

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

Hon. Paul J. Cusick  
3<sup>rd</sup> Circuit Court  
Detroit, Michigan 48226

Formal Complaint No. 104

Master: Peter D. Houk

Margaret N.S. Rynier (P 34594)  
Melissa A. Johnson (P71695)  
Disciplinary Counsel  
3034 W. Grand Blvd.  
Suite 8-350  
Detroit, MI 48202  
(313) 875-5110

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Donald D. Campbell (P 43088)  
James J. Hunter (P74829)  
Attorneys for Paul Cusick  
Collins, Einhorn, Farrell, PC  
4000 Town Center, 9<sup>th</sup> Floor  
Southfield, MI 48075  
(248) 351-5426

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO AMEND  
SCHEDULING ORDER**

Respondent's position is simple: the Master should amend the current scheduling order to require the Disciplinary Counsel to produce its discovery materials before motion cutoff deadlines in this case. Disciplinary Counsel argues for a cutoff date *after* motion filing deadlines. This is unprecedented in any other proceeding.

Respondent's motion outlined several examples of material in the JTC's possession that were not produced until after critical phases in this matter (including after the filing of the formal complaint), which hampered Respondent's efforts to meaningfully prepare his defenses.<sup>1</sup> Given the serious nature of the allegations against Respondent, the modest

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<sup>1</sup> The JTC suggests that it was improper to raise these examples in the discovery motion. Respondent disagrees, as the course of conduct in this case provides important context

requested relief comports with the interests of justice in this case and does not prejudice the JTC.

The JTC appears to agree with the need to amend the scheduling order for dispositive motions to be heard before April 10, 2023, which is the day of the last Commission meeting before the formal hearing in this case (JTC's Answer to Motion, p 4). Respondent agrees that the JTC's proposal is sensible. And, in light of the JTC's statement that they have produced all discovery at this stage, Respondent proposes the following schedule:

- Summary disposition motions filed by noon on Thursday, March 16, 2023;
- Responses to summary disposition motions filed by noon on Thursday, March 30, 2023;
- Reply briefs in support of summary disposition motions filed by 5:00 pm on Monday, April 3, 2023; and
- Hearing on summary disposition motions to take place 9:30 am or as soon thereafter as practical on Thursday, April 6, 2023.

With respect to non-dispositive motions, Respondent's position is that discovery must be completed before a non-dispositive motion cutoff date. In light of the proposed

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as to why a discovery cutoff is justified. It is also worth highlighting Disciplinary Counsel's dismissal of Attorney Fishman's and Judge Groner's corrected statements, which Disciplinary Counsel argues are "minor and not material to the charges against respondent." (JTC's Resp. Br., p 12). The corrected information is clearly material and exculpatory to Respondent, which should not be ignored by Disciplinary Counsel.

summary-disposition briefing schedule above, Respondent proposes the following additional amendments to the scheduling order:

- Discovery cut-off of March 24, 2023;
- Non-dispositive motions filed by noon on Friday, March 31, 2023;
- Responses to any non-dispositive motions filed by noon on Friday, April 7, 2023;
- Reply briefs in support of any non-dispositive motions filed by 5:00 pm on Tuesday, April 11, 2023;
- Non-dispositive motions heard on or before Friday, April 14, 2023;
- Final witness lists, exhibit lists, and exhibits exchanged no later than April 7, 2023;
- Any additional witnesses and/or exhibits to be disclosed as soon as possible after their discovery; and,
- That any additions to witnesses and/or exhibits after April 7 can be challenged if the earlier non-disclosure/non-production was the result of bad faith.

As noted above, the JTC states that it has produced everything it has. So, there is no prejudice to the JTC by imposing a cutoff deadline as requested. Yet the JTC contends that the proposed cutoff violates MCR 9.232(A) because it would have the effect “that evidence discovered after that date would be inadmissible.” (JTC’s Resp. Br., p 12). But that is not Respondent’s goal, as reflected in Respondent’s Motion to Amend Scheduling Order, which provided that after the discovery cutoff and exchange of final witness/exhibit lists, “Any additional witnesses and/or exhibits to be disclosed as soon as possible after their discovery [and] can be challenged if the earlier non-disclosure/non-production was the result of bad faith.” (Respondent’s Motion, p 17). Respondent does

not object to a similar carve out in any order issued by this Master arising from this motion.

The JTC also argues that Respondent's counsel misstated the language of the relevant IOPs. Respondent rejects that contention, noting that the precise language of the IOPs were included in the motion. But the parties disagree with their respective interpretations of the interplay between IOP 9.207(B)-15 and MCR 9.232(A). In its response, the JTC cites MCR 9.232(A)(1)'s provision that certain information must be exchanged "At least 21 days before a scheduled public hearing." (Emphasis added). Yet, in their discussion, the JTC states: "As the rule makes clear, disciplinary counsel have no discovery obligation until 21 days prior to the hearing." (JTC's Resp. Br., p 3 (emphasis added)). In sum, the JTC argues that they need not turn over anything until precisely 21 days before the hearing.

They attempt to convert the plain wording of the court rule from "at least", meaning it could be earlier, to "until" meaning not before. The Rule clearly allows the Master to set another date, so long as it is not less than 21 days prior to the hearing. IOP 9.207(B)-15 very neatly imposes on the JTC an obligation to produce discovery before the 21-day limit: "[A]s soon as reasonably feasible after the Commission files a public complaint, but no later than the time limit in MCR 9.232(A)." That is consistent with the Court Rules and does not supersede anything in MCR 9.232(A).

The essence of the JTC's argument is that it has no obligation to produce *any* discovery more than 21 days before hearing because the IOP lacks the force of law. Under that interpretation, the JTC is not required to follow its governing policy/directive to provide discovery "as soon as reasonably feasible" because it isn't in the Court Rules. Even if the IOPs do not have the force of law, their purpose is clear and cannot be ignored.

Further, the Court Rules provide the Master with the power to "rule on all motions and other procedural matters incident to the complaint . . ." MCR 9.231(B). Entering a scheduling order, including setting discovery dates, is obviously within that power.

In sum, the import of Respondent's request is to avoid surprise on the eve of trial, and to permit pre-trial motions to be filed and heard well in advance of the formal hearing. This is a reasonable request. At the very least, discovery should conclude before a non-dispositive motion cutoff deadline. Respondent therefore respectfully requests that the Master grant his motion to amend the scheduling order for the reasons set forth above.

Respectfully Submitted,

Collins Einhorn Farrell PC

/s/ James J. Hunter

Donald D. Campbell (P43088)

James J. Hunter (P74829)

Counsel for Hon. Paul J. Cusick

4000 Town Center, 9<sup>th</sup> Floor

Southfield, MI 48075

(248) 355-4141

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