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## Judicial Tenure Commission

May 10, 2022

### Via Email

Sarah Roth, Esq.  
Administrative Counsel  
Michigan Supreme Court  
PO Box 300552  
Lansing, MI 48909

### **RE: ADM File No. 2021-11 – Proposed Amendment of Rule 9.116 of the Michigan Court Rules**

Dear Ms. Roth:

The Judicial Tenure Commission thanks the Supreme Court for the opportunity to submit comments concerning the proposed amendment to MCR 9.116, the court rule that governs the attorney discipline system's jurisdiction over former judges.

The proposed amendment partially closes a weakness in the existing division of authority between the judicial discipline system and the attorney discipline system. The weakness is that a judge may be sanctioned for serious misconduct – misconduct that calls into question not only the judge's fitness to sit in judgment of others, but also calls into question the judge's fitness to serve as a lawyer – but may face no actual sanction as either a judge or a lawyer.

For instance, the Judicial Tenure Commission recommended that the Court remove former judge Byron Korschuh for embezzlement he committed while he was a public official, and for false statements he made under oath during the investigation into his embezzlement. This was clearly misconduct that calls into question his fitness as a lawyer as well as a judge. Before the Court ruled, Mr. Korschuh was voted out of office. That made removing him from office moot, but to foreclose the possibility that Mr. Korschuh would seek to regain his seat in a future election, the Court suspended him for six years.

Current MCR 9.116 forbids the attorney discipline system to take action against a former judge if the Judicial Tenure Commission or Supreme Court have already taken action against the judge, unless that action was removal from the bench. As a result, Mr. Korschuh was free to resume the practice of law once his term ended, immune from any action by the attorney discipline process. The consequence – surely unintended by the drafters of the current rule – is that Mr. Korschuh avoided any meaningful sanction by either discipline system for his very serious misconduct.

The Court’s proposed amendment to MCR 9.116 would ensure that a future judge whose misconduct is serious enough to warrant removal, and who leaves office before the order of removal can take effect, will nonetheless have their fitness reviewed by the attorney discipline system. While that is an improvement over the current rule, it still leaves open the potential that attorneys will avoid any sanction for serious misconduct committed while they were judges. There are two ways in which Rule 9.116 can be improved further.

The first is to broaden the category of former judges subject to potential attorney discipline. Under the current rule there is no bar to the following:

- A judge makes false statements. At the conclusion of the judicial discipline process, the Court opts for a sanction less than removal, such as a lengthy suspension. *See, e.g., In re Simpson* [cite]. Unlike Judge Simpson, though, as soon as the sanction takes effect, the judge leaves the bench for the more lucrative practice of law rather than endure the suspension. The attorney discipline process is forbidden to take any action. As a consequence, the judge will face no sanction, and the public will not be protected from a potentially unfit attorney.

- A judge has a misconduct case pending before the Court. While that case is pending, other serious misconduct by that judge is brought to the attention of the Judicial Tenure Commission. *See, e.g., In re Morrow*, [cite]. The misconduct is serious enough that, but for the pending case, it would be worthy of a public complaint. However, given the pending case, the Commission's most effective action is to investigate the new misconduct and merely admonish the judge, in order to be able to inform the Court of the additional misconduct in time for the Court to consider it, if it wishes, in connection with the pending case. The Court ultimately suspends the judge for their conduct in the pending case, and there is no indication that the sanction included the new misconduct. Again, the judge chooses to retire rather than to accept the suspension. Under the current rule, the Commission's admonition bars the attorney discipline system from addressing the judge's new misconduct, even though it was serious. Again, the public is not protected from a potentially unfit attorney.

The Judicial Tenure Commission believes that former judges who fall into *any* of these categories should be subject to evaluation by the attorney discipline system. The reason is that otherwise, by leaving the bench these former judges can go directly into the practice of law without any meaningful sanction for serious misconduct – misconduct that might result in a lengthy suspension, or disbarment, for a similarly situated lawyer who was never a judge.

One likely objection to the Commission's suggestion is that it would be a sort of "double jeopardy" – if the judicial discipline process has already acted against a judge, it is somehow unfair to let the attorney discipline process sanction the now-former judge for the same conduct. This objection rests on two misperceptions:

- 1) Unlike the penalty in criminal cases in which double jeopardy is a concern, professional discipline is not penal in nature. It is to protect the public. If circumstances frustrate one discipline system's effort to protect the public, that should not also frustrate the ability of the other system to do so.
- 2) Unlike the criminal justice system, which has a single goal, the goals of the two professional discipline systems are different. The judicial discipline system protects the public from unethical judges, while the attorney discipline system protects the public from unfit lawyers. Because the two discipline systems have different purposes, the appropriate sanction in one is not necessarily the appropriate sanction in the other. Inasmuch as judges are also lawyers, the two systems should not be seen as either/or, nor in competition.

Rather, they should work together to accomplish the paramount goal, which is protecting the public. It is the attorney discipline system that is structured to protect against unfit lawyers, and its ability to do that should not be hampered by decisions made about judges that were made for a different purpose.

The Judicial Tenure Commission is not suggesting that every former judge who once faced judicial discipline should also be subject to sanction by the attorney discipline process. Rather, the Commission suggests a rule that would require the attorney discipline system to give credit to whatever sanction the judicial discipline system imposed, and that would also require the attorney discipline system to take into account the passage of time since the misconduct occurred, to prevent dredging up misconduct that was addressed by the judicial discipline system long prior to the judge becoming an attorney.

As drafted, the proposed amendment only permits the attorney discipline process to take action against a judge who has left office if the Court first certifies that but for the judge having left office, the Court would have removed the judge. That requirement rests on the premise that only judges who would have been removed should face the risk of sanctions from the attorney discipline system. Inasmuch as the Judicial Tenure Commission believes there are additional situations, as described above, in which the attorney discipline process has a role to play, the Commission recommends that requiring this finding by the Court is both excessive and unnecessary.

In light of the risks identified above, the Judicial Tenure Commission suggests amending MCR 9.116(B) along the following lines:

(B) Former Judges. The administrator or commission may only take action against a former judge:

(1) for conduct resulting in removal as a judge;

(2) for any conduct that was not the subject of a disposition by the Judicial Tenure Commission or by the Court; or

- (3) if, after considering a sanction imposed by the Court or an action by the Judicial Tenure Commission under MCR 9.223(A)(2)-(5), and after considering the passage of time since the sanction or action, it plainly appears that the sanction or action is not adequate to serve the administrator's and commission's need to protect the public in light of the nature of the conduct and its adverse reflection on the former judge's fitness as an attorney.

Very truly yours,



Jon H. Hulsing  
Chairperson  
For the Commission

JHH:cc