STATE OF MICHIGAN

IN THE SUPREME COURT

Review of a Recommendation by the
Judicial Tenure Commission

IN THE MATTER OF:

THE HONORABLE DEBORAH ROSS ADAMS, a Judge of the Third (Wayne County) Circuit Court,

Respondent.

_____/

Supreme Court Docket No. 144985
JTC Formal Complaint No. 89

AMICUS CURIAE BRIEF
on behalf of the
THE MICHIGAN DISTRICT JUDGES ASSOCIATION

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QUESTION PRESENTED

1. Do an attorney's professional obligations to report judicial misconduct and to cooperate with the Judicial Tenure Commission supersede the attorney-client privilege?

The Judicial Tenure Commission answers, "Yes."

Respondent answers, "No."

The Michigan District Judges Association answers, "No."

The Michigan District Judges Association (MDJA) is not filing this brief in support of the Honorable Deborah Ross Adams' (Judge Adams) petition to reject or modify the Judicial Tenure Commission's (the JTC) recommendation that she be disciplined, nor in support of that recommendation. The MDJA takes no position with regard to the allegations of misconduct by Judge Adams and any appropriate discipline.

This brief is filed in support of a principle: the attorney-client privilege, which uniquely implicates significant interests beyond those of the parties, which is why the MDJA is speaking up. That privilege protects a right of privacy of overriding importance, including the privacy of third parties, like exemplary judges, and it enhances the fairness, accuracy and credibility of the adjudicative process in general and the judicial discipline process. Unfortunately, the record in this case says that the JTC and its staff (and the State Bar, too) do not understand the privilege or its value, putting good judges and the latter process at risk.

I. PERTINENT FACTS

William Brukoff, Esq., represented Judge Adams' then-husband during the divorce case which gave rise to this case. He and Andra Dudley, Esq., one of Judge Adams' attorneys during that case, filed the requests for investigation (RIs) which resulted in the formal complaint now before this Court. He told her that she was obligated to file (Vol II, pp 427-428; 484-485). So did the State Bar, even though aware that Ms. Dudley would be basing her RI predominantly on activities by Judge Adams witnessed, and communications exchanged with her, during Ms. Dudley's representation of her (Vol II, pp 429, 483).

The JTC, it acknowledges, subpoenaed from Mr. Brukoff Mr. Adams' "entire divorce file" (JTC Brief, p 10). Mr. Brukoff filed an objection to the subpoena, complaining that compliance with it would seriously jeopardize the attorney-client privilege. The Master

overruled the objection, whereupon Mr. Brukoff complied with the subpoena. Ms. Dudley's entire divorce file regarding Judge Adams was also subpoenaed by the JTC, as were her e-mails to and from Judge Adams. Ms. Dudley, too, complied with the JTC's subpoena.

When, during the JTC's investigation of Judge Adams' behavior, and, then, in preparation for a public hearing into that behavior, she met with Margaret Rynier, Esq., an Associate Examiner appointed by the JTC to prosecute this case, Ms. Dudley explained that she had already sent much of her file to her by-then-former client, Judge Adams; she had retained only "some" of the file. Ms. Dudley also explained that she had erased her e-mail exchanges with Judge Adams, although she thought that she might be able to retrieve them. Ms. Rynier wanted what remained of Judge Adams' file and any retrieved e-mails.

Like Mr. Brukoff, Ms. Dudley had concerns about disclosing her file to the JTC. But, unlike Mr. Brukoff, she did not file an objection. She was content to discuss her concerns with Ms. Rynier. When told, she testified, that she "had to" turn over the file and any available e-mails, because the attorney-client privilege "did not apply" (Vol II, p 435), Ms. Dudley gave Ms. Rynier "[w]hatever I had ... pertaining to my representation [of Judge Adams]" (Vol II, p 436). Eight surrendered e-mails became exhibits at the public hearing (JTC Brief, p 35), and Ms. Dudley was asked, and answered, multiple questions about her dealings with Judge Adams. Objections by the Judge's counsel were largely overruled by the Master.

In a brief to the JTC filed in response to a motion by Judge Adams to dismiss, the examiners asserted that Ms. Rynier gave "no such advice [that the attorney-client privilege did not apply]" to Ms. Dudley (*Id.*, p 34). But, that claim had not been made to the Master; the JTC's examiners let Ms. Dudley's testimony pass without comment, let alone rebuttal; and there is no any evidence in the record to support the claim. The record before the Master actually

suggests the contrary. Subpoenaing Mr. Bruckoff's and Ms. Dudley's "entire" files suggests a belief that the privilege is not applicable; otherwise, those subpoenas would have asked for redacted files. And, it would have been easy and expected, were it true, for Ms. Rynier to tell the Master that Ms. Dudley was mistaken. (Ms. Dudley's unrebutted testimony about what Ms. Rynier told her and the subpoenas are what prompt this brief.)

As just noted, Judge Adams filed with the JTC, before the MCR 9.216 hearing, a motion to dismiss; that motion complained about Ms. Rynier's advice to Ms. Dudley and about subsequent violations of the attorney-client privilege. (A motion in limine which feared the latter, Ms. Dudley having been identified by the JTC as a prospective witness, had been submitted to the Master. Her testimony about her conversation with Ms. Rynier likely was a surprise.) The JTC's recommendation to this Court ignored Judge Adams' motion to dismiss. Instead, the JTC tells this Court that "no such advice [that the attorney-client privilege did not apply] was given" to Ms. Dudley (JTC Brief, p 34).[1]

II. ARGUMENT

This case must, so it does, begin with a prosaic question: Who said what? Legal analysis is best when it occurs, to borrow a tech term, on a platform of attendant facts and circumstances. They educate that analysis with reality, and, sometimes, avoid the need for analysis. Even if Judge Adams' divorce attorney was not told that it does not apply to JTC investigations and prosecutions, the applicability of the attorney-client privilege must be explored herein. The JTC's brief to this Court takes the position that the privilege has been trumped when judicial

[1] The briefs in this case highlight the oddity of Michigan's "commingl[ed]" judicial discipline proceedings. *Chrzanowski, infra* at 483. When Judge Adams objected to the Master's report, briefs were filed with the JTC by the examiners acting on their own behalf, not for the JTC by them. But, once the JTC recommended discipline and the case proceeded to this Court, a brief was filed for the JTC by the examiners, which brief makes the same assertion about the privilege as did the examiners. Does that mean that the JTC adopted the examiners' denial?

discipline is the subject. And, even if it has not been trumped, the JTC interprets it in ways which geld it into practical inapplicability.

A. The Attorney-Client Privilege And The Integrity Of The Judicial Discipline Process Deserve A Better Record In This Case.

The judges of this State are entitled to know whether the JTC and/or its staff believe that the attorney-client privilege does or does not apply to investigations and prosecutions of alleged judicial misconduct, and whether this Court agrees. For good reason, investigations by the JTC are confidential, i.e., are conducted in secret. MCR 9.221. As a result, unless the JTC and its staff genuinely accept that the privilege fully applies to their investigations, demands in breach of the privilege, e.g., subpoenas for lawyers' files, and responses likewise in breach, can occur out of sight. The privilege is violated by any disclosures, not just by disclosures during a formal hearing. Therefore, the MDJA asks, first, that this Court remand this case for development of a more elaborate record as to what the JTC's staff said and did in their dealings with the Adams' divorce lawyers. Then, the MDJA asks that this Court analyze very publicly and definitively their position.

Were this case an appeal, the JTC's examiners' failure to make of record at the public hearing their denial of having told Ms. Dudley that the attorney-client privilege "d[oes] not apply" to JTC investigations and prosecutions would almost surely result in a decision based on her unrebutted testimony. A remand for "further evidence" would be possible, MCR 7.316(A)(B), but unlikely. It would be "an overuse" of appellate authority to accept such a mere representation in a brief. *Pine Ridge Coal Co v Cronin*, 41 Mich App 255, 258; 199 NW2d 876 (1972). Allowing parties to so supplement the record would undermine the much-preferred incentive to parties to present evidence with care, diligence and vigilance. *Hainault v Vincent*, 365 Mich 370, 377; 112 NW2d 569 (1961).

But, even though it follows a Master's findings and a JTC's recommendation, this case is not an appeal. In cases like this one, this Court makes its own finding of facts. *In re Chrzanowski*, 465 Mich 468, 486-487; 636 NW2d 758 (2001). Therefore, a remand for further evidence, as is authorized by MCR 9.225, is not only compatible with, but furthers, this Court's role. More significantly, part of what saves the constitutionality of commingling functions in the JTC is the role of this Court making a *de novo* decision. Therefore, for this Court to limit itself to the proofs before the Master undermines the independence of its decision and, as such, calls into question the constitutionality of commingling functions.

Absent a remand, this case poses that same risk for another reason. Unless Ms. Rynier testifies under oath, and is cross-examined about what she said to Ms. Dudley about the attorney-client privilege, it looks like the JTC favors its staff over others, that what they say in a brief is accepted over a trial record. Such an appearance undermines the impartiality of the JTC by supporting an inference of collaboration between it and its staff sidestepping or concealing the latters' disregard for the attorney-client privilege. That is much akin to what Justice Corrigan said in *In re Servaas*, 484 Mich 634, 709; 774 NW2d 46 (2009), would be a special fact or circumstance rendering unconstitutional the combination of functions in the JTC.

B. The Attorney-Client Privilege Does Apply, And Should Continue To Apply, To JTC Investigations And Proceedings.

The attorney-client privilege is, as discussed below, of an extraordinary long lineage, and, as also discussed below, has never been held to not apply, or to apply less or differently, in judicial discipline investigations and proceedings. That means that the privilege does apply to both. Also for the reasons discussed below, this Court should not now hold any differently, although it can. Therefore, this Court should tell the JTC and its staff that they must honor the attorney-client privilege.

1. The Attorney-Client Privilege Has Not Been Abrogated For Judicial Discipline Proceedings.

In Michigan, the attorney-client privilege is statutory in criminal cases. See MCL 767.5e(2). In all other situations, that privilege remains a matter of common law, which means that this Court can modify it or completely abrogate it, *Placek v Sterling Heights*, 405 Mich 638, 656; 275 NW2d 511 (1979), and, with regard to matters of procedure and practice, the Court can act by rule, as well as by opinion, *Detroit & Northern Savings Loan Assn v Woodworth*, 54 Mich App 517; 221 NW2d 190 (1974), so long as the Court "speak[s] in [a] no uncertain manner ..." *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898). See also *Young v Nat'l Bank of Jackson*, 327 Mich 342, 347-348; 42 NW2d 110 (1950).

The JTC takes the position that this Court has modified the privilege, specifically, that various rules, procedural and professional, adopted by the Court render the attorney-client privilege inapplicable to cases like this one. Not so. Read as a whole, not selectively as does the JTC, the rules cited by it do not abrogate or dilute the applicability of the attorney-client privilege in judicial discipline investigations and proceedings. At a minimum, none of the cited rules do either plainly, which means not effectively. *Bandfield, supra;* and *Rusinek v Schultz Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981).

While, as the JTC contends, MCR 9.208(B) mandates that "member[s] of the bar" comply with requests made by it in the course of its investigations, that mandate is not broad enough to override the attorney-client privilege. That subrule requires compliance only with "*reasonable* request[s]" by the JTC [emphasis added], not any and all requests. Reasonable means "fair, proper, or moderate under the circumstances." *Black's Law Dictionary* (8th ed), p 1293. Demanding disclosures in violation of a longstanding common-law proscription is not

proper, but improper, and, therefore, cannot be deemed reasonable. Hence, MCR 9.208(B) does not trump the attorney-client privilege.

The JTC also argues incorrectly that MCR 9.227, too, abrogates the attorney-client privilege in judicial discipline cases, specifically, that, since that rule confers immunity from civil liability for communications to the JTC, it necessarily follows that the privilege is inapplicable. The JTC is incorrect, however, because it misapprehends the nature and extent of the privilege, the JTC's logic is faulty, and its reading of MCR 9.227 is revisionist.

The JTC again ignores an explicit limitation in the rule. It confers, not "absolute immunity," which is unlimited, but "absolute immunity from civil suit[s]," which is limited. Such immunity provides no protection from disciplinary proceedings, which are not civil suits. 6 Longhofer, *Michigan Court Rules Practice* (5th ed), § 7-2011, p 886. By leaving the prospect of significant penalties for disclosures, just other than civil liability, MCR 9.227 still forbids disclsoures. Furthermore, the privilege is a rule of evidence, plus more. *Sterling v Keidan*, 162 Mich App 88; 412 NW2d 255 (1987). As such, immunity does not affect it; immunity relates to the assessment of liability, not to the admissibility of evidence.

The JTC is correct that MRPC 8.3(b) requires lawyers to report to it significant judicial misconduct, but it does not follow, as intimated by the JTC, that a lawyer must disclose confidences which pertain to alleged misconduct by a judge. Again, the JTC ignores what else the subrule says, specifically, its explicit affirmation of attorneys' obligation to protect the confidences of their clients. Subrule (c)(1) says that disclosure is "not requir[ed] ... of ... information otherwise protected by Rule 1.6." Since MRPC 1.6 mandates that lawyers preserve the confidences of their clients, MRPC 8.3(b)'s cross-reference to its "protect[ion]" necessarily

maintains the privilege when alleged judicial misconduct is reported. Affirming the protection of information is the antithesis of withdrawing or loosening that protection.

MRPC 8.3(c) can be read to say that disclosure of confidences to the JTC is permissive or discretionary, i.e., "not required," with each individual lawyer. But, such a reading is incompatible with the privilege, precluding it. Giving attorneys discretion to honor the privilege or to disclose would take control away from the client. Initially, the privilege belonged to the attorney, but now it belongs to the client. *Wigmore, supra* at 543-544. Hence, interpreting MRPC 8.3(b) to give counsel discretion would step back centuries.

Worse, reading MRPC 8.3(c) to be discretionary would actually eviscerate the privilege. Its purpose is served only when clients can predict with reasonable certainty whether particular disclosures will be protected. An uncertain privilege "is little better than no privilege at all." *Upjohn Co v United States*, 449 US 383, 393; 101 S Ct 677; 66 L Ed 2d 584 (1981). A promise of confidentiality which applies only when counsel after-the-fact chooses to apply it lacks predictability and is, therefore, inconsistent with a meaningful privilege.[2] *Jaffee v Redmond*, 518 US 1, 17; 117 S Ct 1923; 135 L Ed 2d 337 (1996).

In sum, the JTC has presented no basis for concluding that the attorney-client privilege does not, as of now, apply to JTC investigations and proceedings. (That is probably true of all other privileges, but this case presents only the applicability of the attorney-client privilege.) The original privilege is expansive enough to apply here, and the JTC has not demonstrated that,

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[2] Privileges "may [sometimes] have to be narrowed or [have to] yield[] if [they] interfere with certain constitutional rights." *People v Stanaway*, 446 Mich 643, 668-669; 521 NW2d 557 (1994), but the JTC does not even contend that the privilege is trumped in this case by any right which it has. Therefore, this Court should not even consider the prospect. Except in the most unusual of circumstances, issues not raised by a party are not to be considered. *Haynie v Dept of State Police*, 468 Mich 302, 318; 664 NW2d 129 (2003).

thus far, either the Legislature or this Court have said or done something to narrow that applicability in cases like this one.

2. The Attorney-Client Privilege Is A Genuine Protection. It Is Not Feckless.

The JTC also makes an argument which treats the attorney-client privilege as toothless, which explains why that argument cannot be correct. As noted below, principles and rules cannot be applied into oblivion. Specifically, the JTC argues that, because the exclusionary rule does not apply to judicial discipline proceedings, any breaches of the attorney-client privilege in this case are of no moment, and can be considered here, just as they were considered by the Master and the JTC. That argument is wrong for a trio of reasons.[3]

The JTC misapprehends both the nature of the attorney-client privilege and the exclusionary rule. While more than a matter of evidence, the privilege is that, too; it gives attorneys' clients "the right to control the introduction into evidence" of certain information or knowledge communicated to or by or possessed by an attorney. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 615-616; 600 NW2d 66 (1999). Furthermore, because privileges are the subject of MRE 501, information protected by them is inadmissible apart from the exclusionary rule. That is a distinct mechanism for dealing with violations of law which are not self-enforcing, as are privileges and the Rules of Evidence. Hence, its inapplicability is of no consequence.

In addition, the JTC's argument would, if accepted, destroy the privilege, which outcome rebuts the argument. The purpose of the privilege is to encourage full and frank communications between client and lawyer by assuring that they will not be disclosed to others. *People v*

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[3] First of all, the JTC misreads *In re Jenkins*, 437 Mich 15; 465 NW2d 317 (1991), to have held that the exclusionary rule does not apply in judicial discipline proceedings. This Court held in that case that it "need not reach that conclusion." *Id.*, at 28. But, this Court is likely to so hold when it must. Hence, this first error's relegation to a footnote. The MDJA notes simply that, for reasons discussed hereinafter, privileged information is inadmissible even though the exclusionary rule does not apply to JTC proceedings.

Johnson, 203 Mich App 579, 585; 513 NW2d 824 (1994). If not excluded from evidence, there can be no such confidence, which means that the privilege is no more. *McCartney v Atty General*, 231 Mich App 722, 731; 587 NW 2d 824 (1998). All principles of law: statutes, rules or other, are to be interpreted and applied "to save and not to destroy." Cf., *Gora v Ferndale*, 456 Mich 704, 722; 576 NW2d 141 (1998).

3. The Applicability Of The Attorney-Client Privilege Was Not Lost By A Failure To Timely Raise It.

The JTC makes one other argument which, if successful, could sidestep in another way addressing the JTC's contention that the attorney-client privilege "does not apply" to judicial discipline investigations and proceedings. The JTC contends that the privilege was waived by Judge Adams' failure to plead it as an affirmative defense. If so, its applicability can be assumed arguendo, which means not actually held. But, that contention is wrong. Once again, the JTC misconstrues the nature of the privilege.

If Judge Adams' only argument were that, to punish the examiners for inducing breaches of the attorney-client privilege, this case must be dismissed, the privilege might qualify as an affirmative defense as defined by MCR 2.111(F)(3)(b), which was lost because it was not pled, as such a defense must be pled on pain of waiver. MCR 2.111(F)(2). But, that is not Judge Adams' only argument. She also argues that significant evidence presented in this case by the JTC to the Master should not have been received or considered by him, should not have been considered by the JTC, and should not be considered here, all because that evidence is protected by the privilege.

As noted multiple times above, while the attorney-client privilege is not exclusively a matter of evidence, *Sterling, supra*, it is a matter of evidence. *Id.* Accordingly, "a timely objection" is all that is required to assert it and to preserve its inapplicability for review. MRE

103(a)(1). Objections to evidence need not be pled. An objection to evidence need only be voided before or when the evidence is proffered, *Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001), which was done in this case. A motion in limine was filed and argued before the public hearing, and contemporaneous objections were lodged at that hearing. Therefore, the privilege cannot be sidestepped.

4. The Attorney-Client Privilege Should Not Be Abrogated By This Court For Purposes Of Judicial Discipline Proceedings.

That neither the attorney-client privilege nor its enforceability have yet been abrogated or modified by either the Legislature or by this Court for purposes of judicial discipline proceedings does not end this case. In the absence of legislative action, this Court can abolish a common-law doctrine, no matter how ancient, *People v Aaron*, 409 Mich 672, 723, fn 112; 299 NW2d 304 (1980), or it can modify such a doctrine. *Phillips v Mirac, Inc,* 470 Mich 415, 430; 685 NW2d 174 (2004). But, there are several reasons why this Court should not now do either to the attorney-client privilege.

First of all, the attorney-client privilege has been "unquestioned" since the reign of Elizabeth I, and it has long been applied to all evidentiary proceedings, not just to criminal and civil litigation. 8 Wigmore, *Evidence* (McNaughton rev), § 2290, p 542. Here, in Michigan, the privilege dates back to *Alderman v People*, 4 Mich 414 (1857).[4] Perhaps, such a prolonged history reveals just an ossified rule still standing solely because of inertia. More likely, however, the age of the privilege reveals a rule validated by experience. *Williams v Illinois*, 399 US 235, 239-240; 90 S Ct 2018, 26 L Ed 2d 586 (1970). See also *Nix v Whiteside*, 475 US 157, 173; 106 S Ct 988; 89 L Ed 2d 123 (1986).

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4 There are no parallel citations for cases as old as *Alderman*.

Therefore, the common-law attorney-client privilege should stand unless the reasons for its origin no longer exist, *Aaron, supra* at 723; it is incompatible with current mores, institutions and problems, *Adkins v Thomas Solvent Co*, 440 Mich 293, 317; 487 NW2d 715 (1992); has fallen into disfavor, *Aaron, supra* at 699, 707; or has become of questionable wisdom. *Id.,* at 701. Nothing remotely like any of that is true about the attorney-client privilege. To the contrary, its value has been reiterated. Therefore, it would be unprincipled to walk away from the privilege.

Actually, the privilege remains valuable. It protects rights of privacy and security of predominant social importance in this era of "the cloud" watching most everyone. *Sterling, supra.* The attorney-client also continues to benefit the adjudicative process, not just individual clients/litigants. 3 *Weinstein's Federal Evidence* (2d ed), § 503.03[1], p 503-12. As explained in *Upjohn, supra,* 449 US at 389:

> "Its [the attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and [the] administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends ... [The] privilege 'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'"

The better informed a lawyer, the better advice he or she can give to a client, including what points and issues to pursue and which ones to concede, even to the point of resolving cases by admitting liability or guilt. Also, the better informed a lawyer, the better and more accurate his or her legal assessments, arguments, and factual presentations. The better informed lawyer also has a much better prospect of unearthing information pertinent to an ultimate determination of what happened. In other words, because it can result in more information, the attorney-client

privilege does more than shield clients and help lawyers play the game; it can aid ascertainment of the truth.

Those benefits accrue no less when the client is a judge, and no less when judicial discipline is the subject. Judges "must ... accept restrictions on [their] conduct that might be viewed as burdensome by the ordinary citizen," MCJC Canon 2(A), but, surely, that does not mean that judges do not share the right of privacy protected by the attorney-client privilege. And, when a judge is a litigant, e.g., in a divorce case, the benefits to the legal process of the privilege are no less; the nature of the process is not altered by the status of the participants. The same is true for judicial discipline proceedings. Therefore, there is no principled basis for carving out an exception to the privilege for instances of judicial discipline. Cf., *In re Chmura*, 461 Mich 517, 534; 608 NW2d 31 (2000).

And, due regard for the Legislature also counsels maintaining the status quo, not because of inertia, but for good reason. First of all, because the Legislature is better positioned to assess the competing policy considerations which privileges involve, cf., *People v Nash*, 418 Mich 196, 218; 341 NW2d 439 (1983)(op per Brickley, J.), this Court should wait for it to speak, if it has not. And, if the Legislature, whether better positioned or not, has spoken, this Court should act consistently with the public policy underlying what the Legislature said. *Terrien v Zwit*, 467 Mich 56, 66-79; 648 NW2d 602 (2002).

More significantly, the Legislature has acted and has indicated a strong preference for the attorney-client privilege. Specifically, the Legislature has declared that the statutory duty to report suspected child abuse abrogates all privileges, save two: the attorney-client privilege and the clergy-confession privilege. MCL 722.631. What is on par with, or more important than,

protecting children has to be extraordinarily valuable, certainly, not less valuable than the discipline process.

At a minimum, because any modification of the attorney-client privilege is a departure from long experience and implicates many considerations, it should be done, if done, by this Court only after the rigorous consultation and vetting required by MCR 1.201. It should be studied by judges and lawyers; proposed changes should be published; comment should be welcomed and reviewed; and a public hearing should be held. At least, a decision to abrogate or modify the privilege for even one type of proceeding should not occur, even though an issue posed by a case, without the education which comes from full briefing and argument. *Candelaria v B C Gen'l*, 236 Mich App 67, 83; 600 NW2d 348 (1999).

Hence, the appropriate conclusions here and now are that, not only does the attorney-client privilege apply fully when judges are the clients and in proceedings involving judicial discipline, there is no reason to alter that privilege in those situations. The MDJA asks this Court to say so and to, then, apply the attorney-client privilege to this case. Even if it is determined that the privilege was not violated, it is essential that this Court declare that the privilege applied. If any doubt lingers, judges' cooperation with their counsel, with courts when they are litigants, and with the discipline process will be chilled; the JTC's staff will be encouraged to disregard the privilege, to the detriment of all; and the discipline process will be impaired.

5. The Attorney-Client Privilege Is Much More Protective Than The JTC Contends, Assuming The Privilege Applies At All.

A declaration by this Court that the attorney-client privilege applies to JTC investigations and prosecutions does not, however, resolve this case. One more step remains. The JTC's brief to this Court makes multiple assertions which erroneously narrow the privilege, assuming it applies. Since understating a privilege or enforcing it too narrowly modifies it for all practical

purposes, maybe, near to abrogation, it is important that this Court make clear what is the reach of the attorney-client privilege.

First of all, the JTC incorrectly intimates that the privilege applies only to communications from a client to counsel, not also to communications from counsel to client. The JTC's brief repeatedly asserts that the privilege "applies only to confidential communications *by the client* to his [or her] attorney, ..." (JTC Brief, p 35). Maybe, the JTC means to say only that the privilege is limited to the "confidential," which is obvious, but that is not how its brief reads. That brief limits, textually, the direction of the privilege. This Court needs to tell the JTC, its staff, and the future Masters to whom it will present evidence that the attorney-client privilege is not that restricted.

The privilege is "two-way." *US v Amerada Hess Corp*, 619 F2d 980, 986 (3rd Cir 1980). "[C]ommunications *by the lawyer* as well as by the client ... are privileged if the requirements of the privilege are met." *Weinstein, supra* at § 503.14[2], p 503-39 [emphasis added]. Any other rule would geld the attorney-client privilege. It is designed to encourage full and frank communications so that counsel can give good advice. Accomplishing that objective requires exchanges between counsel and client, not just disclosures from client to counsel. In addition, disclosures of what counsel said can often reveal, sometimes, by very easy deductions, what he or she was told by a client. *Nash, supra* at 277 (opinion per Ryan, J.).[5]

Granted, it is often said that the privilege applies "only to confidential communications by the client to his attorney." See, e.g., *In re Costs & Attorney Fees*, 250 Mich App 89, 99; 645 NW2d 697 (2002); *People v Campeau*, 244 Mich App 595, 597; 641 NW2d 868 (2002); and *Krug v Ingham Cnty Sheriff's Ofc*, 264 Mich App 475, 484; 691 NW2d 50 (2004). But, those

[5] As to this point, four justices, at least, concurred, giving it precedential value.

cases involved communications from the client to counsel, so that what they said was just dealing with the case at hand, not narrowing the privilege. Because molded by their facts, *People v Kuchulan*, 390 Mich 701, 704; 213 NW2d 95 (1973), opinions should "not be interpreted as going beyond the scope of matters [presented by a case's facts] for adjudication, *Hardy v Maxheimer*, 429 Mich 422, 431; 416 NW2d 299 (1987).

More significantly, the statements quoted by the JTC are typically followed by a statement that privilege "attaches to direct communications *between* client and attorney," *In re Costs & Attorney Fees, supra*; and *Krug, supra*, at 485 [emphasis added]. The cases which first recognize the privilege in this State said the same thing. See *Passmore v Estate of Passmore*, 50 Mich 626, 627 (1888). "Between" includes from attorney to client. Therefore, there is no basis for concluding that Michigan has restricted the privilege to communications from client to counsel. As noted above, the privilege will not work if so limited.

Nor does the privilege apply only to communications as incorrectly intimated by the JTC. "The attorney-client privilege extends not only to communications, but to observations made as a result of communications with an attorney," such as what counsel saw a client do. *Nash, supra* at 233. Not only can conduct be assertive, MRE 801(a), assertions can be deduced from observations of other than conduct by a client; they, too, therefore, can be privileged if seen because of a confidential relationship. Limiting the privilege to words and other assertions can prompt a client to be so guarded as to undermine its objective.

The JTC's brief also intimates that the attorney-client privilege protects only facially-incriminating data. That limitation, too, is error. First of all, it ignores how people communicate, in bits and pieces of information, none of which are themselves particularly damaging or incriminating, but which collectively in context say something significant.

Likewise, what is an important disclosure might not be apparent until later disclosures are made or a particular use question is asked. Furthermore, such a limitation undermines the effectiveness of the privilege. Privileges must be predictable. *Upjohn Co, supra,* 449 US at 393. Applications which parse apart what was said lack that predictability.

The first statement here in Michigan of the privilege states it well. A communication is privileged if it was made "for the purpose of obtaining" legal advice, or giving it. *Alderman, supra* at 422. The subject of the communication is not dispositive, nor is its form or manner. What makes a communication by a client privileged is its purpose: to obtain legal advice. So defining the privilege's scope makes it far more uniform and predictable to invoke. As noted earlier, such uniformity and predictability is essential to preserving the privilege's usefulness.

Finally, while the JTC correctly observes that the attorney-client privilege, like all other privileges, can be waived, it ignores that effective waivers must be "distinct and unequivocal." *Sterling, supra* at 96. The kind of analysis required by that case and the principle it enunciates were not undertaken by the Master, nor by the JTC when it reviewed the Master's findings.

III. CONCLUSION

The attorney-client privilege is not an antiquated rule leftover from a bygone era which this Court just has not gotten around to abolishing. It is a rule venerable because, in an era of so-called "connectedness" of invisible reach, it protects privacy, provides security, *Sterling, supra,* and furthers honor, *Wigmore, supra* at 553. It is a venerable rule, also, because it is "central[] ... to the proper functioning of our adversary system of justice," *United States v Zolin,* 491 US 554, 562-563; 109 S Ct 2619; 105 L Ed 2d 469 (1989); and *Upjohn Co, supra.* Therefore, the privilege should continue and should be vigorously enforced, not enforced narrowly or

reluctantly. That is equally true when the client is a judge, and when proceedings are to ferret out and deal with judicial misconduct.

Respectfully Submitted,

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