

**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

Margaret N.S. Rynier (P 34594)
Melissa A. Johnson (P71695)
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_____ /
MOTION TO COMPEL PRODUCTION OF WITNESS STATEMENTS

Respondent, Hon. Paul J. Cusick, through his attorneys Collins Einhorn Farrell PC, and pursuant to MCR 9.231(B) and MCR 9.2.32, requests an order compelling production of all witness statements in the possession of the Judicial Tenure Commission made by any witness related to the facts of the above-captioned matter. In support of this motion, Respondent relies on the attached brief.

Respectfully Submitted,

Collins Einhorn Farrell PC

/s/ Donald D. Campbell _____

Donald D. Campbell (P43088)

James J. Hunter (P74829)

Counsel for Hon. Paul J. Cusick

4000 Town Center, 9th Floor

Southfield, MI 48075

(248) 355-4141

Dated: March 3, 2023

**BRIEF IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF
WITNESS STATEMENTS**

Introduction

Respondent issued a discovery demand to the JTC, through its disciplinary counsel, on December 20, 2022, requesting, among other things, witness statements.¹ The demand was repeated on January 4, 2023, with a specific request for “any and all written statements from Judge Groner or any such statements submitted on his behalf,” even if such statements were obtained in a separate investigation.²

¹ Tab A, Email dated December 20, 2022.

² Tab B, Email dated January 4, 2023.

Disciplinary Counsel has broadly objected to producing any material to Respondent in this if it was obtained in connection with any other cases asserting the material is privileged from production. Further, Disciplinary Counsel will not confirm or deny the existence of any such materials, even if the material is exculpatory.

In sum, the Judicial Tenure Commission has employed a legal fiction to circumvent its obligations to permit full and fair discovery in this matter. For the reasons set forth below, Respondent requests that the Master compel the production of all witness statements and any other information related to this case, even if the material was obtained, collected, or produced in connection with a separate investigation.

Analysis & Argument

MCR 9.232(A)(1)(a) requires the parties to provide a copy of all statements and affidavits provided by witnesses. MCR 9.232(A)(1)(b) also requires Disciplinary Counsel or the executive director of the JTC to “provide to the respondent copies of all exculpatory material in its possession.” Failure to provide such material may subject Disciplinary

Counsel / the JTC to sanctions under MCR 2.313(B)(2)(a)-(e). MCR 9.232(C). MCR 9.232(A)(1)(a) and (b) require production of any statement by a witness and does not permit the non-production based on a unilateral claim that a statement by a witness in this matter was made in a separate investigation.

On December 7, 2022 (before the discovery demands were made), the Supreme Court issued new Internal Operating Procedures governing the Judicial Tenure Commission, including IOP 9.207(B)-15, which requires production of all witness statements and all exculpatory information, without limitation and with immediacy:

IOP 9.207(B)-15 –Practice Regarding Discovery. MCR 9.232(A) requires disciplinary counsel to provide the following to respondents, at least 21 days before a public hearing is scheduled to begin: names and addresses of all witnesses that disciplinary counsel intends to call at the hearing, copies of statements and affidavits given by disciplinary counsel’s proposed witnesses; copies of all exhibits that disciplinary counsel intends to introduce; and copies of all exculpatory information in disciplinary counsel’s possession.

It is in the Commission’s interest that public charges against a respondent be resolved fairly and on the basis of all relevant evidence. To that end:

- Unless there are circumstances that make it unreasonable to do so, disciplinary counsel will endeavor to provide

discovery to a respondent as soon as reasonably feasible after the Commission files a public complaint, but no later than the time limit in MCR 9.232(A).

- Unless circumstances make it unreasonable to do so, disciplinary counsel will make available to respondent all witness statements, without regard to whether disciplinary counsel intends to call the witnesses, and all evidence that is part of the investigation, without regard to whether disciplinary counsel intends to introduce the evidence. In that way, disciplinary counsel will not be in the position of having to speculate as to what a respondent may consider to be “exculpatory.”

During the March 1, 2023 scheduling conference, Disciplinary Counsel stated that production of witness statements and other information, even if they contain exculpatory information, are completely privileged from disclosure under MCR 9.261(A) and (B). That argument is misplaced.

MCR 9.261(A) provides:

Except as provided in this rule, 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 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. Nothing in this rule prohibits the respondent from making statements regarding the respondent's conduct.

Adopting Disciplinary Counsel's argument would permit the JTC to hide exculpatory information gathered under the umbrella of one case, which directly relates to a separate case. Such a reading is inconsistent with MCR 9.232 and IOP 9.207(B)-15. Further, MCR 9.261(B) relates to conduct *before* the filing of a complaint and is therefore inapplicable here.

As a hypothetical, the JTC's Exhibit 35 contains Judge Groner's file from the Third Judicial Circuit Court case *People v Thomas McCully*. Judge Groner's file contains a note stating: "Steve [Fishman] looking for 36 months. I made no guarantees. He will bring \$10,000 costs for me."³ Hypothetically, the JTC may have investigated that note. Here would be an example of a matter that derived from their investigation of this case and involved, hypothetically, statements from witnesses in this very matter (both Judge Groner and Attorney Fishman are on the JTC's witness list). If, hypothetically, there were statements from witnesses that are identified in this case about the *McCully* matter – which is a focus of this case - at the very

³ Tab C, March 13, 2014 Note, JTC Ex. 35, Bates P724.

least, that information would be relevant and subject to disclosure under MCR 9.232(A)(1)(a). It could be exculpatory, which requires disclosure under MCR 9.232(A)(1)(b).

Permitting the JTC to circumvent production of exculpatory information merely because it was gathered in a separate investigation would be counter to the interests of justice. Disciplinary Counsel will likely cite to MCR 9.261's general rule of confidentiality prior to filing a formal complaint. MCR 9.261(D)—governs conduct *after* filing a complaint—it provides that the subrule “neither limits nor expands a respondent’s right to discovery under MCR 9.232.” MCR 9.261(D)(2). So, the JTC is required, to produce both all witness statements and other material information that may be exculpatory. This is also in line with MCR 9.232 and IOP 9.207(B)-15 and the interests of justice in this case.

Conclusion

The JTC’s reliance on MCR 9.261(A)-(B) to shield it from acknowledging the existence of and/or producing information related to this case merely because it was gathered in a separate case is inimical to the

interests of justice and counter to MCR 9.232 and IOP 9.207(B)-15. The JTC asks the Master to acknowledge a wall, built on a legal fiction, can prevent Respondent from potentially exculpatory information. Yet there is no question that the Rules require the JTC to produce witness statements it possesses that relate to this action, from whatever source, and obtained for any purpose. Respondent therefore requests that the Master order production of all witness statements, or other information concerning this case, even if the material was obtained in a separate investigation. The undersigned does not oppose any reasonable redactions to avoid any unnecessary disclosures regarding the other investigation(s).

Respectfully Submitted,

Collins Einhorn Farrell PC

/s/ Donald D. Campbell

Donald D. Campbell (P43088)

James J. Hunter (P74829)

Counsel for Hon. Paul J. Cusick

4000 Town Center, 9th Floor

Southfield, MI 48075

(248) 355-4141

Dated: March 3, 2023

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TAB A

James J. Hunter

From: Donald Campbell
Sent: Tuesday, December 20, 2022 12:55 PM
To: Margaret Rynier; 'Lynn Helland'; 'Melissa Johnson'
Cc: Sherrie L. Marinkovich; Erin J. Rodenhouse; James J. Hunter
Subject: Discovery Demand under IOP 9.207(B)-15

Maggie,

I hope you are well. Happy Holidays.

Please consider this my demand for discovery in the Cusick matter.

I ask that you provide discovery as soon as reasonably feasible and in a timely fashion so that the review could be useful prior to providing an answer. It is in the Commission's interest that public charges against a respondent be resolved fairly and on the basis of all relevant evidence.

Our answer is due 1/4/2023. I seek access to all witness statements, without regard to whether disciplinary counsel intends to call the witness, and all evidence that is a part of the investigation, without regard to whether disciplinary counsel intends to introduce the evidence. This is critical to a full, fair, and accurate response to the pending formal complaint.

As you are aware, the duty to provide this information promptly is independent of my request. The Court adopted MCR IOP 9.207(B)-15 on December 7, 2022 giving it immediate effect. This shows the seriousness of the Court's commitment to a full, fair and impartial process.

Although you are just receiving this request now, you have been aware of the filing of the complaint and the due date for the answer before 12/7. Although I have not heard from you as of this email, I hope and expect that your office are in the process of providing the material under the new Court Rule.

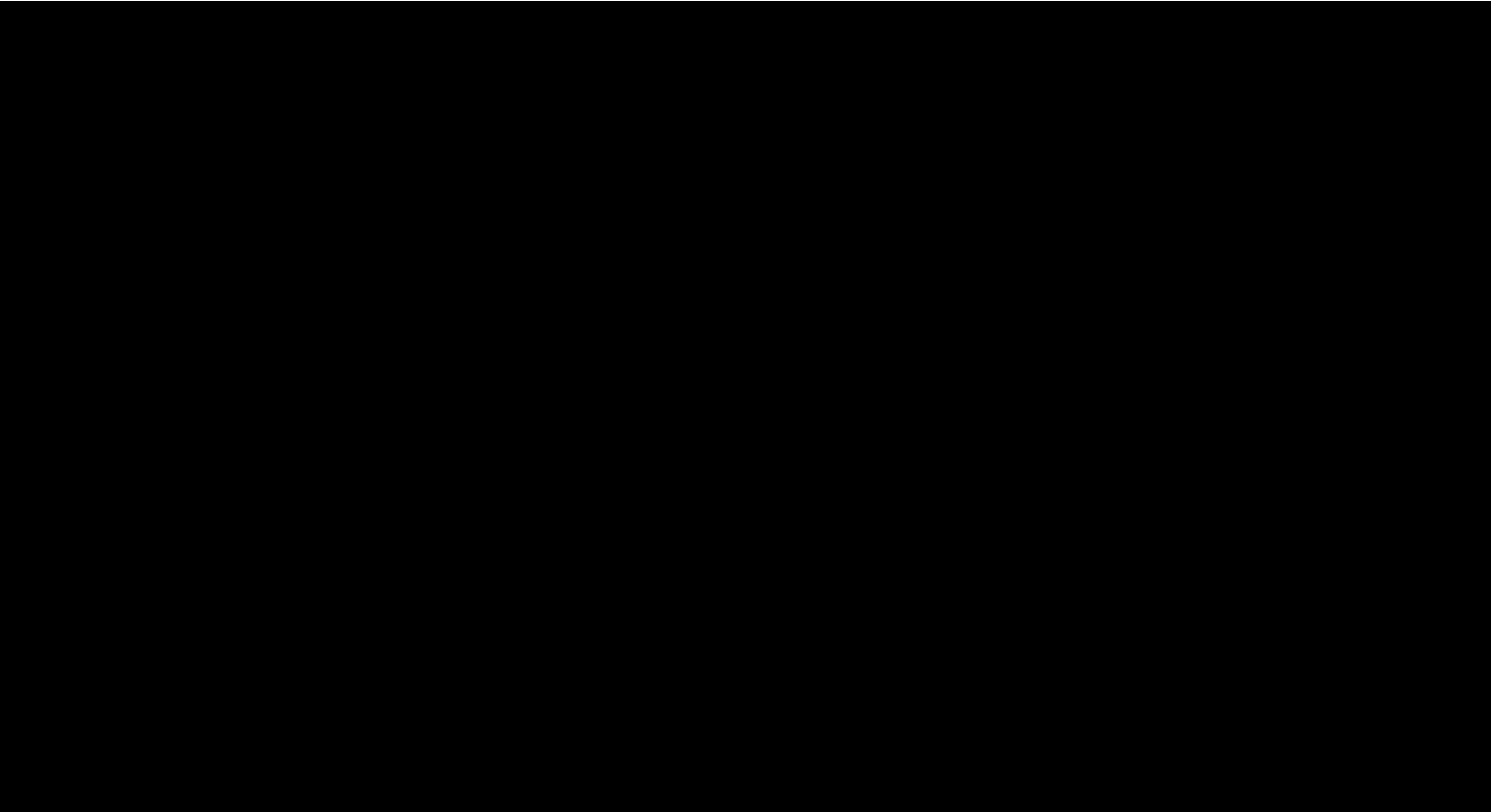
I am happy to work with you on the receipt, of course. In terms of priority, the witness statements are primary, but all of the information you have is requested.

If you need more time and the JTC will extend the answer date, then I will work with you toward that end. But, I am hopeful you can produce the information promptly so that it can be of use in providing the response which will aid the Commission's interest that public charges be resolved fairly and on the basis of all relevant evidence.

Finally, I have included the Executive Director and Ms. Johnson in case you are unavailable to receive this email given the urgent nature of the request.

Don

TAB B



From: Donald Campbell <Donald.Campbell@ceflawyers.com>
Sent: Wednesday, January 4, 2023 10:02 AM
To: Margaret Rynier <RynierM@courts.mi.gov>; Lynn Helland <HellandL@courts.mi.gov>; Melissa Johnson <JohnsonM@courts.mi.gov>
Cc: Sherrie L. Marinkovich <Sherrie.Marinkovich@Ceflawyers.com>; Erin J. Rodenhouse <Erin.Rodenhouse@Ceflawyers.com>; James J. Hunter <James.Hunter@Ceflawyers.com>
Subject: RE: Discovery Demand under IOP 9.207(B)-15

Maggie,

This is a follow-up from your call yesterday. I understand that there are emails that were intended to be produced that were not provided. I also understand that you intended to produce the 2nd Komorn tape, the interview with Thomas McCully.

I would like these asap. I hope they can be provided today. Please advise. I understand that you are not in the office, so that response may come from Melissa.

Finally, I am making a formal demand for any and all written statements from Judge Groner or any such statements submitted on his behalf. This includes, but is not limited to, any answer to any request for investigation or other correspondence with your Commission or its staff even if it was or in related to a confidential investigation – if it touches on any aspect of the McCully criminal matters.

TAB C

3-13-14

of me today for 36 months

I made no guarantees

He will buy \$10,000 costs

for me.