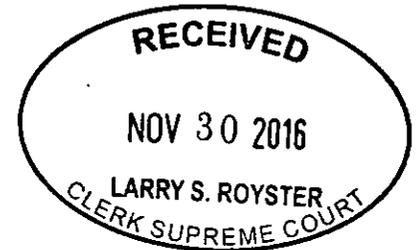


November 30, 2016

Ms. Anne M. Boomer, Esq.
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Re: **ADM File No. 2015-14** - Proposed Amendments to MCR 9.200 et seq concerning the Judicial Tenure Commission created by Const. 1963, Art. VI, §30.

Dear Ms. Boomer:

Déjà vu! Yet another proposal [Rule 9.220(C)] to create a 3-year statute of limitations on judicial misconduct – reminiscent of a similar failed attempt to do likewise in 1984.

The “staff comment” at the end of 32 pages of proposed rule changes suggest this effort is basically a recommendation by the Judicial Tenure Commission (JTC). *Hardly!* “This proposal includes most of the revisions suggested by the JTC, as well as some additional substantive changes added by the Court for purpose of public comment.” I would submit that the “additional substantive changes” are the real crux of No. 2015-14.

The filed response on behalf of the Judicial Tenure Commission by its Chair, the Honorable David Sawyer, systematically refutes the need and apparent rationale for multiple substantive changes. I commend the JTC response as consistent with the intent behind the JTC and would urge the Supreme Court to heed its thoughtful suggestions. More specifically:

The Judicial Tenure Commission was created by constitutional amendment in 1968 to discipline – not immunize – errant judges!

As a Ford Foundation Fellow (intern) assigned to the House Judiciary Committee during 1967-68, I helped draft the constitutional amendment that created the JTC. The Legislature intended to create a better mechanism to address or ferret out judicial misconduct and to provide appropriate discipline when misconduct occurred – not to cover up misconduct or “let them get away with it”. Then-existing alternatives of superintending control, removal, and impeachment were respectively too limited, or too severe and impractical.

With few exceptions, Michigan’s judges perform well. SCAO and the JTC have on many occasions over almost 50 years addressed court issues that could have become embarrassing to local courts in particular and the state judiciary in general by defusing situations with advice, mediation, and assistance. Occasionally a judge has retired. It is extremely rare that a judge’s conduct has prompted a formal complaint by the JTC – 98 through 2015 (averaging 2 per year). Having followed the JTC since its inception, I have confidence in the Commission and its success and commitment to preserve the integrity of Michigan’s one court of justice.

But that deserved confidence could be quickly eroded if the public perceives that the Supreme Court is undermining the ability of the Judicial Tenure Commission to respond to judicial misconduct. ADM No. 2015-14 is no longer a JTC proposal – it’s the *Supreme Court’s*.

As both Alan Falk and Judge Sawyer note, misconduct does not always surface in a conveniently timely fashion. Judge Sawyer cites the Justin case. Mr. Falk notes that we have

unfortunately had misconduct at high levels. I would note that circumstances like those leading to discipline against then-judges Del Rio, Probert, and Lawrence in earlier days of the JTC history could have insulated a judge if that conduct was not brought to the JTC's attention within the proposed 3-year limit. The passage of time may weigh upon the ultimate discipline but should not act as an initial prophylactic to an investigation. Any "statute of limitations" in ADM No. 2015-4 insulates and condones misconduct to the detriment of the public.

Even worse, if the 3-year SOL effectively thwarts JTC involvement, how will the system respond upon revelation of judicial misconduct "that is clearly prejudicial to the administration of justice" (the constitutional charge to the JTC)? Do we fall back on less effective or impractical mechanisms that didn't work before? To whom will the Supreme Court (and public) turn for a remedy? If you clip the wings of an eagle so it cannot surveil the terrain below, how can it fend for you in the time of need?

The Court must not ignore the reality that there are judges who function as the "king or queen of their courts". In counties where a single judge may serve on a trial court, attorneys are extremely hesitant to make waves lest their entire practice be jeopardized and their clients' interests impaired. Sometimes a reputation for high-handedness must develop before an attorney or local bar will complain to the JTC. This delay may also result when the misconduct occurs at the early stages of litigation; an attorney does not want to jeopardize his or her client's interests (which may not be directly affected by the misconduct) and therefore will not pursue the matter until the case is concluded. I worked with a legislator who had to turn down clients whose cases would go before a judge who took out his displeasure over legislation at the expense of that legislator's clients.

One notes that the MJA is again supporting the 3-year limitation. As I recall, MJA was the instigating source of the effort in 1984. At the same time there were efforts by judges on the JTC to unseat another member who reputedly was a little too aggressive against judicial misconduct to suit some judges. This is an old battle being renewed.

There are other issues, like withholding public release of a formal complaint until after the judge files a response. JTC and the State Bar do not support that. It's a transparency issue. When the process has reached that stage, it is time to go public and that is the current practice.

Thirty years ago I was leery of the JTC considering conduct before an individual became a judge. I thought that appropriately remained under the province of the attorney grievance machinery. However, if that conduct meets the standard that it "is clearly prejudicial to the administration of justice" in that person's role as judge, should not the JTC be allowed to do its job? If the pre-judge conduct does not rise to that level, then any recourse should be through the attorney grievance process. ADM No. 2015-14, in conjunction with the ban on grievance action, would insulate the judge from any discipline. There needs to be some flexibility here, with preference given to the JTC if the conduct at issue meets its constitutional threshold; otherwise, a grievance process should apply.

Under Art VI, §30, the Supreme Court has two responsibilities – imposing sanctions upon recommendation of the JTC and adopting rules "implementing this section...". Section 30 does not give the Supreme Court superintending control over the JTC. It is not SCAO. It is not given the role of personnel director (as much as this proposal and MJA would like it). The proposed MCR 9.245(D) that would allow the Supreme Court to intervene at any time during the JTC process or even alter a consent agreement directly contravenes and interferes with the

constitutional role of the JTC. "Implementing" does not mean negating the very authority that the People of this State have entrusted to the Judicial Tenure Commission.

To the extent the Supreme Court attempts to subordinate the JTC, there is a stronger argument that the JTC should not include justices within its scope. To the extent the JTC functions with more limited involvement by the Supreme Court, the argument may tilt toward inclusion of justices within its purview.

I would reluctantly remind the Court that, with regard to rule-making, the Supreme Court is the ultimate arbiter of its own authority. No checks and balances here. The only restraint on use of that power is the wisdom and good judgment of at least 4 justices.

Who will the Supreme Court protect – the judges, or the public?

This proposal lacks public input and public exposure. The proposal is on a website that is difficult to find and unlikely to be discovered by accident. Who among the public (or even attorneys), including the media, would think to look under Chapter 9 – Professional Disciplinary Proceedings? ADM No.2015-14 is buried 8 clicks away in an obscure corner of the government universe that the public rarely if ever sees. As of this writing, there is no reference to this proposal or the JTC response on the JTC's website – or a helpful, quicker link to the site where ADM No.2015-14 and responses could be found.

There is another issue glossed over by ADM No. 2105-14: Over whom does the JTC have jurisdiction, namely who is a "judge". Art. VI, §30(2) says "On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a **judge** . . . ". While the Supreme Court was directed to make rules "implementing this section", that authority does not extend to expansion of "judges" (a clear constitutional limitation) to include quasi-judicial officers – such as juvenile referees, friend of the court referees, and district court magistrates. QJO's are appointed positions that are subject to discipline and removal by their appointing authority without recourse to an onerous removal or impeachment process. If the Court believes that words mean what they say, an admonition I have heard with regard to statutes, then how much more should the Constitution meet the same test – meaning "judge" does not include a QJO?

In the attached appendix I raise the question of whether "judge" includes "justice" because, unlike the assumptions we make about consistency in the use of language, Art VI is partially consistent and agonizingly contradictory. Whither §30?

Thank you for your attention and consideration.

Respectfully,



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APPENDIX

The following reproduces an Issue Brief this writer prepared March 27, 2007 for the House Republican Caucus on the topic of:

Article VI – Judges and Justices – Distinctive and expansive use of the term “judge” in Const 1963, Article VI

The original letterhead is omitted so as to create misimpression that the office for which it was prepared in any way endorsed the content of the issue brief.

Short Summary:

Does “judge” include “justice”? One of conundrums we find in any issue of statutory construction – or construction of the state constitution of 1963 – is the consistency of terminology, or the lack of it.

ISSUE / PROBLEM:

A. Article VI in many respects evidence a clear distinction between the use of the term “**judge**” and the term “**justice**” – with the possible exception of a handful of sections, each with their own unique history.

“**Justice**” is the term given to Members of the state Supreme Court, one of whom is elected by the justices to be Chief Justice (Unlike the United States Supreme Court, Michigan goes not have “associate justices”.)

“**Judge**” is the term given to other members of the Judiciary serving in appellate or trial courts – the Court of Appeals, Circuit Court, Probate Court, District Court, and municipal courts.

There are no less than 8 sections which clearly use **both** “judge” and “justice”, evidencing a clear intention to include **both** positions:

§ 17/Judicial salaries: “No **judge** or **justice** ...”.

§ 18/Salaries; uniformity: “Salaries of **justices** of the supreme court,” otherwise “**judges**”.

§ 19/Qualifications: “**Justices** or **judges** of court of record must be persons who are licensed to practice law in this state.” The distinction is maintained in the remainder of that section.

§ 20/Removal of domicile: “Whenever a **justice** or **judge** ...”.

§ 21/Ineligibility for office: “Any **justice** or **judge** ...”.

§ 24/Ballot designation: “... each incumbent **justice** or **judge** ...”.

§ 27/Power of appointment: “... or any **justices** or **judges** thereof ...”.

§ 29/Conservators of the peace: “**Justices** of the supreme court,” otherwise “**judges**”.

There are numerous sections that use either “justice” or “judge” in the limited context of the Supreme Court on the one hand or specific courts like the Circuit Court or Court of Appeals on the other.

B. There are 3 sections that trace their origin to a time when the Supreme Court consisted of “**judges**”:

§ 6/Decisions of the supreme court: There is a curious anomaly since only the supreme court is at issue in this section: “When a **judge** dissents in whole or in part he shall give in writing the reasons for his dissent.”

§ 23/Filling of Vacancies: Before it was amended in 19689; this section began: "A vacancy in the elective office of a **judge** of any court of record shall be filled at a general or special election as provided by law." That provision was almost immediately amended because filling vacancies by election took too long and was too cumbersome. As amended in 1968, it still talks about a vacancy in the "office of **judge** of a court of record". See **MCL 168.404**: Vacancy of justice filled by Gov. appointment, then election, 1955 PA 271. Post ConCon, appointment by Gov. removed, fill by election, 1963, 2nd Ex Sess PA 61. Gov appointment back, 1970 PA 10.

§ 25/Removal of a judge: This provision for the first time was pulled into the judicial article, without substantive change – or any apparent awareness that it might be the proverbial square peg in a round hole. It still speaks of removing a "**judge**" for reasonable cause not sufficient for impeachment.

The history of these 3 shows an historical pattern that began with members of the supreme court being called "**judges**". Let's take a closer look.

1. Under Michigan's first constitution, "**judges**" of the supreme court were appointed by the Governor with the advice and consent of the Senate. **Const 1835**, art VI, §2.

The section of removal of a judge from office also goes back to Const 1835, but in a separate Article: Art VII, §3, allowed removal of "**judges**" for any reasonable cause that is not sufficient ground for impeachment. No reasonable argument suggests the supreme court was not included; ne, the argument clearly supports their inclusion.

2. See **Const 1850**, art 6, §1. This Constitution began with a supreme court consisting of judges of the circuit court. After 6 years, the Legislature was empowered to provide for 1 chief justice and 3 associate justices to be elected for terms of 8 years. 1887 PA 6 provided for 5 justices with a 10-year term. 1903 PA 250 provided for 8 justices with an 8-year term. But by late 19th century they were clearly "justices".

However, the provision of filling vacancies referred specifically to a vacancy in the "office of **judge** of the supreme, circuit or probate court". Const 1850, art 6, §14. The provision on supreme court decision refers to dissenting or concurring "**judges**". Const 1850, art 6, §10. Note that the conservator of the peace provision also still referred to "**Judges** of the supreme court". Const 1850, art 6, §19. In a separate Article, the removal language still referred to "judge". Const 1850, art 12, §6. There can be no doubt that at the time of its ratification, Const 1850 used "judge" to include the supreme court.

3. By 1908, the supreme court consisted of "**justices**". **Cost 1908**, art VII, §1. The opinion language was updated to use "justices". Const 1908, art VII, §7. However, the provision on filling vacancies continued to refer to "**judge** of any court of record". So far as I can determine, vacancies in the office of supreme court justice continued to be filled by appointment of the Governor. Removal of "**judge**" continued to be in a separate Article. Const 1908, art IX, §6.

4. So, in our **1963** Constitution, the 3 sections using "judge" in a broader context have lengthy historical antecedents. Why ConCon drafters didn't clear up this potential confusion is beyond our guesswork. But the history of each provides a credible argument that each intended to use "judge" in a broader sense and to include the office we now refer to as "supreme court justice". This requires little stretch of imagination. (Most baffling, of course, is how "justice" in Const 1908, art VII, §7, came to be "judge" in Const 1963, art VI, §6.)

C. Under §4, the section which grants the supreme court superintending control over all courts, also provides: "The supreme court shall not have the power to remove a **judge**." There is some history to this which suggests concern that the supreme court might exercise its superintending control with the net effect of removing a judge. See In re Huff, 352 Mich 402 (1958) (judge held in contempt for refusal to accept assignment to different court); In re Graham, 366 Mich 268 (1962) (non-attorney probate judge enjoined from performing duties; matter referred to →

Legislature for removal); Ransford v Graham, 374 Mich 104 (1964) (same judge held not to be "serving" on 1/1/64 so out of office – but not "removed"). So §4 put a break on any extended perception of that power of the court. The context is superintending control over lower courts (appellate or trial) – not over itself.

D. Article VI, §30/Judicial Tenure Commission: "On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for ...".

Does "judge" include "justice" (of the supreme court)? Factors to consider:

It may be the question that was never asked as HJR PP traversed through the Legislature.

This is the only section in the Judicial Article with a separate history and no constitutional antecedents. It didn't amend an existing section; it created a new one. It was the product of a legislative joint resolution, HJR PP, in 1968, that in turn was an adaptation of language from another state (California). [Michigan was among the earliest states to consider and adopt a constitutional amendment on judicial discipline.]

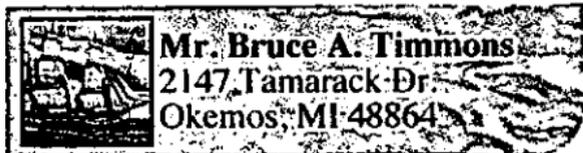
There was serious interest in 1968 to create a mechanism that could respond quicker to judges whose conduct in office was called into question (that impeachment or removal could provide) and proved more appropriate sanctions short of outright removal from office where that was warranted. The Citizens Research Council of Michigan, Council Comments (No. 806, July 18, 1968) – an after-the-fact analysis – state that the supreme court would be "strengthened by being given the power to remove or otherwise discipline judges."

Does one assume, without specific language, that a subordinate agency would investigate its superior?

Implementing court rule MCR 9.201(B)(1) defines "judge" as a person serving "as a judge of an appellate or trial court..." (query whether inclusion of magistrates and referees expands the scope of §30 beyond its clear limits), but MCL 9.204(A) disqualifies a "judge who is a member of the commission or of the Supreme Court" from participating in that capacity in proceedings involving the judge's own actions.

[Different context: The JTC was among the first discipline-type boards in Michigan that included public members. Until then disciplinary boards of all kinds consisted of the regulated profession.]

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