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November 30, 2016

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2015-14: Proposed Amendments of the Judicial Tenure Commission Rules

Dear Clerk Royster:

The State Bar of Michigan (SBM) thanks the Michigan Supreme Court for the opportunity to comment on the proposed amendments to the rules on the Judicial Tenure Commission (JTC), Subchapter 9.200 *et seq.* of the Michigan Court Rules.

SBM is committed to promoting improvements in the administration of justice and strengthening the relationship between the legal profession and public. Judges play an integral role in the administration of justice and the public's perception of the legal profession; therefore, it is vital that the rules governing judges also promote these values.

Given the importance and extensiveness of the proposed amendments, SBM appointed an Advisory Workgroup composed of highly experienced judges and lawyers having particular knowledge regarding the JTC and attorney grievance proceedings to review the proposed amendments.[1] The Workgroup engaged in intensive examination and discussion of the proposed rules. Throughout its review, the Workgroup focused on the impact of the proposed rules on the interest of the public and the integrity of the judiciary. The Workgroup presented its recommendations to the SBM Board of Commissioners (the Board), which engaged in further review and discussion of the proposed rules to reach the following recommendations.

1. **The Current Language of MCR 9.202(B)(2) Should Be Retained to Allow the JTC to Consider Allegations of Misconduct that Occurred While a Judge Was Previously Engaged in the Practice of Law.**

The Board opposes the proposed amendment set forth in Rule 9.202(B)(2), which limits the jurisdiction of the JTC to "conduct that occurs during a judicial campaign or while the judge is service as a judicial officer." Under this amendment, the JTC does not have jurisdiction over

[1] The Advisory Workgroup was composed of the following members: John F. Van Bolt (chair), Hon. Marianne O. Battani, Richard O. Cherry, Thomas W. Cranmer, Nancy J. Diehl, Pamela R. Harwood, James W. Heath, Stephanie J. LaRose, Kenneth M. Mogill, Alisa Parker, Hon. David A. Perkins, Jeanne Stempien, Hon. Michael J. Talbot, Donald R. Visser, Hon. Tracey A. Yokich, Mark A. Armitage (ex officio), and Alan M. Gershel (ex officio).

any allegations of misconduct that occurred while a judge was engaged in the practice of law before taking judicial office. As the JTC noted in its October 10, 2016 letter to the Supreme Court (JTC Comments), the proposed amendment to Rule 9.202(B)(1) "creates a gap for misconduct by sitting judges that occurred while they were attorneys prior to taking office," because "MCR 9.116(A) bars the Attorney Grievance Commission from acting against a sitting judge." JTC Comments, at 1-2. Therefore, under the proposed Rule, a judge would be exempt from both the judicial and lawyer disciplinary systems for misconduct that occurred while an attorney and not engaged in a judicial campaign.

The interests of the public and the integrity of the judiciary are best protected if judges are subject to judicial discipline regardless of when the alleged misconduct occurred. While one may argue that limiting the jurisdiction as proposed by the Rule may be appropriate because the public offers its opinion on judicial fitness through the electoral process, there have been cases where the attorney misconduct did not come to light until after the lawyer took the bench. For example, a judge was removed from office for misappropriating clients' settlement funds while engaged in the practice of law. It was not until the judge took office and the clients obtained new counsel that they discovered that their money had been converted. See *In re Loyd*, 424 Mich 514 (1986). Similarly, another judge was publicly censured for engaging in self-dealing while representing clients in a real estate transaction. See *In re Runco*, 463 Mich 517 (2001). If the proposed Rule had already been in effect, these sitting judges would have been immune from discipline, which would have resulted in substantial harm to the public.

Maintaining the JTC's authority to consider allegations of misconduct that occurred while the judge was previously engaged in the practice of law is also supported by the American Bar Association (ABA). Rule 2 of the ABA Model Rules for Judicial Disciplinary Enforcement provides that "[t]he commission has jurisdiction over judges regarding allegations that misconduct occurred before or during service as a judge and regarding allegations of incapacity during service as a judge."

Finally, the proposed amendment would not have a significant impact on the efficiency of the JTC to justify limiting its jurisdiction in this way. In 2015, only 1% of the grievances – approximately 5 grievances total – alleged that a judge engaged in misconduct as an attorney. See JTC Annual Report 2015, at 10, <http://jtc.courts.mi.gov/annual_report/docs/2015AnnualReport.pdf> (accessed November 22, 2016).

For these reasons, the Board recommends that the Court retain the current language of MCR 9.202(B)(2) that allows the JTC to consider allegations of misconduct "regardless whether the conduct occurred before or after the respondent became a judge or was related to judicial office."

2. MCR 9.220(C) Should Not Impose a Presumptive Three-Year Statute of Limitations for Filing a Formal Complaint Against a Judge.

The Board opposes the proposed amendments set forth in Rule 9.220(C) imposing a presumptive three-year statute of limitations for filing a formal complaint against a judge.

The purpose of the JTC is to "preserve the integrity of the judicial system, to enhance public confidence in that system, and to protect the public, the courts, and the rights of judges." MCR 9.200. Imposing a presumptive statute of limitations that would bar the filing of a formal complaint for conduct that occurred more than three years ago is antithetical to these purposes. While the amount of time that has passed may be relevant in determining whether and to what extent discipline should be imposed, misconduct, no matter when it occurred, is always relevant to a judge's fitness to hold office.

While one may argue that imposing a statute of limitations ensures that grievants assert claims in a timely manner, there are several reasons that a substantial lapse of time between the date of the alleged misconduct and the filing of a formal complaint may occur. Procedurally, a formal complaint is not filed until (1) the grievant has submitted a Request for Investigation, (2) the JTC has completed its initial investigation, and (3) the respondent has had an opportunity to respond. Additionally, grievants may be unwilling to file a Request for Investigation against a judge until their case before that judge is resolved. As the JTC explained, "[l]itigants 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." JTC Comments at 4. Also, it may take considerable time to discover certain types of judicial misconduct, such as fraud. Even after a Request for Investigation is filed, the JTC must conduct a thorough investigation, including locating evidence and securing the cooperation of witnesses. Importantly, the JTC bears the burden of proof, requiring it to engage in a careful and thoughtful analysis of the evidence.

While the proposed Rule creates an exception to the statute of limitations upon a showing a good cause, the proposed Rule is silent as to what constitutes good cause. Even a well-defined good cause exception would not remedy the Board's concerns because the JTC would still have discretion to bar allegations of misconduct that occurred over three years ago. All misconduct is relevant to a judge's fitness to hold office; therefore, allowing the JTC to not file a formal complaint of misconduct solely because it is time-barred is detrimental to the interest of the public and the integrity of the judiciary.

Notably, the Michigan Rules of Professional Conduct (MRPC) do not impose a statute of limitations for the prosecution of attorney misconduct, and, in this respect, judicial misconduct should be treated the same under the Michigan Code of Judicial Conduct (MCJC). Michigan's approach in the attorney discipline context is consistent with Rule 32 of the ABA Model Rules for Lawyer Disciplinary Enforcement, which explicitly exempts all statute of limitations for lawyer disciplinary proceedings. As the comments to ABA Rule 32 explain, "[s]tatute of limitations are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer,

no matter when it has occurred, is always relevant to the question of fitness to practice." Likewise, the ABA Model Rules for Judicial Disciplinary Enforcement do not include a statute of limitations for alleged judicial misconduct. The rationale articulated in the ABA comments is persuasive, and Michigan should continue to embrace this approach.

Therefore, the Board recommends that the Court not adopt the three-year statute of limitations set forth in proposed MCR 9.220(C).

3. MCR 9.225(A) Should Be Further Amended to Require Automatic Interim Suspension of a Judge Without Pay upon a Felony Conviction and Allow the JTC Broader Discretion When It May Recommend an Interim Suspension.

The Board proposes further amendments to MCR 9.202(A)(2) and (A)(3) to require automatic interim suspension of a judge without pay upon conviction of a felony and to expand the circumstances in which the JTC may recommend that a judge be placed on interim suspension.

a. MCR 9.202(A)(2)

The proposed amendment to subparagraph (A)(2), as currently written, raises two major concerns. First, the proposed Rule does not require an automatic interim suspension of a judge upon conviction of a felony, but rather a felony conviction may be "grounds for" an automatic suspension. Second, the proposed Rule does not require automatic suspension of judicial compensation, but instead the JTC retains discretion to determine whether the suspension is with or without pay.

The Board proposes further amendments to MCR 9.225(A)(2) to require automatic interim suspension of a judge without pay upon conviction of a felony as follows in bold:

> (2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a ~~judge~~respondent from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint. In such a circumstance, the documents filed with the Court must be kept under seal unless the petition is granted. Conviction of a felony **shall result in** ~~**is grounds for**~~ automatic interim suspension, ~~**with or**~~ without pay, pending action by the commission. If the respondent is suspended without pay, the respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

These changes better align with the rules governing attorney discipline. MCR 9.120(B) provides that "[o]n conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by the hearing panel under MCR 9.115(J)." Because justices

and judges are required to be licensed to practice law to be qualified to hold judicial office,[2] the judicial disciplinary rules should parallel the attorney disciplinary rules in this respect. The JTC appears to agree with the Board's proposal. See JTC Comments, at 10 (approving of proposed Subrule 9.225(A)(2) "particularly as to a suspension *without pay*, if a judge is convicted of a felony" (emphasis in original)).

b. MCR 9.202(A)(3)

The Board proposes further amendment to MCR 9.202(A)(3) to allow the JTC broader discretion when it may recommend an interim suspension of the judge. As currently written, proposed Rule 9.202(A)(3) sets forth one additional circumstance – allegations of misappropriation of public funds – in which the JTC may petition the Supreme Court to suspend a respondent without pay. While an allegation of misappropriation of public funds may warrant an interim suspension, there are other circumstances in which the JTC should have the discretion to recommend an interim suspension of a judge. For these reasons, the Board proposes incorporating language from Rule 15 of the ABA Model Rules for Judicial Disciplinary Enforcement,[3] as follows in bold:

> (3) Notwithstanding any other provision of this rule, in a matter in which a respondent **poses a substantial threat of serious harm to the public or to the administration of justice** ~~is alleged to have misappropriated public funds~~, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge without pay in response to a request for investigation, pending a decision by the commission regarding the issuance of a complaint. The respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

With these changes, the JTC would have the discretion to recommend an interim suspension for a judge alleged to have misappropriated public funds and also for a judge alleged to have engaged in any other conduct that poses a substantial threat of serious harm to the public or to the administration of justice. This approach better aligns with the purpose of the JTC, specifically regarding protection of the public and ensuring the integrity of the judicial system. See MCR 9.200.

For these reasons, the Board recommends that the Court adopt its proposed changes to Rule 9.202(A)(2) and (A)(3), as presented above.

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[2] Const 1963, art 6, § 19(1) ("Justices and judges of courts of record must be persons who are licensed to practice law in this state."); see also MCL § 168.391(1) (supreme court); MCL § 168.409(1) (court of appeals); MCL § 168.411(1) (circuit court); MCL § 168.426b(1) (municipal court); MCL § 168.431(1) (probate court); MCL § 168.467(1) (district court).

[3] Rule 15(3) of the ABA Model Rule for Judicial Enforcement provides that "[u]pon receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, the highest court may transfer the judge to incapacity inactive status or suspend the judge pending a final determination in any proceeding under these Rules."

4. **MCR 9.236 Should Be Further Amended to Allow the Master's Report to Only Include Findings of Fact, and Not Conclusions of Law.**

The Board proposes additional amendments to MCR 9.236 to limit the role of the master to making findings of fact only. As currently proposed, MCR 9.236 continues to allow a master to issue a report setting forth both findings of fact and conclusions of law.

Historically, the master functioned solely as a factfinder. Over time, however, the report of the master has included both findings of fact and conclusions of law. Allowing the master's report to include initial conclusions of law poses the risk of transforming the JTC from an adjudicatory body to an appellate body. The Board believes that the public and the integrity of the judicial system are best protected by requiring the members of the JTC to exercise their judgment in reaching initial conclusions of law.

Therefore, the Board proposes deleting "and conclusions of law" from MCR 9.236, as follows in bold:

> The court reporter shall prepare a transcript of the proceedings conducted before the master within 21 days of the conclusion of the hearing, filing the original with the commission, and serving copies on the respondent (or the respondent's attorney) and disciplinary counsel, by e-mail. Within 21 days after a transcript of the proceedings is provided, the master shall prepare and transmit to the commission ~~in duplicate~~ a report that contains a brief statement of the proceedings and findings of fact ~~**and conclusions of law**~~ with respect to the issues presented by the complaint and the answer. ~~The report must be accompanied by three copies of the transcript of the proceedings before the master.~~ On receiving the report~~and the transcript~~, the commission must promptly send a copy ~~of each~~ to the respondent, unless the master has already done so.

5. **MCR 9.244(B)(1), 9.245(B), and 9.245(C) Sets Forth Appropriate Disclosure Requirements of Prior and Pending Disciplinary Actions.**

The Board supports the requirements that all prior and pending disciplinary actions are disclosed to the Supreme Court in commission reports and proposed consent agreements as set forth in MCR 9.244(B)(1), 9.245(B), and 9.245(C). As discussed in Section 2 above, the Board believes that all misconduct – no matter how old – is relevant to a judge's fitness to hold office; therefore, the Board believes that the Supreme Court should have access to at least as much, if not more, information that it has with regard to the attorney grievance process. To the extent that irrelevant information is included in these disclosures, the Board is confident that the Supreme Court can make appropriate relevancy determinations. For these reasons, the Board supports the disclosure requirements set forth in proposed Rules 9.244(B)(1), 9.245(B), and 9.245(C).

6. MCR 9.245(D) Provides the Supreme Court with Overly Expansive Authority to Intervene in JTC Proceedings.

The Board opposes the proposed amendment to Rule 9.245(D). The current Rule only allows the Supreme Court to intervene in a disciplinary proceedings if both the respondent and the commission consent. The proposed amendment to the Rule, however, expands the Supreme Court's authority to "impose a sanction or take other action at any stage of the proceedings under these rules" without requiring the parties' consent. Although this authority is included within the rule pertaining to consent agreements, the plain language of the proposed Rule permits the Supreme Court to intervene in a disciplinary action at any point "under these rules," meaning Subchapter 9.200. Therefore, MCR 9.245(D) would allow the Supreme Court to intervene in the disciplinary process at any time after the JTC has opened an investigation.

Even if the proposed amendment is intended to only apply to the Supreme Court's involvement in consent agreements, the proposed Rule is still problematic because it gives the Supreme Court authority to unilaterally change the terms of a consent agreement without the parties' consent and without giving the parties the opportunity to re-negotiate the consent agreement or proceed with a formal hearing.

For these reasons, the Board opposes the proposed revisions to MCR 9.245(D); instead, the current language of the Rule should be retained.

7. MCR 9.246(B)(2) Should Be Amended to Allow the JTC to Recover Transcript Costs.

Because the cost of transcripts is a substantial expense that the JTC incurs, the Board supports the JTC's recommendation to amend Rule 9.246(B)(1) to explicitly include the cost of transcripts in the costs that can be assessed, as follows in bold: "a respondent may be ordered to pay the actual costs, fees, ~~and~~ expenses**, and transcript expenses regarding the formal hearing** . . ." JTC Comments, at 9.

8. MCR 9.251(B) Should Require Commission Counsel, Rather than Disciplinary Counsel, To Advocate Before the Supreme Court on Behalf of the JTC.

The Board opposes the amendment to Rule 9.251(B), which requires that disciplinary counsel advocate only for the position recommended by the JTC when arguing before the Supreme Court. During JTC proceedings, disciplinary counsel holds a prosecutorial role limited to proving the allegations in the complaint, and disciplinary counsel is excluded from the JTC's deliberative process. Commission counsel, however, assists the JTC in preparing is decision and recommendation. Thus, commission counsel is in a better position to articulate the rationale underlying the JTC's position to the Supreme Court.

Therefore, the Board supports the JTC's recommendation to further amend MCR 9.251(B) as follows in bold:

> Roles of **Commission Counsel and** Disciplinary Counsel. If a respondent submits a petition under subsection (A), **commission**~~disciplinary~~ 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.**

JTC Comments, at 9.

9. MCR 9.252(A) Should Not Alter the Lawyer Disciplinary Process After a Judge Has Been Removed from Office by the JTC.

The Board opposes the proposed amendment to Rule 9.252(A), which alters the attorney grievance process after a judge has been removed from office. Under this proposed amendment, the Attorney Grievance Commission (AGC) is required to investigate a judge who has been removed from office, regardless of the underlying misconduct. Once the AGC completes its investigation, instead of following the procedures set forth in Subchapter 9.100, the AGC may file recommendations for attorney sanctions directly with the Supreme Court, thereby bypassing the Attorney Discipline Board (ADB). The Board opposes both of these changes.

First, the AGC should not be given the option to bypass the usual disciplinary procedure and make its disciplinary recommendations directly to the Supreme Court. The more extensive procedural due process afforded all respondents subject to attorney discipline should continue to apply to attorneys who have been removed from the bench to ensure that respondents receive appropriate attorney discipline that is consistent with what the ADB has imposed in similar cases.

Second, the AGC should be allowed to maintain its broad discretion to decide whether to investigate a former judge who has been removed from office. The proposed amendment seemingly conflicts with MCR 9.116(B), which explicitly gives discretion to the administrator whether or not to take action against a former judge removed from office. While the proposed amendment requires that the AGC to investigate these former judges, a judge may commit judicial misconduct and be removed from office without necessarily committing lawyer misconduct.[4] For these reasons, the Board opposes the requirement that the AGC conduct an investigation for every judge removed from judicial office.

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[4] As the Court is aware, judges are held to different ethical standards than attorneys. Judge are subject to the eight canons set forth in the Michigan Code of Judicial Conduct, which focus on the preservation of the integrity and independence of the judicial system. Lawyers, on the other hand, are subject to the Michigan Rules of Professional Conduct, which focus on the lawyer's role as a "representative of clients, an officer of the legal

Therefore, the Board opposes the proposed amendments to MCR 9.252(A).

10. MCR 9.261(D)(1) Should Not Delay Public Disclosure of the Complaint.

The Board opposes the proposed amendments to Rule 9.261(D)(1), which require that the complaint only be made public when the "answer has been filed in response (or the time for filing an answer has elapsed)."

While one may argue that temporarily withholding the complaint is beneficial because it allows the public to consider both sides of the matter simultaneously, the Board opposes withholding the complaint for any period of time after it has been filed. The interests of the public and the integrity of the judiciary are best served if there is no delay between the filing of the complaint and its availability to the public.

Delaying public disclosure of the formal complaint to protect the respondent against surprise is unwarranted because the respondent has already been provided with notice and an opportunity to respond to the allegations set forth in the Request for Investigation, and, therefore, should be prepared to address public concerns upon the filing of a formal complaint. Initially treating the complaint as confidential also raises procedural issues (i.e., is the complaint filed under seal, when and how is the seal lifted, etc.).

Therefore, the Board opposes proposed MCR 9.261(D)(1) and recommends that the Rule be amended to require complaints be made public when they are filed.

In conclusion, ethical and capable judges are essential to the administration of justice and maintaining the public's confidence in our court system. We hope our feedback on the proposed rules is of value to the Court, and we thank the Court for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Lawrence P. Nolan, SBM President

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system, and a public citizen having special responsibility for the quality of justice." MRPC 1.0. Thus, a judge may commit judicial misconduct without also committing attorney misconduct.