

STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

Hon. Paul J. Cusick
3rd Circuit Court
Detroit, Michigan 48226

Formal Complaint No. 104

Master: Peter D. Houk

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**ANSWER TO RESPONDENT'S MOTION TO COMPEL PRODUCTION
OF WITNESS STATEMENTS & BRIEF IN SUPPORT**

Disciplinary Counsel Margaret N.S. Rynier and Melissa A. Johnson, and in answer to respondent's **MOTION TO COMPEL PRODUCTION OF WITNESS STATEMENTS**, state that the motion should be denied for the following reasons:

1. Respondent seeks to compel production of all witness statements in the possession of the Judicial Tenure Commission "related to the facts of" FC No. 104.
2. As detailed below and in disciplinary counsel's response to motion to amend the scheduling order, disciplinary counsel have already provided all witness

statements and other material in its possession that are related to the charges in FC 104. To the extent respondent seeks additional information, what he seeks is information that is not related to the allegations in FC 104.

3. In particular, respondent seeks material that, if it exists at all, was obtained in a separate investigation involving a different judge and has nothing to do with the allegations against respondent.
4. MCR 9.232(A), which governs discovery in professional disciplinary matters, requires the parties to provide “the names and addresses of all persons whom they intend to call at the hearing, a copy of all statements and affidavits given by those persons, and any material in their possession that they intend to introduce as evidence at the hearing.”
5. Disciplinary counsel have provided the names and currently known addresses of all witnesses they intend to call at the public hearing which is scheduled to commence on May 2, 2023.
6. Disciplinary counsel have provided all statements and affidavits given by those persons who may be called as witnesses that were taken or otherwise provided as part of the investigation into respondent’s conduct.
7. MCR 9.232(A)(2) further provides that disciplinary counsel shall provide to the respondent copies of all exculpatory material in its possession.

8. Disciplinary counsel have fully complied with MCR 9.232(A)(2) and have provided respondent with all material in their possession that is even remotely exculpatory.
9. Respondent misrepresents the applicability of the Commission's Internal Operating Procedures (IOPs) rules and the obligations they impose on disciplinary counsel:
 - a. The IOPs do not have the force of law, do not establish any official standards, and are not meant as administrative "rules."
 - b. IOP 207(B)-15 does not make mandatory any conduct or practice regarding any discovery.
 - c. IOP 207(B)-15 pertains only to providing material from the investigation that is being prosecuted after the Commission issues a public complaint. It does not pertain to material in any other investigation that may or may not be conducted by the Judicial Tenure Commission.
10. Confidentiality of Commission documents and investigations is guided by MCR 9.261, which states:

. . . . all papers filed with the commission and all proceedings before it are confidential in nature and are *absolutely privileged* from disclosure by the commission or its staff, including its former members and employees, *in any other matter*, including but not limited to civil, criminal, legislative, or administrative proceedings. All the commission's investigative files and commission-generated documents are likewise confidential and privileged from disclosure. (emphases added)

11. MCR 9.261(C) further provides if a complaint has not been or will not be filed in a matter in which there was a referral for investigation, the *Commission* may waive confidentiality or privilege protections *if*:
 - a. The respondent in the relevant investigation waives, in writing, the right to confidentiality or privilege;
 - b. The grievant waives, in writing, the right to confidentiality or privilege;
 - c. The witnesses whose statement, testimony, or other evidentiary items will be disclosed waives, in writing, the right to confidentiality or privilege;
and
 - d. A majority of the Commission determines that the public interest will be served by doing so.
12. MCR 9.261(B)(1) prohibits disciplinary counsel from disclosing the existence or contents of an investigation, including testimony taken or papers filed, before the Commission files a public complaint in that investigation, except as needed for investigative purposes.
13. In compliance with the court rules cited above, disciplinary counsel have repeatedly informed respondent's counsel that they do not have the authority to comment on any potential referral for investigations to our office, the status of those investigations and/or the contents of those investigations if those investigations were resolved in any manner short of filing a public complaint.

14. Disciplinary counsel have also repeatedly informed respondent's counsel that he should submit any motions requesting disclosure of any alleged documents in investigations other than respondent's to the Commission.
15. In order to avoid any delays of the public hearing, currently scheduled for May 2, 2023, disciplinary counsel ask that the Master refer respondent's motion to compel hypothetical witness statements that potentially were created in other hypothetical investigative cases to the Commission for hearing as soon as possible and no later than April 10, 2023.¹

Respectfully submitted

/s/ Margaret N.S. Rynier
Margaret N.S. Rynier (P34594)
Disciplinary Counsel

/s/ Melissa A. Johnson
Melissa A. Johnson (P71695)
Disciplinary Co-Counsel

¹ April 10th is the last time the Commission meets before the start of the public hearing.