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December 1, 2016

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Via E-mail and Regular Mail

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

RE: ADM File No. 2015-14
 Proposed Amendments of the JTC Rules (Subchapter 9.200)

Dear Ms Boomer:

Collins Einhorn has represented judges in tenure-commission matters for more than 25 years. We appreciate the opportunity to comment on the proposed amendments to MCR 9.200 *et seq.* Our comments regarding the proposed court rule changes are as follows:

- We support MCR 9.202(B)(2), the amendment setting forth grounds on which the Judicial Tenure Commission may issue a complaint. It states that the Commission may issue a complaint for "conduct that occurs during a judicial campaign or while the judge is serving as a judicial officer." This proposed rule is consistent with the wording of Article VI, Section 30(b) of Michigan's 1963 Constitution.
- We also support MCR 9.210(C), the amendment that would require an oath of office for all members of the Commission. Requiring an oath is consistent with

the Commission's solemn duty to perform its tasks faithfully. It is amply justified, given the Commission's role in reviewing judicial officers selected by the people of Michigan.

- We oppose MCR 9.210(F)(3), the amendment that would allow as few as three Commission members to adopt or reject a motion or resolution. The rule currently requires five votes for the Commission to act. Given the gravity and the impact of the Commission's decisions, there should be no diminution in the number of necessary votes to act.
- We support MCR 9.210(F)(4), which allows for teleconferencing. This proposed rule makes it easier for the Commission to have a full complement of members at every meeting. It will also make it easier for the Commission to obtain five votes (which undercuts the need for an amendment for MCR 9.210(F)(3)).
- As for MCR 9.210(H)(1), we oppose the "advice and consent" provision. This provision seems an unnecessary entanglement between this Court and the Commission. We believe the Court should not become enmeshed in the employment-review process. As a consolation, if desired, the lawyers from our firm would be happy to provide feedback to the Commission on the next executive director's performance. We do not oppose the part of the rule that would adopt a six-year term of appointment in the proposed amended language. It seems wise, given the history of that position.
- We support MCR 9.220(C), an amendment that creates a limitations period. The amendment provides a framework for a reasonable limitation period while providing the Commission leeway to address patterns or recurring conduct. We likewise support MCR 9.220(F)(2), which creates a time frame for disposition.
- We oppose MCR 9.220(E), an amendment that creates a presumption that a refusal to submit to a physical or mental examination is evidence of a disability—while also inflicting the costs on the respondent. There are many practical and sound reasons to oppose a request for a physical or mental examination.

Indeed, there are many aspects of such a request that would usually need to be addressed before a reasonable person could agree. Yet, the proposed rule gives the Commission authority to essentially order a judge to an exam—and, if there is the slightest effort to address what could be very substantial considerations,

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the hammer can drop and the judge is labelled disabled (and gets to pay for the privilege).

It is a poor amendment to a bad rule. We urge this Court to overhaul that rule and adopt a new provision that strikes a balance between the need to act when physical or mental disabilities prevent a jurist from performing the duties of the office and respecting basic privacy rights. In addition, the Court should provide a means for review of any decision to order a physical or mental examination. As a template, this Court should consider some of the features and safeguards that have served the attorney-discipline system well for nearly 40 years. That system requires, as a first step, that the administrator show that an attorney's alleged incapacity directly impacts his or her ability to perform a duty. Then the burden shifts to the respondent to submit to testing, but only to examinations that "are relevant to a condition of respondent shown to be in controversy." See MCR 9.121(B)(1)(a)(i).

- We oppose MCR 9.222(A), an amendment that provides grievant anonymity. There is no basis or cause for this rule, since there is no history of Michigan's justices and judges abusing those who file judicial grievances. Indeed, to comply with the Canons and the recusal rules, it is important to know who filed a grievance (and, in some cases, who did not).
- We oppose MCR 9.223(A)(4) and (5), an amendment that removes the Commission's authority to admonish and instead requires a recommendation to the Supreme Court with a statement of reasons. Article VI, Section 30(b) of the Michigan Constitution states that the Commission must make a recommendation when the sanction is a censure or greater. Historically, admonishments have served an important purpose: to remind or inform jurists of certain duties that may have been overlooked or underappreciated. If our experience as lawyers in this area of judicial tenure matters is typical, then most jurists who have been admonished have not had repeat incidents before the Commission. Given the additional process involved in submitting the matter to the Court, it is anticipated that there will be fewer admonishments and an important tool in continuing the education and improvement of judging in Michigan will be lost. This is a circumstance where the system is not broken and simply does not need fixing.
- We oppose MCR 9.231(A)(4), an amendment that prohibits the parties from having a transcript to prepare closing arguments and proposed findings of fact

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and conclusions of law. Currently, the process allows for the filing of closing arguments within a reasonable period of time after the transcripts have been issued. In complicated cases that have hearings over weeks or months, this feature is important. It hones arguments. It improves advocacy. It ensures the Master has the best evidence and argument. And, finally, it produces generally better opinions, which streamlines the appeals process. As designed in the proposed amended rules, the grievant would have nearly 3 years to file a request. The Commission would have no limit on its time to investigate and 18 months to complete a prosecution. Surely, a few weeks to obtain a transcript and write a brief is the proverbial stitch in time that saves nine.

- We oppose MCR 9.231(B), an amendment that would have prior and pending disciplinary actions, as defined by that new rule, submitted to the Master. There is no proper purpose for this rule. It could only serve to prejudice the Master against a respondent. If prior acts are admissible to prove a plan, scheme, motive, or an absence of mistake, then they can be presented in that context. If not, then there is no legitimate basis for exposing a Master to these matters.
- We note a quirk in MCR 9.232(1)(ii), an amendment that requires the “disciplinary counsel” to make available to respondent all exculpatory material in its possession. When the Executive Director is not “disciplinary counsel” it is possible that the Executive Director could have materials not in the possession of disciplinary counsel. The rule should include the Executive Director as being covered under the rule. Also, the duty should be to produce exculpatory material, not merely to make it available.
- We applaud MCR 9.233(A) and the express recognition that a respondent is entitled to be represented by counsel. A similar statement during the investigation phase would also be appreciated—by way of suggestion, maybe as an additional sentence at MCR 9.221(B).
- We oppose MCR 9.245(D), an amendment that would permit the Supreme Court to impose any sanction or take other action at any stage of the proceedings, without the consent of the respondent or the Commission. This provision upsets the constitutional balance between the Supreme Court and the Commission. The Commission is charged—as a constitutional matter—with making recommendations. This Court lacks authority to increase the discipline

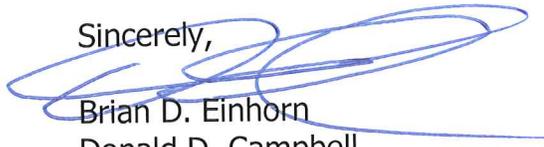
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recommended by the Commission. The Michigan Constitution simply does not support any assumption of such a power by this Court.

- We oppose MCR 9.246, and the taxing of actual expenses in JTC matters. In a system where many jurists do not have any insurance coverage, the cost of representation makes challenging the Commission very difficult, even when it is wrong. An "actual cost" provision simply makes the opportunity for abuse by the Commission too great a risk. There has been no demonstration that the costs of running the Commission is so burdensome that an "actual costs" system is needed or even advisable.

Finally, we are glad this Court is looking at the judicial-tenure system and looking for ways to improve it. The most necessary improvement, however, is a bifurcation of the prosecutorial and adjudicative roles. Just as this Court did in the late 1970s in attorney-discipline matters, two separate agencies should be created to carry out the separate functions of prosecuting jurists and adjudicating cases. This Court should create a committee to study and recommend such a reform.

Sincerely,



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