID M. MURKOWSKI
PRESIDENT

HON. DORENE S. ALLEN
PRESIDENT-ELECT
HON. MONTE BURMEISTER
VICE-PRESIDENT
HON. DARLENE O'BRIEN
TREASURER
HON. THOMAS D. SLAGLE
SECRETARY
HON. JOHN TOMLINSON
PRESIDING JUDGE
HON. ROBERT J. BUTTS
IMM. PAST PRESIDENT
HON. GREGG IDDINGS
EDITOR OF *INTER COM*

AT LARGE MEMBERS

HON. MICHAEL JACONETTE
HON. WILLIAM DOHERTY
HON. GREGG IDDINGS
HON. F. KAY BEHM

REG. ASSN. PRESIDENTS

HON. KATHLEEN RYAN
SOUTHEASTERN
HON. MARCY KLAUS
CENTRAL
HON. SHANA LAMBOURN
TOP OF MICHIGAN
HON. CLAYTON GRAHAM
UPPER PENINSULA
HON. G. SCOTT PIERANGELI
SOUTHWESTERN

NON-VOTING

HON. MICHAEL ANDEREGG
EMERITI JUDGES ASSN

COMMITTEE CHAIRS:

ESTATES AND TRUSTS
HON. JOHN TOMLINSON
MENTAL HEALTH
HON. CURTIS BELL
LEGISLATION
HON. LISA SULLIVAN
GOVERNANCE
HON. PATRICK MCGRAW
COMPENSATION
HON. FREDERICK MULHAUSER
HON. PATRICK MCGRAW
FAMILY COURT – JUVENILE
HON. DORENE ALLEN
FAMILY COURT – DOM. REL.
HON. F. KAY BEHM
FAMILY COURT – ADOPTIONS
HON. WILLIAM DOHERTY
CHILD CARE FUND
HON. SUSAN DOBRICH
TECHNOLOGY
HON. THOMAS BYERLEY

Ms. Anne M. Boomer, Esq.
Administrative Counsel
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

**Re: Administrative File No. 2015-14; Proposed Amendments of the JTC
Court Rules (Subchapter 9.200)**

Dear Ms. Boomer:

The Michigan Probate Judges Association (MPJA) thanks the Michigan Supreme Court for the opportunity to comment on the proposed amendments to MCR 9.200 *et seq.* After full study and consideration by our organization, we would like to offer our comments to the proposed rule changes.

The MPJA has had the opportunity to study the recommendations made by the Judicial Tenure Commission (JTC) as outlined in its October 10, 2016 letter. With two clarifications/exceptions, the MPJA urges the Michigan Supreme Court to adopt all of JTC's recommendations. The two clarifications/exceptions are:

(1) **MCR 9.202.** Regarding jurisdiction, clarification is needed as to which agency (JTC or AGC) addresses an issue of misconduct. If the court rule is adopted as proposed, MCR 9.116 would need to be amended so that judges who engaged in misconduct while they were an attorney could be prosecuted for the ethical breach by the AGC. The issue raised by the JTC about attorney conflicts on panels used by the AGC could be resolved by using attorneys who do not have a conflict. If the proposed amendment to MCR 9.202 is not adopted, then the rule(s) related to the definition of a judge and whether the JTC could interpret and enforce the Rules of Professional Responsibility, in addition to the Code of Judicial Conduct, would need to be clarified (essentially a modification of MCR 9.201 related to the definition of a judge and clarification of the scope of jurisdiction of the JTC). This would be the case because the JTC enforces the Judicial Canons, but would be acting in the capacity where it would be reviewing violations of the Rules of Professional Responsibility for attorney misconduct for a judge, but for that period of time where the judge was an attorney. Whether or not MCR 9.202 is adopted, clarification of the rules as outlined should be considered by the Supreme Court.

(2) MCR 9.220(A). The addition of the Chief Justice is cumulative, since the state court administrator is already included and is subject to direction from the Chief Justice. Additionally, the Supreme Court should have a voice as a unified body on the issue of requesting an investigation, as already provided for in the rule.

In addition to the above recommendations, the MPJA offers the following comments and analysis:

(1) MCR 9.210(H)(1). We find the six-year term to be confusing, as it is contrary to the definition of at-will employment and is instead indicative of just-cause and/or contract employment. The executive director, in his/her role as disciplinary counsel, is in a unique position relative to his/her appearance before the Supreme Court. Given the nature of judicial disciplinary proceedings, the executive director will argue before the Supreme Court on a frequency and duration most practitioners do not see. Further, for the same reasons, the Supreme Court is in a unique position to view and comment on the executive director's performance.

From a pragmatic standpoint, it makes sense for the commission to evaluate the performance of the executive director on an annual basis. This is consistent with what professional organizations do when addressing personnel. It also makes sense to seek input from the Supreme Court for the reasons articulated above. However, as an independent constitutional entity, those recommendations, while good practice, should not be mandated by court rule. The commission should retain its ability to manage its own internal personnel affairs.

Additionally, every member of the judiciary, regardless of where they serve, is subject to the jurisdiction of the JTC. As such, the executive director, who will at times serve as disciplinary counsel, should not conceivably have his or her employment status in jeopardy as a result of input from members of the judiciary who are not on the commission. An independent commission lends credibility to the decisions and recommendations that come forward from that body. To adopt these provisions would infringe on the independence of the commission and deteriorate the integrity of the process.

(2) MCR 9.222(A). This proposed rule redacts the grievant's identity in the 28 day letter. Presumably, judges, like anyone accused, would like to know who is accusing them of misconduct and be able to effectively respond to the accusation.

(3) MCR 9.231(B) and MCR 9.245(B). These proposed rules have definitions of prior discipline that are quite broad in scope. As to "criminal proceedings", since some cases can take 6-12 months to complete, what occurs when someone is accused of criminal conduct but ultimately is acquitted? While

the case is pending, that judge is considered to have prior disciplinary proceedings just by virtue of being in the system. This is true even if the judge is ultimately acquitted.

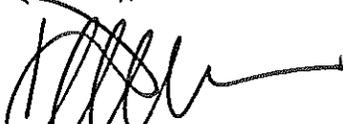
Additionally, the proposed rule included superintending control cases as examples of prior disciplinary proceedings. It does not address the outcome of those cases. Superintending control is a mechanism to compel a court to comply with a clear legal duty. Failing to effectuate a clear legal duty could conceivably be misconduct. However, a review of the appellate history for cases seeking superintending control demonstrates that often the party advocating superintending control is not successful. Further, often the reason for non-success is that the relief being sought could have been obtained through a declaratory judgment proceeding. This rule makes no distinction between successful or unsuccessful superintending control cases. So if a judge is subject to such a suit, whether because the proponent did not appreciate relief was available as a declaratory ruling or because the complaint was initiated for political or other nefarious reasons, that judge is considered to have had prior disciplinary proceedings. Superintending control should be removed as a consideration in this rule or, if not removed, the rule should be modified to reflect examination as to whether a proponent was successful in their claim. In other words, a modification that would allow the JTC to examine the case to see what was in issue and whether it was something that should even be considered discipline.

(4) MCR 9.245(D). Art. 6, Sec. 30 (2) of the Constitution begins: "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."

In short, the Supreme Court's jurisdiction is triggered by a recommendation from the JTC and not before. This proposed provision would run afoul of the plain language of the Constitution.

Once again, the Michigan Probate Judges Association thanks the Supreme Court for providing it with this opportunity to provide input into these important proposals.

Sincerely,

A handwritten signature in black ink, appearing to read "DM Murkowski", with a long horizontal flourish extending to the right.

David M. Murkowski
President,
Michigan Probate Judges Association