

November 30, 2016

Via email only to boomera@courts.mi.gov

Anne M. Boomer, Esq.
Administrative Counsel
Michigan Supreme Court
P O Box 30048
Lansing MI 48909-7548

re: ADM File #2015-14; proposed amendments to MCR subchapter 9.200

Dear Ms. Boomer:

As a practitioner who has long represented attorneys and judges in matters involving professional and judicial ethics, I would like to offer the following comments on proposed amendments to MCR subchapter 9.200 beyond those addressed by the State Bar.

Proposed MCR 9.210 – separation of prosecution and recommendation functions of the JTC.

There is no doubt that the members of the Judicial Tenure Commission take very seriously their separate responsibilities of investigating/prosecuting suspected judicial misconduct and making recommendations to this Court as to misconduct. As a matter of sound policy, however, the Commission's investigative/prosecution functions should be entirely separated from its recommendation function. A system in which the same body decides both to bring charges and whether those charges have been established is vulnerable to inadvertent bias; such a system is also inconsistent with promoting the greatest public confidence in its fairness. The risk of the current system is comparable to that of a biased juror. As Chief Justice Marshall famously observed, such an individual "will listen with more favor to that testimony which confirms, than to that which would change his opinion." *United States v Burr*, 25 F Cases 49, 50 (1807). With respect to promoting public confidence in the process, the Supreme Court's admonition in *In re Murchison*, 349 US 133, 136, 137 (1954), is also noteworthy: "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." While separation of responsibilities in proceedings comparable to judicial discipline proceedings is not constitutionally required, *cf., e.g., Withrow v Larkin*, 421 US 35 (1975), and a judge charged with judicial misconduct is not entitled to the same procedural due process rights as is the defendant in a criminal case, the policy importance of satisfying the appearance of justice in a judicial discipline proceeding is as great as it is in a criminal case.

Separating the Commission's functions would also be consistent with the ABA Model Rules

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for Judicial Disciplinary Enforcement, which provide not only for separate commission counsel and disciplinary counsel but also for a commission that in each case divides itself into an investigative panel and a hearing panel (Rule 3). Commission counsel communicates with and advises the hearing panel, and disciplinary counsel communicates with and advises the investigative panel (Rules 4 and 5), but, unlike in our current system, disciplinary counsel does not have *ex parte* contact with the hearing panel at any point.

The structure of our state's system would make it somewhat challenging to work out a comparable separation of responsibilities given both the constitutional composition of Commission and the extremely small percentage of requests for investigation that result in the filing of a complaint. However, given the importance of separating the functions of both the Commission and counsel, I believe that the current proposal does not go far enough. I propose that the Court, in conjunction with the Commission and other interested parties, explore ways to achieve separation of the Commission's functions within the current constitutional structure.

Proposed MCR 9.210(H)(1) – appointment of the executive director. The proposed amendment to allow the Court veto power over the Commission's selection of its executive director is incompatible with Commission's constitutional independence. Regardless of whether the provision would violate Const 1963, art 6, § 30, it would detract from the Commission's independence and appearance of independence and, for these reasons, be unwise as a matter of policy. It is not insignificant that the members of the Court, like all other Michigan jurists, are subject to the Commission's jurisdiction. As such, the Court taking a role in selecting the Commission's executive director is as inappropriate as allowing a party to litigation to select their opponent's lawyer.

Proposed MCR 9.232 – discovery. With respect to discovery, the current rules do not provide an opportunity for the parties to depose prospective witnesses except in the case of a witness who lives out of state or is physically unable to attend a hearing. MCR 9.208(C)(2). For the same reasons that the availability of depositions improves the ability of the civil litigation process to uncover the truth, the availability of depositions in judicial discipline proceedings would similarly improve the ability of this process to get at the truth. For these reasons, I propose amending current MCR 9.208(C)/proposed MCR 9.232(2) to allow the parties to take depositions on the same terms as apply in circuit court civil litigation or, at least, "for good cause shown", as permitted by Rule 22(A) of the ABA Model Rules.

Proposed MCR 9.244(A)(2) – Commission decision-making: decision-making. The current and proposed rules allow a judge to be convicted of misconduct even if an overwhelming majority of Commission members conclude that, as to all individual charges of misconduct, the judge is not guilty. The current and proposed rule provides that "[i]t is not necessary that a majority agree on the specific conduct that warrants a recommendation of action with regard to a judge, or on the specific

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action that is warranted, only that there was some misconduct that warrants such a recommendation.” As such, if a judge is charged with nine counts of misconduct and the Commission votes 8-1 to exonerate the judge as to each count but the dissenting votes on the nine counts come from nine different members of the Commission, the judge will be found guilty. Regardless of whether this result has occurred in the past or not, this is a troubling possibility that is easily avoided. If this rule was adopted to be comparable to the process for appellate court decision-making, the analogy is inapt. While judges deciding an appeal need not agree on the grounds for their decision in order to reach a decision, an appellate panel rules as to issues of law; in contrast, the Commission makes findings of fact in addition to making determinations of law.

Thank you in advance for your consideration of these comments.

Sincerely,



Kenneth M. Mogill

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