

comments

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Subject: Comments on proposed amendments to Commission on Judicial Conduct Rule 12

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Commission on
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Re: Proposed Amendment to the Rules of the Commission on Judicial Conduct
RULE 12: CASES INVOLVING ALLEGATIONS OF MENTAL OR PHYSICAL
DISABILITY

By E-mail & Fax

Revised

Page 2 of 100

Revised

Dear Members of the Commission on Judicial Conduct,

The proposed amendment of the RULE 12: Cases Involving Allegations of Mental or Physical Disability is very important and timely for improving of administration of Justice in Massachusetts. Article XXIX of the Massachusetts Constitution^[1]:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws. [See Amendments, Arts. XLVIII, The Initiative, II, sec. 2, and The Referendum, III, sec. 2, LXVIII and XCVIII.]

Physical and especially mental disabilities of a Judge have a significant impact on Judge's ability to perform his/her judicial duties in accordance with the article above. In fact, Massachusetts Constitution provides a mechanism to remove judicial officers if their mental or physical ability to perform their duty is compromised, Chapter III.

JUDICIARY POWER, Article I., and more specifically Article LVIII and Article XCVIII:

...the governor, with the consent of the council, may remove them upon the address of both houses of the legislature; and provided, also, that the governor, with the consent of the council, may after due notice and hearing retire them because of **advanced age or mental or physical disability**; and provided further, that upon attaining seventy years of age said judges shall be retired. (emphasis supplied)

Moreover, Massachusetts Supreme Judicial Court (SJC) provides a limited rule for Judicial disability in the Rule 3:09 MASSACHUSETTS CODE OF JUDICIAL CONDUCT in the CANON 2 **Rule 2.14 Disability and Impairment**

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or **by a mental, emotional, or physical condition**, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

COMMENT

[1] Taking appropriate action to address disability or impairment pursuant to this Rule is part of a judge's judicial duties. This Rule requires a judge to take appropriate action even if the disability or impairment has not manifested itself in a violation of the Rules of Professional Conduct or the Code of Judicial Conduct. See Rule 2.15, which requires a judge to take action to address violations of the Rules of Professional Conduct or the Code of Judicial Conduct.

Which is very closely based on ABA Model Code of Judicial Conduct: Canon 2.14^[2]

Interestingly enough, Judicial Conference committees on **Codes of Conduct and Judicial Conduct** and **Disability Code of Conduct for United States Judges** on September 13, 2018 released for public comment^[3] proposed changes to the **Code of Conduct for U.S. Judges**^[4] and the **Rules for Judicial-Conduct and Judicial-Disability Proceedings**^[5]. The committees on Codes of Conduct and Judicial Conduct and Disability collect comments until November 13, 2018.

In light of these observations, Commission on Judicial Conduct should seriously consider both SJC and US Courts proposed Codes of Judicial Conduct to expand, amend and improve its own proposed RULE 12: Cases Involving Allegations of Mental or Physical Disability.

For example, proposed RULE 12: Cases Involving Allegations of Mental or Physical Disability completely lacks any recommendation that Committee should take in case it confirms that allegations of the current or past mental or physical health of a judge are found to be true. Thus, **1st Recommendation**—Rule 12 should be amended by adding a section that contains specific steps to be taken in case the Commission find allegations or statements of judge's mental or physical disability to be found true. These steps must include:

- a. informing or notifying judge against who complaint was filed, Chief Judge of the corresponding court, Governor and members of Joint Legislature Committee on Judiciary about outcome of the investigation and of the Commission's findings.
- b. notifying a complainer only whether his/her complaint was confirmed or unconfirmed.
- c. in case of mental disability of a judge, depending on the seriousness of disability, a judge should be immediately relieved from his/her duties with pay until qualified medical opinion by a physician or a medical commission can provide a conclusion about seriousness of the disability and available treatment. After such medical opinion is obtained, a final decision must be made whether dismissal of a judge is temporary in case of possible treatment or permanent if no treatment is currently available to cure a judge from his/her disability.
- d. in case of a physical disability, decision on whether a judge should be completely relieved of his/her duties (temporarily or permanently) or should a load of work be decreased temporary to allow judge to recover from his/her abilities in full, should be based on qualified medical opinion of a physician or a medical commission.

2nd Recommendation- while initial evaluation of judge and his medical records could be performed by a general practitioner, this general practitioner should be obligated to:

- a) refer a judge for any necessary tests or to medical specialist(s) for more complete examination if needed;

- b) in case of referral to a specialist(s), final medical opinion should be signed off by all physicians who evaluated a judge.

3rd Recommendation the Rule 12 should specify personal responsibility of physicians who examine a judge.

4th Recommendation should include a provision similar to the proposed Canon 3B(4) of the **Code of Conduct for U.S. Judges** (Guide to Judiciary Policy, Vol. 2A, Ch. 2 Page 11-12)

A judge should not engage or arrange any conduct that could be reasonably interpreted as harassment, abusive behavior, or retaliation for filing a complaint regarding his/her mental or physical impairment. Under this Canon, harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others.

5th Recommendation the Rule 12 should state that Commission members must protect identity of the authors of any complaint or statement of allegations regardless of its outcome.

6th Recommendation the Rule 12 should state that in case Commission members have reasons to believe that a complaint was filed in retaliation, because of other malicious reasons or is abusive and completely frivolous, it can be presented to a district attorney office for investigation and/or prosecution of its author for defamation and/or any other appropriate violations of the law.

7th Recommendation should include a provision similar to the proposed ARTICLE I. GENERAL PROVISIONS 1. Scope and Covered Judges of the **Ch3 Rules for Judicial-Conduct and Judicial-Disability Proceedings**, Page 3

Covered Judge. A covered judge is defined under the Act and is limited to judges of Massachusetts State Superior and District courts, judges of the juvenile and probation courts, magistrate judges, justices of the Appeals Court and justices of the Supreme Judicial Court as specified in Chapter 211C, section 10.

8th Recommendation should include a definition similar to the proposed 3. General Definitions **Rules for Judicial- Conduct and Judicial-Disability Proceedings**, Page 5

Complaint. A "complaint" is:

- (1) a document that is filed by, or on behalf of, any person, including a document filed by organization; or
- (2) information from any source, other than a document described in (c)(1), that gives a Chairman of the Commission probable cause to believe that a covered judge, as defined in above, may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

9th Recommendation should include a definition similar to the proposed ARTICLE II. MISCONDUCT AND DISABILITY, (c) Disability **Rules for Judicial- Conduct and Judicial-Disability Proceedings**, Page 14

(c) Disability. “Disability” is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.

10th Recommendation should include a protocol similar to the proposed ARTICLE III. INITIATION OF COMPLAINT 8. Action by Circuit Clerk Disability (a) Receipt of Complaint **Rules for Judicial- Conduct and Judicial-Disability Proceedings**, Page 23

Upon receiving a complaint against a judge, the Commission must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Commission, and acknowledge the complaint’s receipt. If several complaints are received within a short interval of time, the Commission should consolidate them into a single file. Any previously filed complaints opened as files that have been investigated should be added to a newly opened complaint so they could be re-evaluated again in light of the latest complaint.

11th Recommendation The Commission can dismiss a complaint in whole or in part only after reviewing medical opinion of a qualified physician(s) about judge’s medical history and substance of the complaint(s) for the following reasons:

- a) alleged conduct, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate that a mental or physical disability can affect judge’s ability to perform his/her judicial duties;
- b) the complaint is established to be frivolous;
- c) the allegations even if they are true are not supported by the results of medical examination and tests as summarized in physician’s opinion;

Impermissible grounds for dismissal. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and without medical opinion that does not support accusations of physical or mental disability.

See similar ARTICLE V. REVIEW OF COMPLAINT BY CHIEF JUDGE 11. Chief Judge’s Review (c). Dismissal **Rules for Judicial- Conduct and Judicial-Disability Proceedings**, Page 26

Thank you for your consideration of the proposed amendments.

Sincerely,

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^[1] <https://malegislature.gov/Laws/Constitution>

^[2] American Bar Association website:

https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_14disabilityandimpairment/

^[3] <http://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-conduct-judges-judicial-conduct-disability-rules>

^[4] <http://www.uscourts.gov/file/24738/download>

^[5] <http://www.uscourts.gov/file/24739/download>

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Commission on
Judicial Conduct

Massachusetts Judges Conference
Comments on Proposed Amendments to the
Commission on Judicial Conduct Rule 12
November 30, 2018

The Massachusetts Judges Conference (the "MJC") appreciates the opportunity to comment on the proposed amendments to Commission on Judicial Conduct Rule 12. The MJC respects the goals the Commission on Judicial Conduct (the "Commission") seeks to achieve in amending Rule 12 and respectfully offers its comments as follows:

1. General Laws. c. 211C, sec. 11 is the statutory embodiment of Rule 12. The proposed rule is inconsistent with Section 11 in several regards. First, Section 11 provides that, "the commission shall appoint an attorney to represent him at public expense." (Emphasis added.) The proposed amendment varies from Section 11 to the extent the proposed rule would vest discretion in the Commission to request the SJC appoint an attorney to represent a judge. Second, the proposed rule differs from Section 11 insofar as Section 11 makes no reference to "current or past" mental or physical health of a judge. Third, Section 11 does not specify that an IME is to be "at the cost of the Commission." In light of such inconsistencies, the proposed rule should not be effective until such time as Section 11 is amended in order to avoid conflicts between Rule 12 and the Section 11.
2. The MJC understands that the Commission seeks to ensure that the time, resources and expense associated with the appointment of counsel is not unnecessarily spent on complaints which prove to be factually insufficient. We are concerned that, under the proposed rule, a judge who is wrongfully accused may be denied appointed counsel pending a determination of whether the claim is sufficient. While we respect that the Commission is efficient in screening out insufficient claims, we suggest that the proposed rule include language which permits a judge to request appointment of counsel along with the filing of the judge's response¹.
3. The probable cause standard proposed is not found in any other rule of the Commission. We understand that the standard for determining whether the Commission should proceed is whether a preponderance of the credible evidence demonstrates that there is sufficient cause to believe that misconduct has occurred. See Rule 7. In order to avoid confusion between Rule 7 and a "probable cause" standard, we suggest the "probable cause" standard be replaced with the same standard articulated in Rule 7, to wit, facts supporting a sufficient cause to believe that misconduct has occurred.

¹ We are unsure if it the Commission's current practice that that appointed counsel are subject to the provisions of Rule 6O and G.L. c. 211C, sec. 5(8) providing that, "the judge shall be entitled to counsel of the judge's own choice."

4. The proposed rule refers to “current or past” medical or physical health of a judge. The breadth of such “past” issues requires refinement. We understand that the Commission wields discretion in weeding out stale complaints pursuant to Rule 6E’s one-year lookback period. We recommend that “current or past” medical or physical health issues be limited to the time during which the judge has served.
5. It is important to ensure safeguards will be in place in order to ensure the confidentiality of a judge's medical and other treatment records both before the Commission as well as at any public hearing. We understand that all records of matters before the Commission are confidential. Our concern arises in the event of a public hearing. If appropriate, within the context of a rule of the Commission, we suggest that the proposed rule specify that any public hearings before the SJC be held behind closed doors.
6. The scope of the waiver of a judge’s medical privilege and the ensuing turnover of documents should be defined. We recommend that the rule specify that the scope of the waiver and ensuing turnover be limited to the judge’s alleged mental or physical disability. Nonetheless, a judge should be permitted to object to the turnover of certain documents subject to the filing of a privilege log. In its current form, Rule 12 requires a judge who denies a claim in the judge’s response to waive the medical privilege or submit to an IME. No such waiver or IME should be required unless and until the Commission has determined that there is a sufficient factual cause to believe that a mental or physical disability has occurred. Lastly, we recommend that the rule specify that the judge may have counsel, expert or other third party present during an IME and that a video recording of the IME be permitted.

Thank you for the opportunity to comment on the Commission’s proposed Rule 12.
Please feel free to contact us with any questions or comments you may have.

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