

December 15, 2020

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

RE: ADM File No. 2020-16 – Proposed Amendment of Rule 9.261 of the Michigan Court Rules

Dear Clerk Royster:

At its November 20, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (SBM) considered ADM File No. 2020-16. In its review, the Board considered recommendations from the Judicial Qualifications, Lawyers & Judges Assistance Program, and Judicial Ethics committees, all of which supported the proposal. The Board voted unanimously to support the amendment.

The amendment would allow the Judicial Tenure Commission to share pertinent information about sitting judges with the SBM's Judicial Qualifications Committee in order to: (1) ensure the committee has all relevant information at its disposal when evaluating judicial candidates and (2) provide the committee with a way to verify judicial candidates' self-reported disclosures. In addition, the amendment would allow the Judicial Tenure Commission to share pertinent information about sitting judges with SBM's Lawyers & Judges Assistance Program (LJAP) Committee to help connect judges suffering from substance abuse or mental health challenges with appropriate LJAP resources.

To assist the Court with its consideration of this rule proposal, enclosed please find the recommendations provided to the Board by the Judicial Ethics, the Judicial Qualifications, and the Lawyers & Judges Assistance Program committees.

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

**Public Policy Position
ADM File No. 2020-16**

Support

Explanation

The proposal identified in Administrative File No. 2020-16 would allow the Judicial Tenure Commission to disclose to the State Bar of Michigan similar to the currently authorized practice of the Attorney Grievance Commission being able to disclose to the State Bar of Michigan pursuant to MCR 9.126(E)(2)(a) and (b).

There are several reasons this information is so imperative for the State Bar of Michigan to obtain during many of their processes when working with the bar population. For instance, when the State Bar Judicial Qualifications Committee requests information from the Judicial Tenure Commission for a sitting judge who is under consideration for appointment to another position within the judiciary, the State Bar is unable to access the information. Currently, the Judicial Tenure Commission has no mechanism to provide this information to the State Bar of Michigan. Further, this position has caused frustration on behalf of the State Bar as well as by the Judicial Tenure Commission as no policy reason has been articulated to explain the need or reasoning for such confidentiality when determining the qualifications of a judicial appointment especially when considering that the confidential information through the Attorney Grievance Commission is accessible to the State Bar Judicial Qualifications Committee when considering attorneys being appointed to a judge seat. This information would also allow the Bar committee to verify the information provided by the judicial applicant. The application for judicial appointment specifically asks the applicant for complaints filed with the Judicial Tenure Commission and any disciplinary action by the Judicial Tenure Commission. The Bar Committee is reliant on the applicant to be truthful without any way to verify the information provided.

This issue continues with requests from the Lawyers and Judges Assistance Program who assist the legal community in a variety of ways, including but not limited to, alcohol and substance use disorders. Information from the Judicial Tenure Commission would further assist the Lawyers and Judges Assistance Program to provide the appropriate services to the member they are assisting when knowing additional facts that brought them to their attention.

Additional reasoning for these disclosures is if there is information the State Bar Judicial Qualifications Committee needs to be aware of when considering an appointment for elevation of a sitting judge, it serves the public's interest to have knowledge that the Bar committee has access to all relevant information and be able to evaluate all information received regarding the sitting judge to perform a proper audit of the individual and the appropriateness of the elevation.

The Bar Committee further receives confidential information from a variety of sources when evaluating a judicial elevation and has shown itself capable of maintaining that information confidential. Further, the Lawyers and Judges Assistance Program continually receives and protects confidential information through the course of its service.

As stated before, the Attorney Grievance Commission is able to share confidential information with the State Bar. It should also be noted that the Judicial Tenure Commission is also able to share its confidential information with the State Court Administrative Office, the Attorney Grievance Commission, and law enforcement, in limited circumstances pursuant to MCR 9.261. The proposed disclosures as stated in Administrative File No. 2020-16 are consistent with existing exceptions.

Position Vote:

Voted For position: 10

Voted against position: 0

Abstained from vote: 0

Did not vote (absence): 1

Contact Person:

Email: d70-6@saginawcounty.com

**Public Policy Position
ADM File No. 2020-16**

Support

Explanation

The committee provided detailed comments in the attached letter.

Position Vote:

Voted for position: 20

Voted against position: 0

Abstained from vote: 0

Did not vote (absent): 0

Contact Person: Kathleen Bogas

Email: kbogas@kbogaslaw.com



Kathleen L. Bogas
Brian E. Koncius
Helene L. Fleisher
Lisa M. Panourgias
Of Counsel

October 26, 2020

Board of Commissioners
State Bar of Michigan
Michael Franck Building
306 Townsend
Lansing, MI 48933-2012

Dear Members of the Board of Commissioners:

The Judicial Qualifications Committee is currently made up of twenty members of the State Bar of Michigan. Our jurisdiction is, as requested by the Governor, to evaluate candidates for possible appointment to judicial vacancies and report in confidence to the Governor. This Committee is a hard-working committee and all members take the responsibilities entrusted to them very seriously.

Over the years, the Committee has been unable to access any records or information from the Judicial Tenure Commission regarding sitting and former judges seeking appointment from the Governor. We are able to obtain information from the Attorney Grievance Commission regarding lawyers but have been hamstrung in obtaining any information regarding private discipline of judges. This has led to concern and unease among Committee members in that we have not believed that we had the best information available to rate the applicants and fulfill our duty to the Governor.

When we most recently revised the Judicial Application we placed questions attempting to elicit from applying judges what their experience has been with the JTC. Now we can only rely on what information the applicant indicates on the Application. While we expect everyone to be trustworthy and truthful, sadly, that is not always the case. It is important to our role in evaluating applicants to know what official actions have been taken against them, if any, by any agency, and this is particularly true of the JTC.

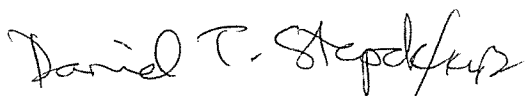
The Supreme Court has published a proposed amendment of MCR 9.261. The proposed amendment provides, in part, that "upon request the

Judicial Tenure Commission shall disclose all information in its possession concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission (JTC) action ... to the State Bar Judicial Qualifications committee, or to any other officially authorized state or federal judicial qualifications committee."

If there is any concern that the adoption this Amendment could lead to private information from the JTC getting out into the public, please be aware that our Committee has very strong confidentiality rules in place. It is a no tolerance policy and is the first thing every Committee member is advised when joining the Committee. Our background investigations, information gleaned from the application and interview, discussions of the Committee and the ratings are never disclosed except to the Governor's Office. Therefore, no Committee member would be permitted to share any information received from the JTC.

Our Committee unanimously believes that this amendment would serve our Committee well and allow us to perform our job better for the Governor. The Committee strongly supports this proposed amendment and we ask the Board of Commissioners to endorse this proposed amendment to the Court Rules.

Sincerely,



Daniel T. Stepek
Co-Chairperson



Kathleen L. Bogas
Co-Chairperson

KLB:caw

**Public Policy Position
ADM File No. 2020-16**

Support

Explanation

The committee provided detailed comments in the attached letter.

Position Vote:

Voted For position: 13

Voted against position: 0

Abstained from vote: 4

Did not vote (absence): 3

Contact Person: Sean M. Siebigteroth

Email: ssiebig@thewilliamsfirm.com

To: State Bar of Michigan Board of Commissioners
From: Lawyers & Judges Assistance Committee
Re: Position Statement Regarding ADM File No. 2020-16
Date: November 9, 2020

Thank you for the opportunity to comment on the proposed amendment of Rule 9.261 of the Michigan Court Rules.

The Lawyers & Judges Assistance Committee **supports** the proposed amendment.

MCR 9.114(C) makes Contractual Probation available to certain attorneys as an alternative to formal discipline where the alleged misconduct “is significantly related to a respondent’s substance abuse problem, or mental or physical disability[.]” MCR 9.114(C)(1)(a).

The terms and conditions of Contractual Probation are created by a monitoring agreement between the attorney and the Lawyers & Judges Assistance Program (LJAP). Contractual Probation allows an attorney to receive treatment, support, and monitoring to address an underlying substance abuse problem or disability. An attorney’s satisfactory completion of Contractual Probation permits the attorney to avoid formal disciplinary charges.

By directing an attorney to enter a monitoring agreement with LJAP, the Attorney Grievance Commission creates a “motivational fulcrum.” The attorney recognizes that complying with the monitoring agreement protects their professional licensure. When the attorney complies, the probability that they will

establish physical and mental well-being is high, and the probability of further professional misconduct is low.

MCR 9.114(C) serves two purposes. First, it creates a path to establish and maintain mental health for struggling attorneys. At the same time, it creates a process through which the regulatory authority can ensure the attorney is addressing root causes of misconduct.

The proposed addition of (K) to MCR 9.261 permits the Judicial Tenure Commission to “disclose information concerning a judge’s misconduct in office, mental or physical disability, or some other ground that warrants commission action . . . to [LJAP].” Similarly, proposed MCR 9.261(J) allows the Judicial Tenure Commission to “disclose information in its possession concerning a judge’s misconduct in office, mental or physical disability, or some other ground that warrants commission action or to any other officially authorized state or federal judicial qualifications committee.”

Currently, when a Michigan judge engages in official misconduct, or is struggling with a mental or physical disability, regulatory bodies have few options. The State Court Administrative Office can encourage struggling judges to come to LJAP for evaluation and a possible monitoring agreement but have no authority to do so or leverage to apply. The Judicial Tenure Commission (JTC) may remove judges, but those proceedings remain private. A judge who the JTC has removed can run to be a judge again, notwithstanding serious misconduct potentially related to untreated mental illness or substance abuse.

The current Michigan Court Rules prohibit the JTC from reporting misconduct or evidence of untreated mental illness or substance abuse to any state or federal judicial qualifications committee, or to LJAP, without the judge's permission. The amendments proposed in ADM File No. 2020-16 would permit the JTC to do so. This will allow LJAP to engage with struggling judges to help them find needed treatment and will allow judicial qualifications committees to protect the public from those who will not seek the help they need. These amendments will help protect public confidence in the judicial system's integrity from the challenges resulting from the misconduct of impaired judges.

LJAC supports the amendments to MCR 9.261 proposed in ADM File No. 2020-16. They represent strong steps toward a form of Contractual Probation for Michigan judges. Contractual Probation has saved the lives and the practices of many licensed attorneys. A similar approach could save the lives and vocations of struggling Michigan judges.