IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. JAMES P. NOECKER
Judge, 45th Circuit Court
Centreville, Michigan 49032
_____/

DOCKET NO. 124477

FORMAL COMPLAINT NO. 73

RESPONDENT JAMES P. NOECKER'S BRIEF IN SUPPORT OF PETITION TO REJECT AND/OR MODIFY THE MICHIGAN JUDICIAL TENURE COMMISSION'S DECISION AND RECOMMENDATION, THE CONCURRING DECISION AND RECOMMENDATION, AND ADOPT, ON THE ISSUE OF COSTS, THE CONCURRING/DISSENTING DECISION AND RECOMMENDATION OF THE COMMISSION

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

INTRODUCTION

The Decision and Recommendation of the Michigan Judicial Tenure Commission concerning Judge James P. Noecker found, in relevant part, that alcohol had affected Judge Noecker's abilities on the bench and was the proximate cause of his automobile accident on March 12, 2003. As will be explored more fully within, Judge Noecker requests that the Michigan Supreme Court reject the finding of the Michigan Judicial Tenure Commission on the basis that there was insufficient evidence to support a finding that Judge Noecker's abilities on the bench were affected by alcohol, that he had consumed alcohol prior to the automobile accident, or that the automobile accident was the result of alcohol consumption.

The expert testimony admitted at the formal hearing, and subsequently used as the sole basis for finding that alcohol adversely affected Judge Noecker's judicial responsibilities, was improperly admitted. As a result, the recommendation of removal from the bench is without foundation, unduly harsh, and should be rejected or, at a minimum, modified by this Court.

The Commission found that Judge Noecker was "less than candid" regarding his actions the night of March 12, 2003. (*See* Michigan Judicial Tenure Commission Decision and Recommendation, Commission Appendix Tab 55 at 6). The Commission further found that Judge Noecker "misled the public, he was not forthcoming under oath to the Commission and he failed to offer credible testimony while under oath in the public hearing." Id. Noticeably absent from the Commission's Decision and Recommendation was a statement that Judge Noecker *lied* at any stage of these proceedings. Similarly, no actual evidence was presented to refute any alleged lies by Judge Noecker. Rather, the Master's findings and those of the Commission were based on inference and innuendo. Such foundation is

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insufficient to support the allegation that Judge Noecker made false statements to the Commission. He did not. Accordingly, Judge Noecker requests that this Court reject the Decision and Recommendation of the Commission.

As recognized by the Concurring/Dissenting Opinion filed by the Michigan Judicial Tenure Commission, there exists no statutory or constitutional basis in the State of Michigan to support the imposition of costs on Judge Noecker related to these proceedings. Consequently, the recommendation of reimbursement of costs should be rejected in its entirety by this Court.

For purposes of the present Petition, Respondent relies on all previous filings in this matter, the original record of the Formal Hearing filed in this Court by the Commission on August 4, 2004, and the Appendix filed in this Court by the Commission on August 4, 2004.

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LEGAL ARGUMENT

A. STANDARD OF REVIEW

The Michigan Supreme Court reviews proceedings brought by the Michigan Judicial Tenure Commission *de novo*. In re Somers, 384 Mich 320, 323; 182 NW2d 341 (1971); Const 1963, art. 6, § 30. The Michigan Supreme Court also reviews the recommendations and findings of fact of the Michigan Judicial Tenure Commission *de novo*. In re Chrzanowski, 465 Mich 468, 478; 636 NW2d 758 (2001) .

B. STANDARD OF PROOF

The standard of proof in Michigan judicial disciplinary matters is by preponderance of the evidence. In re Ferrara, 458 Mich 350, 360 (1998).

C. INSUFFICIENT EVIDENCE WAS INTRODUCED TO SUPPORT THE FINDING THAT JUDGE NOECKER ENGAGED IN A "PERISTENT PATTERN OF ADMINISTRATIVE FAILURES" AS A RESULT OF HIS HISTORY OF ALCOHOLISM.

The Specific Findings of Fact within the Master's Report found that Judge Noecker's alcohol dependency was the proximate cause of all issues related to his docket. Specifically, the Master found:

> The MCR 8.110 reports that were submitted usually reflected an unreasonably high number of cases that had encountered undue delay. Respondent's alcohol dependence was a causal factor in the undue delay in the handling and completion of cases.
>
> Respondent's alcohol dependency was a proximate cause of Respondent's failure to periodically enter timely legal decisions in matters taken under advisement.
>
> Respondent's alcohol dependency was a proximate cause of Respondent's failure to conduct certain proceedings and complete cases within the time frames referenced in MCR 8.110 Reports.

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(*See* Master's Report of Specific Findings of Fact, Commission Appendix Tab 47 at 19).

Similarly, the Conclusions of Law within the Master's Report found Judge Noecker guilty of habitual intemperance. Specifically:

> Following a review of the evidence as a whole, the Master makes the following conclusions of law and finds that Respondent's conduct constitutes:
>
> > Habitual intemperance, as defined by the Michigan Constitution of 1963, Article VI, Section 30, as amended, and MCR 9.205;

(*See* Master's Report of Conclusions of Law, Commission Appendix Tab 47 at 22).

The Michigan Judicial Tenure Commission (hereinafter "the Commission"), in adopting the Master's Report, found that alcohol was the cause of any issues related to Judge Noecker's docket. Specifically, the Commission found:

> Respondent has a history of alcohol abuse. As a result of that abuse, Respondent engaged in a persistent pattern of administrative failures. ...
>
> Respondent's abuse of alcohol, even when it occurred off-the-bench, had an impact on his ability to hear matters, render timely decisions and file required reports with the State Court Administrative Office. ...
>
> Respondent's abuse of alcohol, the impact on the administration of his court, and his inaccurate statements regarding the collision, adversely affected the actual administration of justice. ...
>
> Respondent's involvement in the collision, his misrepresentations to the police, and the impact of alcohol on the performance of his judicial duties implicated the actual administration of justice and created an appearance of impropriety.

(*See* Michigan Judicial Tenure Commission Decision and Recommendation, Commission Appendix Tab 55 at 3-4).

The fundamental flaw with the above-cited findings is that no evidence was presented, nor did any person testify, establishing a causal connection between Judge Noecker's alcoholism and any alleged effect on his workload. Similarly, not one person testified, nor

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was one piece of evidence offered, indicating that Judge Noecker's alcoholism, in any way, affected the rights of any person in his courtroom. Nevertheless, the Commission asserts, without foundation, "[w]ith all due respect to those witnesses [who testified in support of Judge Noecker] and Respondent's position, the testimony does not change the fact that the docket and the public suffered." (*See* Michigan Judicial Tenure Commission Decision and Recommendation, Commission Appendix Tab 55 at 9). There is simply no evidentiary basis for such a conclusion by the Commission.

The only evidence or testimony presented that addressed the issue of Judge Noecker's alcoholism as it related to his judicial responsibilities was the testimony of Dr. Harvey Ager (for the Examiner) and Dr. Norman Miller (for Judge Noecker), neither of whom could identify a causal link between Judge Noecker's alcoholism and his work as a judge.

Dr. Ager, responding to the issue of Judge Noecker's alcoholism and his judicial responsibilities, conceded "***I have no idea how effective he has been as a circuit judge in recent years. I have no way of measuring his work performance.***" (*See* Formal Hearing Transcript at 376 (hereinafter "T")) (emphasis added). The remainder of Dr. Ager's testimony in this regard focused only on alcoholics in general, not on Judge Noecker specifically. (T. at 366-416).

Similarly, Dr. Miller, who conducted a much more thorough review of Judge Noecker than Dr. Ager, did not testify to any specific actions regarding Judge Noecker's abilities as a judge being affected by alcoholism. Rather, Dr. Miller identified Judge Noecker as having an obsessive-compulsive disorder and testified that this would better explain the problems in Judge Noecker's docket than his alcoholism. (T. at 1157-1160).

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There being no basis for the finding that Judge Noecker's judicial responsibilities were affected by his ongoing battle with the disease of alcoholism, other than mere speculation, and there being no causal connection whatsoever between Judge Noecker's alcoholism and his effectiveness as a judge, it is improper and severely prejudicial to Judge Noecker for this Court to adopt such a finding. Judge Noecker requests that this Court reject the decision that his judicial responsibilities were adversely affected by his alcoholism. Judge Noecker further requests that this Court modify the proposed sanction of removal and impose a penalty, if any, proportionate to any harm proven to be causally related to his alcoholism.

D. INSUFFICIENT EVIDENCE WAS INTRODUCED TO SUPPORT THE FINDING THAT JUDGE NOECKER CONSUMED ALCOHOL PRIOR TO THE AUTOMOBILE ACCIDENT ON MARCH 12, 2003 OR THAT THE CAUSE OF THE ACCIDENT WAS THE RESULT OF JUDGE NOECKER'S ALLEGED CONSUMPTION OF ALCOHOL.

The Specific Findings of Fact within the Master's Report found that Judge Noecker had been consuming alcohol prior to his automobile accident on March 12, 2003. Specifically, the Master found:

> Respondent stated to the Michigan Judicial Tenure Commission that he had not consumed alcohol prior to the collision.
>
> Respondent's statements to the media, police, the Michigan Judicial Tenure Commission and to the Master at the Public Hearing that he had not been drinking prior to the collision were not accurate.
>
> Respondent consumed alcoholic beverages prior to the collision at the Klinger Lake Trading Post on March 12, 2003. Alcohol was a factor in the collision of Respondent's vehicle with the building.

(*See* Master's Report of Specific Findings of Fact, Commission Appendix Tab 47 at 22).

Similarly, the Conclusions of Law within the Master's Report found Judge Noecker guilty of habitual intemperance. Specifically:

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Following a review of the evidence as a whole, the Master makes the following conclusions of law and finds that Respondent's conduct constitutes:

> Habitual intemperance, as defined by the Michigan Constitution of 1963, Article VI, Section 30 , as amended, and MCR 9.205;

(*See* Master's Report of Conclusions of Law, Commission Appendix Tab 47 at 22).

In adopting the Master's Report in its entirety, the Commission made similar findings:

> Respondent misled the master regarding his consumption of alcohol prior to the March 12, 2003, collision. ...
>
> Respondent's abuse of alcohol, the impact on the administration of his court, and his inaccurate statements regarding the collision, adversely affected the actual administration of justice. ...
>
> Respondent attempted to conceal that he had been drinking prior to the collision. His version of events was not consistent with eyewitness accounts, and he was not candid with the police or the Commission. ...
>
> In the case at bar, Respondent stated in his answer to the 28-day letter (Exhibit 51) that he had not been drinking before to the collision. He denied that alcohol was a factor in the accident. He gave a similar answer to the formal complaint. Witnesses to the accident, however, indicated that Respondent's face was red, his gait was wobbly, and his manner of walking indicated that he had been drinking, and a blood alcohol test done two hours after the collision revealed a blood alcohol level of .10. The master found, and we agree, that Respondent's claim that he had not been drinking was not credible.

(*See* Michigan Judicial Tenure Commission Decision and Recommendation, Commission Appendix Tab 55 at 3-5, 8).

As referenced in Respondent's Brief in Support of Objections to the Master's Report, any assertion that Judge Noecker had consumed alcohol prior to the collision on March 12, 2003 is based solely on speculation and conjecture. No direct evidence or testimony supported the assertion that Judge Noecker had consumed alcohol prior to the accident.

There were seven witnesses at the accident scene who testified at the hearing. Six of those witnesses testified consistently with what they told Michigan State Police Trooper Craig

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Wheeler who investigated the accident. They did not testify to intoxication, smelling alcohol or bloodshot eyes. At the conclusion of his investigation at the scene Trooper Wheeler was left not only with insufficient information to make an arrest for impaired driving based on probable cause, (T. at 277, 293) but was not even going to – nor did he - ask Judge Noecker to take a PBT. The PBT was administered only because Judge Noecker consented to it after telling Sgt. Barker that he had a drink after arriving at home. However, there was still insufficient information upon which to establish probable cause of impaired driving or an arrest would have likely ensued. (T at 293). No amount of arguing can boot strap facts that do not amount to probable cause to a preponderance of the evidence.

To be fair, witnesses Seager, Bender and Miller all testified that Judge Noecker's face was reddish. However, Mr. Bender volunteered that even in court Judge Noecker's face had a "reddish flush." (T. at 131). Mr. Seager, who like Judge Noecker, suffers from a heart condition noted that someone's face can get red in a situation like this. (T. at 144). Further, Mr. Mark Brown testified that when Judge Noecker gets upset his face gets red. (T. at 802). This event was clearly an upsetting situation thus accounting for Judge Noecker's reddish appearance.

To reach the level of a preponderance of the evidence the Master would have to believe the testimony of Harry West. Harry West is simply not worthy of belief. He testified about three things he noticed when he got up to Judge Noecker's car door: his face was very red, he had a cigar in his mouth, and he had, "[a] real nice tan coat." T. at 44-49). He also said the Judge Noecker spoke to him and that he walked in a manner that he had seen him walk when he saw him intoxicated ten years ago. He also said that Trooper Wheeler called him on his cell phone and that Trooper Wheeler had him sign a statement.

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Importantly, however, virtually everything Harry West said was contradicted by others who were present at the scene. Scott Carpenter who was riding in the very same truck as Harry West, testified that that he (West) never got closer than 10-15 feet to the car. Mr. Carpenter saw Judge Noecker get out of car. (T. at 114), and he didn't notice any unusual walk. (T. at 117).[2] Contrary to Mr. West's "testimony" Trooper Wheeler didn't call Mr. West and didn't have him sign a statement. (T. at 269-270). For Trooper Wheeler to have called at 7:30 p.m., as stated by West, he would have had to make this phantom call while he was still at Judge Noecker's home. Additionally the other witnesses, and Judge Noecker, reported that the Judge was wearing a black coat, not "A real nice tan coat." (T. at 282, 1247). In short, nothing Harry West says can be relied upon.

The present investigation/charge began as an inquiry predicated upon the belief that Judge Noecker drank alcohol, drove, had an accident, unlawfully left the scene, and lied to the police about drinking. The unlawfully driving away charge was dismissed as a matter of law. The police report, testimony of Trooper Wheeler, and actions of Trooper Wheeler and Sgt. Barker do not support the conclusion of drinking and driving, and certainly not by a preponderance of the evidence.

Trooper Wheeler testified regarding what he learned at the accident scene:

> Q. [Mr. Morley]: Did you get statements from anybody that Judge Noecker – before he left the scene was staggering or anything like that?
>
> A. [Trooper Wheeler]: No sir.

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[2] It is also interesting to note that Sgt. Barker observed Judge Noecker pacing back and forth at his home, didn't notice any stumbling, and didn't otherwise comment upon his gait. (T. at 305).

Q. Did you get statements from anybody that Judge Noecker smelled of alcohol?

A. No sir.

Q. Did you get statement from anybody before you left the scene that Judge Noecker appeared intoxicated?

A. No sir.

Q. Did you get statements from anybody before you left the scene that Judge Noecker had been drinking.

A. No sir.

(T. at 272). Such testimony simply does not rise to the level of a preponderance of the evidence. Consequently, the assertion that alcohol was a factor in the accident on March 12, 2003, or that Judge Noecker consumed alcohol prior to the accident, has an insufficient evidentiary basis and should be rejected by this Court. Further, this Court should modify the proposed sanction and impose a sanction, if any, proportionate to any actual wrongdoing proven to be causally related to Judge Noecker's alleged consumption of alcohol.[3]

E. JUDGE NOECKER HAS AT ALL TIMES CANDIDLY AND TRUTHFULLY ANSWERED ALL INQUIRIES RELATED TO THE AUTOMOBILE ACCIDENT ON MARCH 12, 2003.

The Commission, adopting the finding of the Master, found that Judge Noecker "failed to credibly report" the events of March 12, 2003. (*See* Michigan Judicial Tenure Commission Decision and Recommendation, Commission Appendix Tab 55 at 1). The Commission has further recommended that Judge Noecker's alleged failure to be truthful requires his removal from the bench.

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[3] In making its decision, the Court should also be mindful of the fact that Judge Noecker was never charged with any alcohol-related crime as a result of the accident on March 12, 2003.

From the inception of the present matter involving the automobile accident up and through the present, Judge Noecker has candidly and honestly answered any and all inquiries. Although the Master found that Judge Noecker's testimony at the formal hearing was either "not accurate" or "not credible," no evidence or testimony has ever been provided to specifically refute statements made by Judge Noecker. Rather, the Master relied on different versions of events by several alleged eyewitnesses. (*See* Master's Report of Specific Findings of Fact, Commission Appendix Tab 47 at 13-16). There has never been, however, a specific instance where Judge Noecker was shown to have lied – nor can there be. Rather, much like the conclusion that Judge Noecker consumed alcohol prior to his collision, the finding that Judge Noecker has been either non-credible or inaccurate is based solely on inference and conjecture.

The Commission, in its Decision and Recommendation, relies on several court decisions, from Michigan as well as other jurisdictions, to support removal if Respondent is found to have testified falsely. In all of the cases cited, however, the Respondent judge has either recanted his earlier statements/testimony or direct evidence was presented to refute statements. In the present case, Judge Noecker has, at all times, accepted responsibility for the accident and truthfully relayed the events surrounding the accident whenever questioned. As Judge Noecker testified at the Formal Hearing:

Q: [Mr. Houk]: You're 63 years old?
A: [Judge Noecker]: Sixty-two.
Q: Sixty-two. You've been on the bench since 1981, 22 years?
A: Yes.

* * *

Q: You were county prosecutor before that?
A: Yes.
Q: Your pension is vested?
A: Yes.
Q: ***Why are you here?***

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A: ***Because I didn't do what he [Mr. Fischer] claims.***

(T. at 1278) (emphasis added).

At no point during his lengthy career, either as a Judge or as a Prosecutor, has Judge Noecker's integrity been called into question as it has in the present case. Judge Noecker understands, appreciates, and respects the integrity required by members of the State Bar of Michigan, as well as the even higher standard required of the Michigan Judiciary. Against that background, and in the absence of any direct evidence to the contrary, it is improper for the Commission or this Court to simply *believe* Judge Noecker was less than candid or accurate. It is even more improper, and prejudicial, to base removal from the bench on a feeling or belief not supported by any evidence. As a result, Judge Noecker asks this Court to reject the finding that he was less than candid or that he misled anyone associated with these proceedings.

F. THE ONLY BASIS FOR THE SUGGESTION THAT JUDGE NOECKER'S JUDICIAL DUTIES WERE AFFECTED BY ALCOHOL WAS THROUGH THE IMPROPERLY ADMITTED TESTIMONY OF DR. HARVEY AGER.

As referenced previously, the only evidence, testimonial or otherwise, presented regarding Judge Noecker's battle with alcoholism was testimony proffered by the Examiner's purported expert witness, Dr. Harvey Ager, and Judge Noecker's expert witness in response, Dr. Norman Miller. Dr. Ager's testimony was allowed at the Formal Hearing despite the objection raised by counsel for Judge Noecker:

> [Mr. Houk]: ***Respectfully, Your Honor, I cannot agree to qualifications of this witness as an expert in this case.*** I think there are three reasons that this Court has considered very carefully. First addressing MRE 702. ***MRE 702 requires an initial determination by the Judge that the testimony will assist the trier of fact to understand the evidence or to determine a fact at issue. Now, the most helpful fact that Dr. Ager could help the Master with is whether Judge Noecker's relapse affected his work. And he said here in***

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> ***Court, and in his written report, that he can't make that determination. I have no way of measuring his work performance. Lack of foundation, Your Honor, a second reason. He hasn't reviewed any of the Respondent's work or work records. Has no idea of how effective he has been as a Circuit Judge in recent years.*** He reports that additional psychological testing would be helpful but hasn't sought it. And the Tenure Commission here has broad authority to order up tests. If you recall wasn't – our client didn't voluntarily seek out Dr. Ager. ***Evidence from an expert which would be used to remove an elected Judge should be made of sterner stuff than what we are looking at here.*** Finally, lack of expertise. And I'm deeply troubled in this regard in a couple different respects. But first I just want to emphasize that under the amended Court Rule, you have an additional burden that we as attorneys haven't experienced in the last many, many years in this state. And that burden is, you are the gatekeeper under the amended MRE 702 and 703. You are the gatekeeper not only on what type of evidence is admissible, but what experts are truly qualified. The staff comments to that new rule state that "the new language requires Judges to act as gatekeepers who must exclude unreliable expert testimony". Then they cite to the Daubert case.
>
> Here are my problems. We have got a psychiatrist who spends less than four percent of his time dealing with alcohol-related issues. He has not published or presented in this area in 20 years. He doesn't sit as a reviewer of journals dealing with these issues. Additionally, his report states he doesn't know why - - I'm not going to go there - - I will go there later, perhaps. And he has, again, admitted that he has no way of measuring work performance. ***For all these reasons, Your Honor, with all due respect to Dr. Ager, who I'm sure is a fine physician who has many interests, he is not an expert in this area.*** Thank you.

(T. at 376-378) (emphasis added).

This Court has recently clarified the controversy surrounding proposed expert testimony and such clarification in the present case mandates disregarding the expert opinion of Dr. Harvey Ager and, as an extension, disregarding the finding that Judge Noecker's abilities were affected by the consumption of alcohol.

In Gilbert v DaimlerChrysler Corp, 470 Mich 749; _____ NW2d _____, 2004 WL 1632857 (Mich, July 22, 2004), this Court addressed the admission of expert testimony as it relates to the Court's gate keeping role required by MRE 702, stating in relevant part:

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We now clarify that MRE 702 requires the trial court to ***ensure that each aspect of an expert witness's proffered testimony -- including the data underlying the expert's theories and methodology by which the expert draws conclusions from that data -- is reliable.***

* * *

In both its former and current incarnations, MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable. While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither "abandon" this obligation nor "perform the function inadequately."

Indeed, the obligation imposed by MRE 702 is reinforced by MRE 104(a), which provides that "[p]reliminary questions concerning the qualification of a person to be a witness . . . *shall* be determined by the court . . . ."

* * *

It is well-established that the proponent of evidence "bears the burden of establishing relevance and admissibility." At the time this case was tried, the proponent of expert opinion bore the burden of establishing admissibility according to the *Davis-Frye* "general acceptance" standard. MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert testimony -- regardless of whether the testimony is based on "novel" science -- is reliable.

* * *

This gatekeeper role applies to *all stages* of expert analysis. ***MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data.*** Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.

Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation. The United States Supreme Court's caveat in *Joiner* is persuasive:

> [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

When a court focuses its MRE 702 inquiry on the data underlying expert opinion and neglects to evaluate the extent to which an expert extrapolates

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> ***from those data in a manner consistent with Davis-Frye (or now Daubert), it runs the risk of overlooking a yawning "analytical gap" between that data and the opinion expressed by an expert.*** As a result, ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions.

Gilbert, 2004 WL 1632857 at *12-14 (emphasis added) (internal citations omitted).

In the present matter, the entire foundation for the finding that alcohol, in any way, caused Judge Noecker's work as a trial judge to suffer came from the testimony of Dr. Ager (and rebuttal testimony by Dr. Miller). Dr. Ager reviewed no documents related to Judge Noecker's work product. (T. at 376). Dr. Ager only met with Judge Noecker one time for approximately 90 minutes. (T. at 399). By his own admission, Dr. Ager "has no idea" as to Judge Noecker's work product or work in general. (T. at 376). Nonetheless, Dr. Ager was allowed to opine as to the actions of alcoholics in general and that opinion has formed the basis of the Commission's present Decision and Recommendation.

Reliance on Dr. Ager's testimony as a primary basis for removing Judge Noecker from the bench does overlook "a yawning 'analytical gap'." Gilbert, 2004 WL 1632857 at *14. Consequently, the improper admission of Dr. Ager's testimony should be stricken from the record, the Decision of the Commission rejected, and the proposed sanction modified to be proportionate to any actual evidence properly admitted.

G. THE PROPOSED DISCIPLINE OF REMOVAL FROM THE BENCH, BASED ON NOTHING MORE THAN IMPERMISSIBLE SPECULATION, INNUENDO, AND INFERENCE, IS UNDULY HARSH AND SHOULD BE REJECTED BY THIS COURT.

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This Court has the authority to "censure, suspend with or without salary, retire or remove a judge." Const 1963, art. 6, § 30. There being no direct evidence or testimony to establish either that Judge Noecker was not candid during these proceedings or that the St.

Joseph County Circuit Court suffered as a result of his alcoholism, Judge Noecker requests that this Court reject the recommendation of the Commission. Judge Noecker requests that this Court, after *de novo* review of the proceedings, impose a sanction, if any, commensurate with any wrongdoing actually proved.

In imposing any discipline, the Court should look to assisting Judge Noecker with his medical condition of alcoholism rather than punishing him for his ongoing recovery. Along those lines, Dr. Norman Miller, in his testimony at the public hearing, outlined a formal medically-based recovery plan that would allow Judge Noecker to continue his recovery while at the same time continuing to properly serve the St. Joseph County citizenry. Specifically:

> Q: [Mr. Houk]: Dr. Miller, you're about to begin telling us about your recommendations in this matter.
>
> * * *
>
> A: [Dr. Miller]: Yes. Okay. Good. Well, I think Judge Noecker should continue in his alcoholism treatment program for a duration of two years. He's - - he has about nine months, as I understand at this point.
>
> THE MASTER: An additional two years or a total of two years?
>
> THE WITNESS: I think it could include the nine months that - - well, I would say from when he left - - I would feel most comfortable. I'm going to be conservative here. I would be most comfortable from when he left Hazelden. So, two years from July. I think he left Hazelden in July 2003. Two years from July 2003.
>
> And that he participates in an alcoholism treatment program that is approved by someone who is knowledgeable in addiction medicine. Maybe approved is not the right word, but with - - with an opinion or whatever. I mean this is where - - consultation would be the word, consultation with someone in addiction medicine, and that he would attend at least once a week for two years. So, until July of 2005.
>
> And then recommendation, too, that he will abstain from alcohol continuously during his tenure as Circuit Court Judge. I just think it's common sense and clinically relevant, and also important, that in his overall - - the appearance - - I know I'm not a legal expert, but one of the cases I read about a judge was not only that a judge - - a judge needs to - - the standard is not only is the judge factually correct, but the appearance that a judge's conduct should not raise any improper - - you know, any appearance of impropriety. And right or wrong, a judge who has an alcohol problem and continues to drink does not

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give the correct appearance. So, I think that he needs to assure the Judicial Tenure Commission that he will not and is not drinking during those - - during his tenure as a Judge. I wouldn't recommend that he drink after that either, but I'm just saying for the purpose of this testimony.

Three, the Judge will enter a contractual agreement with the monitoring of full authority to abstain from alcohol until he really retires from his judicial duties.

* * *

And then that Judge Noecker will attend at least three meetings of Alcoholics Anonymous per week until he retires from his judicial duties. And it may not be clear - - yeah, it is later on. It will explain it.

And then Judge Noecker will enter into a contractual agreement with the Judicial Tenure Commission that he will resign from his judicial tenure voluntarily - -

THE MASTER: From the judicial tenure or from the bench?

THE WITNESS: From the bench, yeah. As a judge, he'll just resign if he fails to comply completely with the terms of the contractual agreement.

THE MASTER: Thank you.

THE WITNESS: And then Judge Noecker will receive treatment for alcoholism and monitoring for continued abstinence and compliance with the agreement, contractual agreement, in part anyway from treatment professionals. That in addition to whatever, that treatment professionals are involved in assessing his continued abstinence and his continued compliance with the agreement.

And this may be redundant, it didn't seem at the time, but treatment professionals experienced in monitoring professionals who suffer from alcoholism will monitor Judge Noecker. I bring this up because there is a very good model that physicians have in the State of Michigan actually, where they're monitored by the state and their abstinence is monitored, their compliance with contractual agreements is monitored, and it works very well. And there's consequences if they don't, you know, if the compliance isn't satisfactory. It's available to physicians, nurses, healthcare professionals. And it's done by - - it's done in a combination by the state and by addiction medicine professionals. I've done it myself. I've been involved in it. I've monitored people and that's what I'm proposing is something like that.

I'm not proposing that the current monitoring system not be employed that's used by - - that would be authorized currently by the Judicial Tenure Commission. I would just propose adding a professional treatment component and maybe even looking at the State of Michigan monitoring program. It's called the health professionals, MPRHC or something like that, looking at that.

(T. at 1168-72).

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The above-referenced roadmap allows this Court to assist Judge Noecker rather than imposing punishment for someone who is taking affirmative steps to treat a medical condition. Judge Noecker requests that this Court adopt the recommendations of Dr. Miller in imposing any sanctions.

H. NO LEGAL OR NECESSARY BASIS EXISTS FOR THE IMPOSITION OF COSTS AGAINST JUDGE NOECKER RELATED TO THESE PROCEEDINGS.

Judge Noecker requests that this Court reject the Decision and Recommendation awarding costs against Judge Noecker to the Michigan Judicial Tenure Commission and asks that the Court adopt the decision, as it relates to costs, of the Concurring/Dissenting Opinion of the Commission and reject any imposition of costs to Judge Noecker. [4]

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[4] It is relevant to note that Judge Noecker has incurred significant out-of-pocket expenses related to this matter, both in defending himself and in getting medical treatment. Any award of costs against Judge Noecker for defending himself would merely be punitive and should not occur.

RELIEF

Judge Noecker has, at all times, been candid and honest about all issues relating to the present case. No testimony or evidence was presented to the contrary.

Similarly, Judge Noecker has been a recovering alcoholic for approximately ten years. No testimony or evidence was presented evidencing any harm to the St. Joseph County Circuit Court or the Michigan Judiciary as a result of Judge Noecker's alcoholism.

Judge Noecker requests that this Court reject and/or modify the Decision and Recommendation of the Michigan Judicial Tenure Commission and impose a sanction, if any, commensurate with any alleged harm proven by the Examiner.

Judge Noecker requests that this Court impose a sanction, if any, that adopts the medical treatment outlined by Dr. Miller.

Judge Noecker requests that this Court reject in its entirety the recommendation of reimbursement of costs to the Michigan Judicial Tenure Commission.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
Attorneys for Judge James P. Noecker

Dated: 8-27-04

By: _____
Peter D. Houk (P-15155)
Brian P. Morley (P-58346)

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LAWYERS
LANSING, MICHIGAN 48933

VERIFICATION

I, James P. Noecker, swear that the above stated information is true to the best of my information, knowledge, and belief.

James P. Noecker

Subscribed and sworn to before me this 27th day of August, 2004.

Susan Lubitz
Notary Public

SUSAN LUBITZ
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF IONIA
My Commission Expires May 25, 2010
Acting in the County of Ingham