

April 24, 2023

Honorable Elizabeth T. Clement  
Chief Justice of the Michigan Supreme Court  
925 W. Ottawa Street  
Lansing, MI 48915

**RE: Proposed Amendments of Rules 9.220, 9.221, 9.223, 9.232, and 9.261 of the Michigan Court Rules**

Dear Chief Justice Clement and the Justices of the Michigan Supreme Court:

On behalf of the Association of Black Judges of Michigan, the Michigan Judge's Association and the Michigan Probate Judge's Association, it is respectfully requested that this Honorable Supreme Court deny the proposed amendments to the Michigan Court Rules referenced above. On the surface, these amendments present narrow changes. However, they harbor inescapable sweeping implications that synthesize inevitable consequences. These changes would impede respondent judges' access to discoverable documents in the possession of the Judicial Tenure Commission (JTC) and further obscure JTC procedures and investigations behind a cloak of confidentiality/secrecy. Immaterial to its intentions, history is clear that institutions operating under a veil of secrecy are predisposed to corruption and an appearance of impropriety. With the benefit of analysis through a lens comprising the nuance, history, and intentions of the JTC, it is clear that this amendment would orchestrate the disruption of a delicate balance; the balance between pursuing an investigation of alleged judicial misconduct and the most basic due process rights of the judge being investigated.

The Judicial Tenure Commission was established in 1968 with the passage of an amendment creating Article 6, §30 of the Michigan Constitution. It was further defined in the Michigan Court Rules of 1985, subchapter 9.200, and is regulated by the Michigan Supreme Court. Until 1968, Michigan Courts were self-regulated, subject only to the superintending control of the

Supreme Court up to, but short of the authority to remove a seated judge. The creation of the JTC expanded the authority of the Supreme Court by creating a procedure to remove judges. This change was done with the tactful purpose of judicial oversight. Augmentations through amendments and interpretations of subchapter 9.200 of the Michigan Court Rules have endeavored to hold our judiciary accountable for egregious conduct. In this pursuit, alleged egregious behavior is judged by the low standard of preponderance.

Prior to analyzing the anticipated effects of the proposed amendments to the Michigan Court Rules, the motivations for the proposed modifications must be firmly established. Superseding the specifics discussed in the individual provisions, the *prima facie* intention of the amendments is to protect grievants from potential retribution by withholding their identities at the discretion of the JTC. In a vacuum, preserving the confidentiality of a grievant's identity to protect against a perceived potential for retribution is inoffensive. However, to contextualize something in a vacuum is to neglect all other considerations for the benefit of just one. Thoughtful consideration will yield the conclusion that there is never a time when maintaining the grievant's confidentiality through the entirety of JTC proceedings is necessary.

Grievants can be divided into two categories: individuals with working relationships that could be affected by the discord of a grievance, and individuals without such a relationship. Grievants who have a relationship with a respondent could be, among other classifications: co-workers, staff, attorneys, or litigants. Individuals in this group may, under limited circumstances possess a legitimate claim to confidentiality, but in such circumstances, the relationship, testimony, and identity of the grievant would be exceedingly relevant throughout all JTC proceedings. While a need for confidentiality may be established, resolving that need through the proposed amendment would impermissibly prejudice a respondent by depriving her/him of due process.

In instances where privileges conflict with constitutional rights, the constitutional rights of an individual must be paramount. Even in cases where the identity of a complaining witness is highly sensitive, such as minors or sexual assault victims, our justice system regards their identity and testimony as critical parts of due process. This is not to say that grievants in similar scenarios should be left without protection; for existing court rules provide remedies for grievants who may be subject to retribution for filing a request for investigation. This court has already provided ample protections for attorneys, and litigants in Michigan Court Rule 2.003. With these safeguards, grievants who are attorneys or litigants may seek the disqualification of a respondent judge and

have the option to appeal the judge's decision on the matter to the Chief Judge of the relevant court. Moreover, any retribution would compound the allegations, proving detrimental to respondents and providing a clear cause of action for additional remedy through the JTC.

Alternatively, grievants who have no relevant relationship with a respondent judge possess no legitimate claim of needing the proposed confidentiality. As if no relationship exists between a grievant and respondent, such retribution would be conspicuous and easily addressed through general existing remedies.

Additionally, the requirement found in MCR 9.233 that the public hearing mirror civil action in the Circuit Court is instructive on the procedure that should be followed in JTC hearings. It extends the adversarial system of justice foundational to the U.S. justice system to JTC proceedings. Accordingly, because complaining witnesses are the fulcrum of this form of procedural justice, the JTC acts as a proxy for the grievant, filing complaints on their behalf. The proposed amendment opens channels for the JTC to obscure the grievant behind a cloak of confidentiality, extracting a critical element upon which the United States justice system relies. Under the existing rule, the grievant may be called during the hearing by either the Commission or a respondent. In withholding their identity, respondents are deprived of the opportunity to examine the bias and credibility of the witness, regardless of the nature of their allegations, unless the JTC chooses to call the grievant as a witness. The imbalanced access to vital information and access to witnesses imparts an endemic prejudice against respondent judges.

The discussion of a respondent's due process rights is incomplete without the inclusion of critical points of context. The capacity of the JTC is unique, existing in both investigatory and disciplinary roles. In the State of Michigan, there is no judicial or quasi-judicial system where a body with ex parte access to the judging tribunal is the potential grievant or proxy of a grievant, the investigator, and the prosecutor.

While the authority of the Michigan Supreme Court under article 6, §30 to implement rules providing confidentiality and privilege to JTC proceedings is recognized, the interpretations and implications of proposed provisions debilitate a respondent's procedural due process rights. Indeed, the proposed amendment establishes this premise in MCR 9.261:

*“(a) If the commission grants the grievant’s request for confidentiality, the request for investigation shall not be disclosed to the respondent or other persons, either during or at*

*the conclusion of the investigation except as necessary to conduct the investigation, unless either*

*(ii) the commission has filed a public complaint against the respondent, and*

*(A) disclosure of the grievance is necessary to comply with MCR 9.232(A)(1)(b);*

*(B) the grievant is a witness in the proceeding and the request for investigation is material to the grievant's testimony, or*

*(C) as otherwise necessary to protect the respondent's due process interests at the hearing.*

The requirements of subsection (A) mandate the disclosure of exculpatory material in the JTC's possession, and while subsection (C) recognizes the due process rights of respondent judges in part, it qualifies the statement. This qualification to the otherwise categorical protections of respondents' due process rights limits the scope of the protections only to the hearing. Interpretations of this provision could be construed to deprive respondent judges of due process rights during other stages of the JTC procedure, including the consequential period in which a respondent forms their defense to the allegations.

Although there are limited protections of due process rights in the proposed amendment, they are insufficient, failing to establish any remedy for inadequate interpretation or application. Because a respondent is precluded from accessing the request for investigation, they are powerless to contest the determinations of JTC staff. The combined investigatory and disciplinary roles entrusted to the JTC in tandem with the proposed amendments deprive respondents of access to the grievant's request for investigation, further empowering the JTC to its own self-oversight. While JTC proceedings are distinguished from civil and criminal proceedings, MCR 9.233 states:

*"The public hearing must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court."*

Exculpatory evidence lacks foundation in civil law and is not defined in the Michigan Court Rules governing the JTC. While it has been established that the JTC must conform to the standards of civil law, the absence of such a standard necessitates the expansion of scope. The plain text of Michigan Court Rule 9.232 reads:

- (1) *At least 21 days before a scheduled public hearing,*  
(b) *the disciplinary counsel or executive director shall provide to the respondent copies of all exculpatory material in its possession.*

In light of the absence of precedent in civil law, the explicit mention of exculpatory material necessitates the use of the criminal standard. Without such, this oversight delegates the initial decision of whether evidence is exculpatory to JTC staff, who may likely lack the motivation or context to appreciate the exculpatory nature of particular statements or materials. Further, requests for investigation that have been granted confidentiality would not be subject to review by a respondent, nor any other person, effectively making the decisions of JTC staff dispositive in determinations of exculpatory evidence.<sup>1</sup> From the perspective of a prosecutor, or in this case, JTC investigator and attorney, having the ability to decide what person or evidence is not relevant to a respondent would be ideal. This is the system used in many autocratic societies. However, our social contract and laws, require individuals to decide how they will adjudicate conflict, irrespective of the prosecutor's determination. The infirmity of provisions protecting a respondent's due process rights and the centralized authority to exclude evidence on grounds of confidentiality are an affront to the most basic principles of due process and a vehicle for the miscarriage of justice.

While the JTC has authority to investigate and make determinations on judicial misconduct, the JTC is not immune to the corruptive nature of excessive power. In *In re Servaas*, this Supreme Court identified that while serving a copy of the official complaint to Judge Servaas, a former JTC director threatened to “humiliate respondent and drag his name through the mud.” *In re Servaas*, 484 Mich. 634, 650, 774 N.W.2d 46, 54 (2009). In this instance, the Supreme Court recognized the limitations of its power and left the determination of whether the JTC Director's actions constituted misconduct to the Attorney Grievance Commission. The Commission later dismissed the complaint.

Irrespective of its conclusion, the altercation demonstrates one form of injustice that protections are in place to limit. While the event and actions were ultimately determined not to be

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<sup>1</sup> Recent changes to the Judicial Tenure Commission's internal operating conditions have elucidated procedures for handling complaints against JTC staff members. IOP 9.202(G)-6 asserts that the Executive Director will be solely responsible for handling complaints against staff members. This unbridled self-oversight granted to the Executive Director of the JTC cultivates an environment ripe for internal exploitation.

misconduct, protections must be in place to secure respondents' due process rights under even the worst of conditions. Accordingly, it is improper to expect respondents to place an unproven trust in even the most mundane procedures and determinations of the JTC. The incontrovertible remedy to this issue is the fullest practicable transparency in the JTC and comprehensive protection of due process rights.

Indeed, the Judicial Tenure Commission has recognized and acted to remedy this dereliction of due process through the adoption of internal operating procedure 9.207(B)-15:

*“It is in the Commission's interest that public charges against a respondent be resolved fairly and on the basis of all relevant evidence. To that end:*

- *Unless there are circumstances that make it unreasonable to do so, disciplinary counsel will endeavor to provide discovery to a respondent as soon as reasonably feasible after the Commission files a public complaint, but no later than the time limit in MCR 9.232(A).*
- *Unless circumstances make it unreasonable to do so, disciplinary counsel will make available to respondent all witness statements, without regard to whether disciplinary counsel intends to call the witness, and all evidence that is a part of the investigation, without regard to whether disciplinary counsel intends to introduce the evidence. In that way, disciplinary counsel will not be in the position of having to speculate as to what a respondent may consider to be exculpatory.”*

This explicit recognition of the precise issues arising from increased confidentiality of JTC materials is indicative of conspicuous due process violations against respondent judges. While it remains true that respondents are currently protected by this rule, the internal operating procedures are subject to change without notice upon approval of this Honorable Supreme Court. Moreover, the proposed amendment would supersede the authority of this internal operating procedure and impede its stated goals, limiting access to relevant evidence and presenting a clear and intolerable risk of unfair resolution.

The JTC has previously argued the existence of blanket immunity from discovery of its investigative materials in *Lawrence v. Van Aken*, 316 F. Supp. 2d 547 W.D. Mich. (2004). This argument for evidentiary privilege was predicated upon the existence of the confidentiality

established in what is now MCR 9.261. Notwithstanding, the U.S. District Court was unconvinced, citing the conspicuous absence of privilege in the text and asserting:

*“Certainly, such investigation files are entitled to confidential treatment, but such confidentiality cannot impede the legitimate needs of the judicial truth-seeking process.”*  
*(Lawrence v. Van Aken, 316 F. Supp. 2d 547 W.D. Mich. 2004)*

Adoption of the proposed amendment would bolster the JTC’s authority to deny discovery on the grounds of additional confidentiality requirements, thereby further limiting a respondent’s access throughout the truth-seeking process. In its current state, the proposed amendment to MCR 9.261 provides no remedy to obtain a confidential request for investigation outside the direct scope of the hearing. Accordingly, this narrow exception does not sufficiently accommodate the legitimate needs of the judicial truth-seeking process and thus explicitly contradicts the ruling of the U.S. District Court. This Honorable Court must ask what the purpose is in allowing the Judicial Tenure Commission to play “hide the ball”. The JTC process should be one of transparent truth-seeking. Whenever there is a misalignment of power and access, it is naive to expect a consistent fair outcome.

The amendments will serve not only to deny the judge access to information, but will most certainly diminish the functionality of the courthouse environment. Requiring a witness, who may be a clerk, a judicial aide, or a judicial colleague to maintain confidentiality, will sow suspicion and discord in the work environment. The judge will be unable to exercise his/her right to secure exculpatory information from those who may have spoken with the JTC and potentially others who have not. Employees and colleagues may very likely choose to alienate themselves from the judge being investigated in order to avoid any risk of sanctions by the JTC. The respondent judge would likely seek to restrict his/her contact with colleagues and others for fear of additional charges.

The Judicial Tenure Commission has a history of conflict with respondent judges arising from conduct after initiating an investigation. The origins and motivations for this tension are uncovered through thoughtful institutional analysis of the JTC. Heightened confidentiality and closely held access to JTC investigatory findings deploy unseen and unintended influences on respondents. Respondents without transparent access to JTC findings are suspended in darkness, uninformed of the JTC’s findings and determinations until as little as 21 days before their hearing.

The respondent's absence of knowledge concerning JTC materials is weaponized, even if inadvertently, by the JTC during the investigation.

Under existing rules, respondents may not knowingly make false statements to the JTC at any time lest they be subject to further charges of misrepresentation. However, this rule is not to be construed so as to deprive respondents of the right to deny the allegations and fight them within the bounds of the law, see *In re Simpson*, 500 Mich. 533, 902 N.W.2d 383. The delicate balance between these rules forces respondent judges to walk a tight line during all interactions with the JTC.

For a respondent judge, maintaining absolute and uncompromised integrity is made dramatically more difficult by the veil of ignorance cast upon them by the JTC's rules of confidentiality and disclosure. This is exemplified through the analysis of previous JTC complaints. Of the last five public complaints served to judges by the JTC, all of them included charges arising after the initiation of the investigation and resulting from the respondents' alleged failure to adhere to JTC rules. Those complaints being numbers 101, 103, 104, 105, and 106. Clearly, the pervasive occurrence of these violations is the direct result of systematic deficiencies in the JTC procedure. Procedures that draw undisclosed lines in the sand and then proceed with harsh and unrelenting enforcement. The unseen influences of institutional procedures permeate all interactions and shape the way individuals engage with organizations. And within the context of the JTC, the outcome is respondents who reciprocate institutional secrecy with reflective secrecy of their own.

Further concerns over the due process rights of respondent judges and how a grievant's confidentiality would be used, permeate the discussion on this amendment. The proposed amendments sow discord in the delicate balance of JTC procedures by seeking the implementation of overly-broad solutions to narrow problems, while failing to effectively uphold the due process rights of respondent judges. Grievants innately, by the nature of their participation, possess a vital role in the JTC process. And while grievants vary in their relationships with respondents, they are, in all cases, a victim, witness, or third-party discoverer of the alleged misconduct. Although a narrow set of facts may warrant additional protections for the grievant, in all scenarios, their identity and testimony are vital to the due process rights of a respondent judge. While the Supreme Court holds the authority to make these changes, centralizing and limiting access to documents and witnesses that provide context for the entire proceeding poses an intolerably high risk of



unfairness resulting from unnecessary secrecy and the potential omission of exculpatory evidence, whether deliberately or erroneously.

The answer to the question as to whether this Honorable Supreme Court should grant the request of the Judicial Tenure Commission to expand its discretion, increase its secrecy and ultimately provide it with more authority is clear. It should not. We would ask that the Judicial Tenure Commission be required to produce a study to investigate its claims. The study must be done through an outside organization, with the selection and method determined through collaboration between the Judicial Tenure Commission and various Judicial organizations.

Respectfully submitted by,



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cc: Associate Justices Michigan Supreme Court  
Hon. Jon Hulsing, Chair Judicial Tenure Commission