

**STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION**

COMPLAINT AGAINST

Hon. Kirsten Nielsen Hartig
52-4 District Court
Troy, MI

FC 109

**DISCIPLINARY COUNSEL'S RESPONSE TO EMERGENCY MOTION TO
COMPEL DISCOVERY**

I. INTRODUCTION

Respondent, Hon. Kirsten Nielsen Hartig, asks the Master to order disciplinary counsel to produce all relevant evidence on an “emergency basis” and asserts that she is entitled to immediate production even before she files her answer to the complaint. Judge Hartig’s request is contrary to law and good practice.

II. PROCEDURAL POSTURE

On June 4, 2025, the Judicial Tenure Commission (Commission) filed a complaint alleging that Judge Hartig committed judicial misconduct by refusing to comply with the Commission’s request to provide the report of her Commission-ordered psychological evaluation; making false statements to the Commission in her response to the Commission’s request for comments; mistreating/abusing court employees and others and obstructing the administration of her court; and disregarding the law when dismissing criminal cases.

Also on June 4, counsel for Judge Hartig filed his appearance. On June 5, Judge Hartig’s counsel advised that he had not yet received a file from Judge Hartig’s previous counsel, David Timmis. As a courtesy, the next day disciplinary counsel provided Judge Hartig’s counsel with materials that, to disciplinary counsel’s knowledge, would have been in Mr. Timmis’s file. The materials disciplinary counsel provided to Judge Hartig’s counsel on June 6 included copies of the two requests for investigation (RFIs) that initiated the investigation into Judge Hartig, the Commission’s requests for Judge Hartig’s comments and their attachments, Judge

Hartig's answers to the requests for comments and the attachments to Judge Hartig's answers, and emails in which Judge Hartig was asked to clarify her answers because they appeared to contain an error as to date.

Under MCR 9.232(B)(1) Judge Hartig had 14 days to answer the complaint. That would have made her answer due on June 18. On June 9 the chair of the Commission granted Judge Hartig's request to extend the deadline for her to answer to July 9.

III. ARGUMENT

A. Michigan Court Rules provide for discovery well *after* Judge Hartig has answered the complaint

Judge Hartig seeks to have discovery before she answers the complaint. The Michigan court rules preclude her request.

For example, MCR 9.232(A)(1) expressly *prohibits* pretrial or discovery proceedings in judicial discipline matters. In other words, this rule precludes Judge Hartig's emergency discovery motion. In lieu of "discovery proceedings," the rule specifies disciplinary counsel's obligation—it mandates that disciplinary counsel provide discovery at least 21 days before a scheduled public hearing.¹

In addition, Michigan Court Rule 9.233 provides that "the public hearing [in a judicial discipline matter] must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court." MCR 2.301 and 2.302 clearly establish that a defendant in a civil case may not engage in discovery until *after* they have answered the complaint. Judge Hartig's status is analogous to that of a defendant to a civil complaint. Even in the absence of Rule 9.232(A)(1) that forbids discovery proceedings in judicial discipline cases, application of the civil rules would make Judge Hartig's request premature until after she has answered the complaint.

This outcome makes sense in a proceeding that is designed to arrive at the truth. Providing Judge Hartig with discovery before she answers the complaint would

¹ There are limited exceptions in the rule that are not pertinent here.

enable her to mold her answer to the information she would then know is all the information that disciplinary counsel possesses. That is especially problematic in a case such as this, in which the complaint charges Judge Hartig with withholding a damaging psychological examination from the Commission and with lying to the Commission. Further, if pre-answer discovery is appropriate for Judge Hartig in this case, it is equally appropriate for every other judge in every future public complaint of judicial misconduct. The court rules wisely provide otherwise.

Judge Hartig's motion essentially disregards these governing court rules. Page 7 of her brief asserts that "[T]o some extent, the Michigan Court Rules cover the parties' discovery obligations in this proceeding." Her brief then cites only those portions of Rule 9.232 that are *not* applicable to her motion while not mentioning the part that precludes it. Her brief does not acknowledge MCR 2.301 and 2.302 at all.

Judge Hartig maintains that she needs to know what the evidence against her will be before she answers the complaint, in order to have a "fair chance" to provide the required full and fair disclosure of all the facts and circumstances pertaining to the allegations against her. (Judge Hartig's brief at p 11). The court rules do not require this, and for good reason. She is required to do no more than her best to make a full and fair disclosure with the resources available to her.² She does not need, and is not entitled to, help from disciplinary counsel to do that.

B. The Commission's Internal Operating Procedures Cannot Compel Discovery

In lieu of addressing the court rules that govern discovery, Judge Hartig relies on the Commission's Internal Operating Procedure 9.207(B)-15 to support her demand. The IOP states that in the absence of circumstances that make it

² It is worth noting that if Judge Hartig can compel early discovery to provide full and fair disclosure of all the facts and circumstances, she should equally be able to compel disciplinary counsel to take affirmative steps to obtain *additional* information not presently in the possession of disciplinary counsel—again, under the guise of needing a "fair chance" to explain all the facts and circumstances. It would be absurd to require disciplinary counsel to do additional investigation to assist Judge Hartig with her answer, but that is no more absurd than saying she needs to first know what disciplinary counsel knows before she can respond to the allegations in the complaint.

unreasonable to do so, disciplinary counsel will *endeavor* to provide discovery as soon as “reasonably feasible” after filing of a public complaint.

Judge Hartig asserts that pursuant to the IOP, “Disciplinary Counsel now has an obligation to provide evidence *as soon as it reasonably can*, with the only exception being circumstances that make it unreasonable.” (Judge Hartig’s brief at p 9; emphasis in original). Respondent further boldly asserts, “Those are the instructions from the Michigan Supreme Court and those are the rules that apply to this proceeding.” (Judge Hartig’s brief at p 9). Therefore, argues Judge Hartig, disciplinary counsel are obligated by the IOP to provide respondents to public complaints with discovery before they answer those complaints.

Judge Hartig is trying to use the IOP to create a right that it cannot create. An insurmountable problem with Judge Hartig’s argument is that the Commission’s IOPs are intended only for internal guidance and do not create any rights.³ The Introduction to the Commission’s Internal Operating Procedures plainly states:

[T]hese IOPs do not constitute legal advice, *do not have the force of law, and do not confer any substantive or procedural due process rights on litigants*. In short, these IOPs are meant to describe Commission practice and procedure, not to establish any official standards or to be administrative rules. *The Michigan Constitution, the Michigan Court Rules, and the decisional law construing the Constitution and court rules, remain the authoritative, controlling law.* (emphases supplied).

The IOPs could not more clearly state that Judge Hartig may not invoke them to get the discovery she seeks.

Moreover, Judge Hartig overstates the meaning of the IOP she cites. The IOP begins by quoting MCR 9.232(A) in its entirety, reinforcing that it is the court rule that is the controlling authority on disciplinary counsel’s discovery obligations. The IOP again acknowledges the authority of the court rule at its end, by noting that disciplinary counsel will provide discovery no later than the deadline in MCR

³ Perhaps indicative of Judge Hartig’s misunderstanding of the role of the Internal Operating Procedures, her brief refers to them as “Internal Operating *Rules*.” (Emphasis added). *See, e.g.*, her brief at p 7.

9.232(A). In between those references to the governing court rule, the IOP requires disciplinary counsel to provide discovery as soon as is reasonable and feasible after a complaint is issued.

The IOP is clearly designed to encourage disciplinary counsel not to wait until 21 days prior to a public hearing to provide discovery, as the court rules permit. The IOP was passed in response to concerns raised by judge groups that it was unfair for disciplinary counsel to withhold discovery until so close to the public hearing (a concern that was purely hypothetical in any event, because it has always been disciplinary counsel's practice to provide discovery much earlier than required by the court rule).

Left undefined in the rule is when it is "feasible" and "reasonable" to provide discovery. Disciplinary counsel assert that it is unreasonable to provide discovery prior to a respondent's answer to the complaint. Further, in this case there is a significant amount of discovery and it is not feasible in this case to provide it until it is gathered and organized.⁴

Disciplinary counsel note Judge Hartig's comments insinuating that our providing discovery in compliance with the court rules would be contrary to our obligations as "ministers of justice." (Judge Hartig's brief at p 10). The obligation of a minister of justice is to ensure that justice is done—to ensure that the truth comes out. It does not include providing Judge Hartig an opportunity to more effectively avoid accountability for her actions by molding her answers to the complaint to fit the evidence that exists.

Also misplaced are Judge Hartig's assertions about *In re Cusick* (FC 104). Judge Hartig claims that disciplinary counsel "refused" to turn over a witness statement in that case. That is a distorting oversimplification.⁵ In any event, the

⁴ Judge Hartig gave every indication that she intended to resolve this matter short of a public complaint until just prior to when the complaint was issued, making it appear unlikely that it would be necessary to prepare the discovery materials to be shared.

⁵ The document in question was one that related to a judge other than Judge Cusick who was investigated in an investigation other than the investigation of Judge Cusick. As such, the document was confidential under MCR 9.261(B). The other judge refused to consent to release of the document to Judge Cusick. Accordingly, disciplinary counsel were not at liberty to provide the

circumstances surrounding disclosure of the witness statement in FC 104 are irrelevant to Judge Hartig's argument here, which concerns the *timing* of discovery and not whether it should occur at all. The document from the *Cusick* case to which Judge Hartig refers was provided well after Judge Cusick answered the complaint.⁶ Judge Hartig's distortion of events in FC 104 should not distract from the fact that her demand for discovery prior to filing her answer is unsupported by the court rules and the Commission's IOP does not change that.

Judge Hartig also notes that in the *Cusick* case disciplinary counsel produced discovery materials prior to Judge Cusick answering the complaint. (Judge Hartig's brief at p 11). The fact that discovery was voluntarily produced prior to the answer in another case has no impact in this case.

C. Information Provided to, and Communications with, third parties to Obtain Psychological Evaluations of Judge Hartig Are Not Relevant to THESE Proceedings

In addition to the blanket request for immediate production of all evidence related to this matter, Judge Hartig specifically requests "[t]he JTC's correspondence

document to Judge Cusick and that decision had to be made by the Commission as the holder of the document.

The Commission determined that MCR 9.232(A) and MCR 9.261(B) were in conflict as to the release of the confidential document from another case in Judge Cusick's case. See Attachment A. The Commission provided the document to Judge Cusick and the Master under seal with various confidentiality protections set forth in its order.

Contrary to the implication of Judge Hartig's brief, there is no sense in which disciplinary counsel simply "refused" to provide the document to Judge Cusick.

⁶ Judge Hartig exaggerates another discovery event in the *Cusick* case, claiming that the production of one recording produced by disciplinary counsel in FC 104 "led to" dismissal of the entire complaint by the Master and the Commission. (Judge Hartig's brief at p 11). Most important for present purposes, the timing of that disclosure was unrelated to any impact the evidence had at the eventual hearing. It did not matter whether the recording was disclosed before or after Judge Cusick answered the complaint.

The recording referenced by Judge Hartig was *one* piece of evidence that the Master and Commission found relevant. Disciplinary counsel never resisted producing the recording. Contrary to Judge Hartig's assertion, the case never went to the Supreme Court. The Cusick matter did not go to the Michigan Supreme Court. The matter was concluded when it was dismissed by the Commission.

with Molly Ranns, and the JTC's correspondence with [All Points North]" and notes that she is "[e]specially interested in the 140-150 pages of information that were provided to both Ranns and [All Points North]." (Judge Hartig's brief at p 5). Ranns is the director of the State Bar Lawyers and Judges Assistance Program, and All Points North is the facility at which Judge Hartig underwent a psychological evaluation that was ordered by the Commission.

The materials Judge Hartig seeks are not relevant to the public complaint. The complaint alleges that Judge Hartig refused to provide the All Points North report to the Commission for several months. The only aspect of the All Points North report that matters in this proceeding is that Judge Hartig refused to provide it as she was required to do. It does not matter whether the diagnoses in the report were accurate or inaccurate, and any information provided to All Points North that demonstrated the need for an examination matters even less. Information that went to Ranns matters least of all, since there is no allegation in the complaint that even concerns the Lawyers and Judges Assistance Program.

IV. CONCLUSION

For the reasons discussed disciplinary counsel ask the Master to deny Judge Hartig's motion to immediately provide discovery on an "emergency basis."

Respectfully submitted,

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Dated: June 30, 2025