STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
Brighton, MI 48116

Formal Complaint No. 99
Master: Hon. William J. Giovan

REPLY TO EXAMINERS' RESPONSE TO MOTION TO DISQUALIFY COMMISSION

On Friday, February 22, 2019, in the afternoon, the Examiners filed a response to Judge Brennan's motion to disqualify the Commission and to administratively close this case. This is a reply to that response. Judge Brennan anticipates that the Commission wants to resolve her motion before March 4, 2019, which means without oral argument. This reply is, therefore, being filed in lieu of such argument.

1. Yes, the petition filed by the Commission with the Supreme Court does seek Judge Brennan's removal from the bench. Asking that she be barred "from acting as a judge," which is what an interim suspension does, MCR 9.219(A)(1), and that she be stripped of pay, which presumably includes health insurance, all because she "is not fit to be a judge" (¶ 31) and, therefore, "should not continue to enjoy the . . . perquisites of being a judge" (¶¶ 46, 47), is removing her. Claiming otherwise is disingenuous. The removal may not final, but it is a removal, nonetheless.

2. Judge Brennan accepts that "the purpose of judicial discipline is not to punish, but to maintain the integrity of the judicial process." *In re Moore*, 464 Mich 98, 118; 626 NW2d 374 (2001). It is euphemistic, however, to not characterize judicial discipline as punishment, as would

the Examiners (p 2).[1] Stripping a judge of her livelihood and health insurance has a sting which is punitive, even if her salary is paid into escrow. While escrowed funds can eventually be paid, most people need current income, especially, health insurance. Will the cost of replacement insurance be reimbursed, too? Besides, does MCR 9.219(A) allow even a suspension without pay? It says that the Supreme Court can be asked to suspend a judge "from *acting as a judge* until final adjudication of the [formal] complaint" [emphasis added]. Collecting a salary and benefits is a noticeably crass way to interpret "acting as a judge." Those words encompass managing a docket, presiding over proceedings, issuing rulings and the like.

3. Yes, the Commission has acknowledged that its filing a petition for Judge Brennan's interim suspension constitutes a disqualifying prejudgment of this case. Initially refusing, because it is "the adjudicative body" which will review the Master's report, to itself file a petition and explicitly refusing, for the same reason, to express any opinion "regarding the Master's report or the substance and/or merits of the Examiners' motion for interim suspension" was an acknowledgment that doing either would be a prejudgment or give the appearance of a prejudgment. Again, to claim otherwise is disingenuous. In sum, by acknowledging what would happen if the Commission itself filed a petition, the Commission acknowledged what did happen when it later filed a petition.

4. Even if the Commission "did not give the petition [for interim suspension] [which it filed] detailed scrutiny before filing" (p 12), the Commission is held to have read it and to have accepted what it said. MCR 2.114(D)(1) and (2). Besides, Judge Brennan does believe the Commission was sloppy, as suggest the Examiners.

[1] All parenthetical references hereinafter to "p __" are to the Examiners' response to Judge Brennan's motion. The earlier parenthetical references to "¶ __" were to the Commission's petition for interim suspension.

5. The Examiners' reliance on *People v Upshaw*, 172 Mich App 387; 431 NW2d 520 (1988), is misplaced. It was the prosecution in that case which was seeking a disqualification on retrial because the judge had prejudged the case when he previously found the defendant guilty in a bench trial. His disqualification was not required, said the Court of Appeals, because "the party the most at risk, namely, defendant, is apparently satisfied with the assignment of Judge Evans, and has waived his right to a jury trial." *Id.*, 172 Mich App at 388. Accordingly, the prosecution was not an aggrieved party with standing to seek disqualification. Hence, the case said nothing pertinent to this case.

6. Also misplaced is the Examiners' reliance on the so-called "extrajudicial source rule," which they overstate as saying that a judge is subject to disqualification only for what he or she learned outside of the case in which disqualification is sought, i.e., has an "extrajudicial source," never for what he or she learned and expressed in that case. That is "overly simplistic." Geyh, *Judicial Conduct and Ethics* (5th ed), § 4.05A. A extrajudicial source is not the only basis for establishing a disqualifying bias or prejudice. A disqualifying predisposition can also spring from what is adduced during a case which displays a clear inability to render a fair judgment. *Liteky v United States*, 510 US 540, 551; 114 S Ct 1147; 127 L Ed 2d 474 (1994). See also *Geyh*, *supra*. More significantly, *Gibson* itself makes clear that prejudgment is not governed by that rule. 90 Mich App at 707, fn 2.[2]

[2] The Examiners cite several other cases (pp 10-11), but none are applicable. The subsequent trials were jury trials, *United States v Thirion*, 813 F2d 146 (8th Cir 1987); and *United States v Bernstein*, 533 F2d 775 (2nd Cir 1970); on stipulated facts, *Emerson v Arnold*, 93 Mich App 345 (1979); or the case was resolved by a guilty plea, *United States v Burrette*, 518 F3d 942 (8th Cir 2002), so any risk of prejudgment by the presiding judge was immaterial. Unlike this Commission, those judges were not the triers-of-fact. At the time of *State v Smith*, 242 NW2d 320 (Iowa 1976), Iowa did not recognize prejudgment as a basis for recusal, and *People v White*, 411 Mich 366; 308 NW2d 128 (1981), involved successive preliminary examinations which did not result in findings of fact, but only findings of probable cause followed later by jury findings of fact . All are significantly distinguishable, therefore, from *Gibson* and from this case, so that they do not affect it or this case. Besides, except for *White*, all those cases are from outside Michigan, so they cannot overrule *Gibson*.

7. *In re Chrzanowski*, 465 Mich 468; 636 NW2d 758 (2001), is not "precedent," as the Examiners contend (p 6), which undermines Judge Brennan's claim of prejudgment. At no time did that case consider, address or even involve the issue of disqualification, which is why the case is not precedent regarding that issue. Furthermore, *Chrzanowski* was not at all like this case, so it says nothing pertinent, even inferentially. The Commission's petition in that case for interim suspension had been filed and granted, although not at the case's very beginning, still before the formal hearing had begun,[3] not like in this case months later and after the Master had issued his report, so there was no prospect in that case of a prejudgment by the Commission of the sufficiency of the proofs. The Examiners acknowledge that difference, but contend, without explanation, that it is not a "meaningful difference" (p 7). It is a huge difference, the difference between no prospect of prejudging upcoming de novo review and an acknowledged prejudging of such review.

8. The Examiners are correct that MCR 9.219 authorizes without setting a time limit the Commission to petition the Supreme Court for the interim suspension of a judge. But a grant of authority to do something is not an okay to do that something at any time in any way. Rules of good practice apply. Judge Brennan is not accusing the Commission of any impropriety; she is simply noting that there can be consequences to what is done, even properly. For example, there is nothing the least bit improper about being in most of the situations listed in MCR 2.003(C) -- judges are born or marry into some of them -- yet they are disqualifying. By not explicitly cross-referencing those situations, MCR 9.219 does not exempt petitions for interim suspensions from the former rule, nor exempt from review and reversal violations of the latter in the course of seeing the former.

[3] Judge Brennan notes that *Chrzanowski* involved a petition for interim suspension with pay.

9. Likewise, and for the same reasons, because it is "routine[]," "widespread[,] and judicial practice" to grant preliminary relief does not establish that seeking an interim suspension cannot result in a disqualifying prejudgment (pp 5, 7, 11). The examples given by the Examiners of typical preliminary rulings (pp 7-8) demonstrate how different is the Commission's petition for an interim suspension. Warrant requests and bail determinations, temporary support and custody awards, and temporary restraining orders and preliminary injunctions come very early, well ahead of significant proofs, so that such decisions do not, because they cannot, foreshadow the ultimate outcome and are not likely to be understood by outside observers to predict what will ultimately be decided. That is not this case; far from it. The petition for interim suspension is based on completed proofs and buys into the Master's key findings. That likely creates in the mind of a detached observer an expectation of a likely predisposition.

10. That it was necessary, the Examiners concede, for the Commission "to comment on the evidence" submitted in support of its petition for interim suspension (p 12) does not erase or forgive the predisposition inherent in doing so. In *Gibson*, 90 Mich App at 797, the disqualified judge "was required to make [the] findings of fact" at the co-defendant's trial which subsequently worked his disqualification from Mr. Gibson's case. Nonetheless, he was disqualified. In this matter, the Commission could have avoided prejudging Judge Brennan's case by waiting the few months (from February 4 through the hearing on March 4 and the issuance thereafter of its recommendation) to resolve this case and, if considered essential, to then ask for an interim suspension until the Supreme Court acts. Doing the latter would have revealed no prejudgment or predilection. But it didn't wait. Judge Brennan respects, although she disagrees with, the Commission's decision to ask for her interim suspension, but, as *Gibson*, 90 Mich App at 797,

noted, the "exigencies of the circumstances" did not erase the disqualifying prejudgment which followed.

11. Judge Brennan's motion is not undermined because its argument will "appl[y] equally to the Supreme Court" if it grants the Commission's petition (p 9), so it must be wrong. The rule of necessity undermines the predicate of that contention. *United States v Will*, 449 US 200, 213-215; 101 S CT 471; 66 Led2d 392 (1980). As explained in her motion, that rule does not affect Judge Brennan's motion.

12. Finally, Judge Brennan's motion cannot be resolved, as the Examiners suggest, by leaving it to each member of the Commission to "determin[e] whether he or she has 'prejudged' [the Judge's] conduct" (p 12). The proper standard for disqualification is not how the situation is assessed "in the mind of the judge [or each Commissioner] or in the mind of the movant, but in the mind of a reasonable person." 85 Citera, "A Look at the Extrajudicial Source Doctrine Under 28 U.S.C. § 455," *The [Northwestern Univ Law School] Journal of Criminal Law & Criminology* 1114, 1127 (1995). Our Supreme Court has said the same thing at least twice. See *In re Hocking*, 451 Mich 1, 12; 546 NW2d 234 (1996); and *In re Haley*, 476 Mich 180, 192 fn 17; 720 NW2d 246 (2006). In addition, if the Commission accepts the Examiners' argument, must it not reject out of hand their complaint about Judge Brennan not disqualifying herself? She stated each time that she was not biased.

WHEREFORE, Judge Brennan again asks the members of the Commission other than Judge Cortes and Mr. Burdick to recuse themselves and to close this case until a new Commission is constituted.

Respectfully submitted,

By:*/s/ Dennis C. Kolenda*
Dennis C. Kolenda

DICKINSON WRIGHT PLLC
Attorneys for Hon. Theresa M. Brennan

Suite 1000
200 Ottawa Avenue NW
Grand Rapids, MI 49503
(616) 458-1300
dkolenda@dickinsonwright.com