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

COMPLAINT AGAINST

Formal Complaint No. 100

**Hon. Byron J. Konschuh**
**40th Circuit Court**
**255 Clay Street**
**Lapeer, Michigan 48446**

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# DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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## INTRODUCTION AND SUMMARY

The Amended Formal Complaint (Complaint) charges Judge Byron J. Konschuh (respondent) with seven counts of misconduct based on multiple violations of criminal statutes, Michigan Court Rules (MCR), Michigan Rules of Professional Conduct (MRPC), and Michigan Code of Judicial Conduct (MCJC or "Canons"). Respondent committed these violations before and during his tenure as the Lapeer County Prosecuting Attorney and after he became a Lapeer County Circuit Court judge.

The Complaint also charges respondent with one count of misconduct for providing false information to the Michigan State Police (MSP) during their criminal investigation into his financial wrongdoings as the Lapeer County Prosecuting Attorney and to the Judicial Tenure Commission during the course of its investigation into the facts and allegations underlying the Complaint.

Respondent's misconduct falls into five general categories: the misdemeanor of public officer failure to account for county money (Count 1), financial improprieties (Counts 2, 3, 4, and 5), improper demeanor (Count 6), failure to disclose/disqualify (Count 7), and misrepresentations (Count 8 and throughout all other counts).

The evidence overwhelmingly proved the truth of the facts and allegations in the complaint. Respondent embezzled county money both before and after he took office as the elected Lapeer County Prosecutor. Before becoming the Prosecutor, he deposited into his personal bank accounts $600 that had been paid for law enforcement training sessions he and other Lapeer County Assistant Prosecuting Attorneys (APA) conducted during regular work hours. After becoming the Prosecutor, he continued to obtain money for training sessions he and other APAs presented during county time which he deposited into his personal accounts. He repeatedly obtained money from

the county by submitting false and/or misleading reimbursement vouchers. In his capacity as the Prosecuting Attorney, he entered into contracts/agreements in violation of the county's established policies and/or procedures. He deposited money generated by those contracts/agreements into his personal checking accounts. He did not maintain any accounting records for these proceeds. In 2014 respondent was charged with five felony counts of embezzlement with respect to some of those funds. On March 8, 2016, respondent pled no contest to a criminal misdemeanor of "public officer – failure to account for public money" (MCL 750.485).

The evidence also established that after becoming a judge respondent was improperly confrontational, aggressive, and belligerent toward Bonnie Oyster, an 81-year old Lapeer County resident, and her 61-year old son, Samuel Oyster; that he made disparaging and vulgar comments about another member of the bench; and that he failed to disqualify himself from numerous cases over which he presided or to disclose the nature of his relationship with several attorneys of record in those cases with whom he had a conflict of interest such that his presiding created the appearance of impropriety.

Finally, the evidence established that respondent made numerous serious and intentional misrepresentations to the MSP and the Judicial Tenure Commission regarding the purpose of, and the manner in which, he had used funds generated by the contracts he had entered into as the Prosecuting Attorney; regarding the misdemeanor plea in his criminal embezzlement case; regarding his failure to comply with the disqualification requirement of MCR 2.003; and regarding his conduct towards Mrs. Oyster and her son. Respondent also provided false testimony under oath at the hearing before the Master.

## JURISDICTION

As a judge, respondent is subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.202. As an attorney licensed by the State of Michigan, respondent was, and still is, subject to the standards of conduct applicable to an attorney under MCR 9.103(A) and the Michigan Rules of Professional Conduct (MRPC). Pursuant to MCR 9.202(B) (2), the Judicial Tenure Commission has jurisdiction over respondent's pre-bench conduct. Respondent agrees with all this. (R's Ans. ¶6; R's Ans. ¶ 7)

## STANDARD OF PROOF

Judicial discipline is a civil proceeding, the purpose of which is not to punish but to maintain the integrity of the judicial process. *Matter of Mikesell*, 396 Mich 517, 527 (1976); *In re Seitz*, 441 Mich 590, 624 (1993); *In re Haley*, 476 Mich 180, 195 (2006). The standard of proof is preponderance of the evidence. *Id.* at 189; MCR 9.223(A).

## THE MASTER'S ROLE

The Master's report must contain a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and the answer. (MCR. 2.236) The Master does not address sanctions. The standards of judicial conduct are established by MCR 9.202 and the Michigan Code of Judicial Conduct. *Ferrara,* 458 Mich 350, 359-60 (1998)

The Master must evaluate respondent's conduct objectively rather than focus on his subjective intent. In Ferrara, supra, at 362, the Michigan Supreme Court, citing *In re Tschirhart*, 422 Mich 1207, 1209-1210 (1985), recognized that:

> *[t]he proper administration of justice requires that the Commission view the respondent's actions in an objective light.* The focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers. Although the Respondent's subjective intent as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such *individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary.* (Emphasis added.)

## STATEMENT OF PROCEEDINGS

On February 6, 2019, the JTC filed an eight count complaint. On March 18 the JTC filed an amended complaint that expanded on some of the details but did not change the essence of the charges. Also on March 18, the Supreme Court appointed the Hon. William J. Caprathe as Master.

On April 2, 2019, respondent filed his Answer to the Amended Formal Complaint together with Affirmative Defenses. A pretrial hearing/meeting was conducted on April 15. Motions were heard on June 12. The public hearing commenced on June 28 at the 47th District Court, Farmington Hills, and concluded on September 23. During the hearing 39 witnesses testified and more than 350 exhibits were admitted. Closing arguments were heard on September 23.

## PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent was admitted to the State Bar of Michigan in 1985. (R's Ans. ¶5; E's Exh. 130)[1] In 1988 he obtained a master's degree in business administration with a concentration in finance. (p. 76-77; E's Exh. 129) That same year he joined the Lapeer County Prosecutor's Office (LCPO) as an APA. (p. 77) In 1992 he was promoted to the position of the chief assistant under then-Prosecutor Justus Scott. (p. 78; p. 303) In November of 2000 Scott was elected to the Lapeer County Probate Court. (p. 356) In the same election respondent ran unopposed and was elected as the Lapeer County Prosecutor. He took office in January of 2001. (p. 78) He continued as the elected Prosecuting Attorney until April 8, 2013. (p. 80; R's Ans. ¶4) Beginning in 2001 he also served as the Lapeer County Corporation Counsel, providing the county with legal advice/opinion on various issues other than labor matters. (p. 79; p. 149-152)

On March 23, 2013, respondent was appointed to the Lapeer County Circuit Court. (p. 80; p. 271; R's Ans. ¶3) He formally separated from the LCPO on the morning of April 8, 2013. (p. 81) At noon of that same day, he was sworn in as a Lapeer County Circuit Court judge. (p. 271; R's Ans. ¶4)

## COUNT I
## 2016 CRIMINAL MISDEMEANOR PLEA & FALSE STEMENTS

On March 8, 2016, respondent pled nolo contendere to a criminal misdemeanor of "Public Officer – Failure To Account For Public Money" under MCL 750.485. On February 19, 2018, he filed a Motion Nunc Pro Tunc in which he represented that his plea was to a non-criminal

[1] Under the new Michigan Court Rules, the Examiner is referred to as "Disciplinary Counsel." The exhibits were marked before the effective date of the changes to the court rules, therefore, all exhibit references will continue as "E's Exh...." The abbreviations used in the citations are as follows: "p" - refers to the page number of the formal hearing transcript; "E's Exh..." – Examiner's Exhibit; "R's Exh..." – Respondent's Exhibit; "R's Ans.¶..." – the paragraph number in respondent's Answer to Amended Formal Complaint.

accounting statute, MCL 21.44, rather than a misdemeanor. (p. 135-137; E's Exh. 1t) This statement was false. (p. 137) Respondent also testified falsely about his plea in a November 15, 2017, deposition taken in connection with a lawsuit he had filed against Lapeer County.[2] (p. 717-718) He repeated the falsehood in his answers to the JTC's inquiries during the investigation into this matter, in his Answer to the Amended Formal Complaint (Answer), and during his testimony before the Master.

In July of 2014 Special Prosecutor Deana M. Finnegan issued a criminal complaint charging respondent with five 10-year felony counts of embezzlement by a public official over $50 in violation of MCL 750.175[3]. (p. 81; R's Ans. ¶9-11; E's Exh. 1a; E's Exh. 1b) The charges followed a MSP investigation that showed that as the Prosecuting Attorney, respondent deposited into his personal bank accounts, and accounts he held with his wife and son, funds totaling $1802 that had been received by the LCPO. The $1802 included $1022 in 42 checks in referral fees from Bounce Back, a collection company respondent contracted with in his capacity as the Prosecuting Attorney to handle select bad check cases on behalf of the LCPO. (p. 81-83; p. 223-230; E's Exh. 9-74); and $780 in two checks as payments by the Law Enforcement Officers Regional Training Commission (LEORTC) for training sessions conducted on county time by APA Cailin Wilson in 2011 and 2012. (p. 82-83; E's Exh. 92k) All of those checks were made payable to either the "Lapeer County Prosecuting Attorney's" or the "Prosecuting Attorney's Office." (E's Exh. 9-74; E's Exh. 92k)

The preliminary examination in *People v Konschuh* commenced on September 24, 2014, before Shiawassee District Court Judge Terrance Dignan. (R's Ans. ¶12) Respondent was

[2] *Konschuh v Lapeer County, et al*, Oakland County Circuit Court, case nos. 2017-SC0045-SC and 20170046-SC

[3] The charges were filed in the 71-A District Court under case number 14-1779-FY.

represented by attorneys Michael Sharkey and Thomas Pabst. On October 15, 2014, respondent was bound over for trial as charged to Lapeer County Circuit Court where it was assigned to Genesee Circuit Court Judge Geoffrey L. Neithercut.[4] (R's Ans. ¶13; E's Exh. 1c)

Judge Neithercut remanded the case for a clarification on respondent's claim that the funds in question were not public monies and thus could not support the charges against him. On December 19, 2015, Judge Dignan, rejected respondent's argument. (E's Exh. 1aa) Judge Dignan relied on MCL 750.175 and Michigan Criminal Jury Instructions 27.3 to determine that embezzlement by a public official means "the misappropriation of *any money* received by the defendant in his official capacity as prosecuting attorney." (emphasis in original) (E's Exh. 1aa-page 2) Judge Dignan also stated, "The Court found these monies were received by the defendant in his official capacity as Lapeer County Prosecutor. It should be noted that the statute does not mention 'public money' in defining the crime." (E's Exh. 1aa-page 2)

On February 9, 2015, Judge Neithercut denied respondent's second motion to quash and a motion for reconsideration. (p. 89; E's Exh. 1z) The Court of Appeals and the Michigan Supreme Court denied respondent's leave to appeal[5] (p. 90-91; E's Exh. 4a; E's Exh. 4b; E's Exh. 4d)

On March 8, 2016, the parties met to take the unusual step of mediating respondent's case with the assistance of former judge Robert M. Ransom. (p. 3215-3216; E's Exh. 1cc) Following mediation the parties signed a "stipulation and agreement" (E's Exh. 1i) which in part provided that:

> MCL 21.44 required each department and County office to make an annual financial report involving public monies. While it is still not clear that the stipends or fees fall into the definition of public

[4] The case was assigned a Lapeer Circuit Court case number 14-012016-FY as well as a Genesee case number 14-36353.

[5] The COA also denied respondent's motion for reconsideration of its denial of his request for leave to appeal.

> monies, the parties agree that the monies raised could be interpreted as public monies that would require financial reporting.
>
> In order to prevent further tax payer expense of a trial in this matter, the parties have agreed that Judge Konschuh will plead "no contest" that there may be an interpretation of MCL 21. 44 that supports the argument that he should have reported the collection of these funds to the State or other appropriate entity for accounting purposes. After a delay of sentence as determined by the Court, the matter will be dismissed with prejudice.

After the stipulation was reached, respondent appeared before Judge Neithercut and entered a plea of no contest to violating MCL 750.485. Judge Neithercut sentenced respondent on March 31, 2016. (E's Exh. 1p) Pursuant to the plea agreement, the prosecutor dismissed the case in July of 2016. (E's Exh. 1k)

Respondent claims the stipulation proves that his plea was only to a violation of an accounting statute, MCL 21.44, and not to a crime under MCL 750.485. (R's Ans. ¶22; ¶31; ¶32) On February 19, 2018, nearly two years *after* his plea and after he filed his civil case against the county and others,[6] respondent filed a motion Nunc Pro Tunc (E's Exh. 1t) in which he explicitly stated he did not plead no-contest to MCL 750.485, a misdemeanor, but pled no contest under MCL 21.44. (p. 136; p. 137; p. 3243) The evidence, including his own admissions, proves respondent wrong. Respondent's testimony and statements to the contrary are misrepresentations.

At the preliminary examination, throughout his pre-trial motions, in his applications for leave to appeal in the Court of Appeals and the Supreme Court, and in the deposition taken in his civil matter, respondent persistently argued that the original criminal charges should be dismissed because the funds at issue were not public or county money, an argument rejected by Judge Dignan and Judge Neithercut. (p. 87; E's Exh. 1aa; E's Exh. 1z) In light of that, as Prosecutor Finnegan

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[6] On May 15, 2017, respondent filed a civil action against Lapeer County and several of its employees under *Konschuh v Lapeer County, et al,* case no. 17-050852-CL(H) assigned to Oakland County Circuit Court's Hon. Shalina Kumar under case no. 17-SC-0045-SC (E's Exh. 142).

explained at the March 5, 2018, hearing on respondent's Motion Nunc Pro Tunc, in order to facilitate the plea respondent agreed that under MCL 21.44 the funds "could be interpreted as public monies requiring financial reporting." (E's Exh. 1i; E's Exh. 1cc) This stipulation and agreement was for the purpose of establishing the factual basis for his no-contest plea under MCL 750.485. (E's Exh. 1cc-page 16) The purpose of the stipulation was to establish that the funds *could be considered as public monies*, contrary to the position respondent had persistently taken until that time, and therefore his failure to report them provided a factual basis for respondent's plea to a crime under MCL 750.485.

Respondent's testimony before the Master that he was surprised by Ms. Finnegan's inclusion of Count 6 in the amended complaint/information (p. 3218) is not credible. Likewise incredible is Mr. Sharkey's claim that the only resolution he would accept for respondent was an outright dismissal (p. 2350), and Mr. Pabst's claim that Prosecutor Finnegan "pulled a fast one" by going outside of the "stipulation and agreement." (p. 2858; E's Exh. 1i)

This testimony is nothing more than a brazen collective effort to rewrite history. The "fast one" was written on documents respondent and his attorneys signed. Neither respondent nor his attorneys said anything about Prosecutor Finnegan's supposed "fast one" when she clearly stated it on the record and respondent entered his plea. It is not believable that a judge and former prosecutor and his two experienced lawyers, all failed to notice that a "fast one" was being pulled right in front of their eyes just minutes after their mediation.

Further, in his answer to the Amended Formal Complaint respondent admitted that he "...stipulated to the addition of Count 6 to the amended information..." (R's Ans. ¶16; ¶17) He also admitted before the Master that before the plea hearing started, he was aware of the additional

misdemeanor count in the amended complaint/information and did not either object or question it. (p. 3217-3221)

Moreover, before tendering the plea respondent also filled out and signed several documents that were utilized by Judge Neithercut during the hearing. (p. 91-101; E's Exh. 1f; E's Exh. 1g; E's Exh. 1h) Respondent admitted signing those documents *while he was in court and in the presence of his two experienced lawyers.* (p. 91-101) These documents unequivocally establish respondent's and his attorneys' clear knowledge and understanding that his plea was to a criminal misdemeanor under MCL 750.485 and not to MCL 21.44, a non-criminal accounting statute.

One of the documents is a form Judge Neithercut had used for many years entitled "People's Exhibit No. 1." (E's Exh. 1h) Respondent admitted to not only signing it, along with Mr. Sharkey and Mr. Pabst, (91-101) but to filling out and initialing all information the form called for, including that he was pleading "no contest" to "Fail to Account, contr. to 750.485," that the offense carried a maximum of 90 days in jail and a maximum fine of $500, and that he understood that a no contest plea "constitutes a conviction." (p. 98-101) In the section asking respondent to "state in your own words what you did," respondent, using the language of MCL 750.485, handwrote:

> FAIL TO ACCOUNT FOR → See Exhibit "1"
> NO CONTEST – request EXAM TRANSCRIPT
> BE USED AS FACTUAL BASIS

(E's Exh. 1h)

Another document that respondent, his attorneys, and Ms. Finnegan signed before the plea hearing was the "plea agreement/sentence agreement." (E's Exh. 1f) By signing it, respondent expressly agreed to plead "no contest to Count 6 - Public Officer – Failure to Account for Public Money" under MCL 750.485 (E's Exh. 1f-section 1). He also agreed to "a "delayed sentence with a dismissal with prejudice upon successful completion of the terms of the delay" (p. 95-96; E's

Exh. 1f-section 3) Consistent with that agreement, in July of 2016, Prosecutor Finnegan filed and Judge Neithercut signed a Motion/Order of Nolle Prosequi dismissing with prejudice Count 6, Public Officer – Failure to account for county money, MCL 750.485. (E's Exh. 1k) Neither the Plea Agreement/Sentence Agreement (E's Exh. 1f) nor the Motion to Nolle Prosequi (E's Exh. 1k) make any reference to MCL 21.44.

Respondent's understanding that he was pleading to a misdemeanor was irrefutably established by the video and corresponding transcript of the plea hearing. (E's Exh. 1(l); E's Exh. 1cc) At the outset, Ms. Finnegan made a clear record of the parties' agreement including the fact that respondent would plead no contest to count 6 of the newly amended information, which she identified as public officer failure to account for county money. In exchange for that plea, Ms. Finnegan "agreed to dismiss today counts one through five, embezzlement by a public official over $50." (E's Exh. 1cc-pages 3-4) When given an opportunity to respond, Mr. Pabst objected *only* to Ms. Finnegan's reference to restitution. In fact, he added: "...other than that, I think she stated everything correctly except there's no provision for restitution in here." (E's Exh 1cc-page 5) Respondent said nothing to dispute Prosecutor Finnegan's description of the parties' agreement.

At the time of his plea, respondent had been practicing criminal law for more than a quarter of a century. It is more than just a little disingenuous for him to contend that he did not understand the implications of having signed an Advice of Rights and Plea/Sentence Agreement form in connection with his plea. This is especially true in light of Judge Neithercut's "exhaustive Advice of Rights routine" (E's Exh. 1(l); E's Exh. 1cc-page 7) during which respondent acknowledged that he understood his right to a trial (E's Exh. 1cc-page 11), that he and his attorneys discussed the case, including trial strategies and potential sentences (E's Exh. 1cc-page 9-11), and that his plea was to an "offense" that carried a penalty of up to 90 days in jail and up to a $500 fine (E's

Exh. 1cc-page 9). None of that would have made sense as applied to MCL 21.44. Respondent also confirmed that he filled out two Advice of Rights forms, (E's Exh. 1cc-page 11) that he reviewed those forms with his attorneys, (E's Exh. 1cc-page 11) and that he understood what he was "getting [himself] into." (E's Exh. 1cc-page 12) When Judge Neithercut asked respondent how he would plead to the charge of "being a public officer who failed to account for county money," respondent replied "No contest, Your Honor." (E's Exh. 1cc-page 16)

Respondent's awareness that his no-contest plea was to a crime was also established by the testimony of Wendi Jackson, the Genesee County probation officer who interviewed respondent for a Presentence Investigation (PSI) report. (p. 117-132; Exh. 1n; E's Exh. 1o) It is uncontroverted that Ms. Jackson advised respondent that her interview was in connection to his plea to a 90-day criminal misdemeanor – MCL 750.485 – Public Officer Failure To Account For Public Money. (p. 824-825) It is also uncontroverted that respondent, who was accompanied by Mr. Sharkey (p. 2486), did *not* express any objection to the interview or give any indication that the plea was not to a criminal offense. (p. 132; p. 824) Further, in three separate areas, Ms. Jackson's report clearly designates MCL 750.485 as the statute underlying respondent's no contest plea. (p. 824; E's Exh. 1o) At the March 31, 2016, sentencing hearing before Judge Neithercut, neither Mr. Sharkey nor respondent so much as hinted that Prosecutor Finnegan had pulled a fast one. To the contrary, after confirming that he and his client had had an opportunity to review Ms. Jackson's report (E's Exh. 1p-page 3), Mr. Sharkey advised the court that neither he nor his client had any "corrections or additions or any other requests" with respect to it. (E's Exh. 1p-page 3)

Just eight days after his plea respondent's current counsel, Mr. Campbell, sent a letter to the Attorney Discipline Board, with a copy to the Attorney Grievance Commission as well as respondent, Mr. Sharkey, and Mr. Pabst. (E's Exh. 1ff) The letter, required under MCR 9.120,

stated that on March 8, 2016, respondent was "convicted of the misdemeanor offense of Failure to Account for County Money contrary to MCL 750.485." (E's Exh. 1ff) The letter makes no mention of MCL 21.44. Had respondent believed he only violated MCL 21.44, he would have been under no obligation to report anything to the Discipline Board or Grievance Commission.

One might reasonably wonder why respondent is so brazenly denying the obvious. In fact, his motive is clear. On May 17, 2017, he filed a civil action against Lapeer County and several of its employees, including witnesses who had testified against him at the preliminary exam in the criminal case. His civil complaint included a claim of malicious prosecution. That claim required proof that the underlying criminal proceedings were terminated in respondent's favor. (p. 2859) *Matthews v Blue Cross and Blue Shield of Michigan*, 456 Mich 365, 378 (1998); *see also* MCL 600.2907. It was for this reason respondent attempted to rewrite history. He carried out that attempt by knowingly filing a false and fraudulent pleading, his Motion Nunc Pro Tunc in the criminal case. Judge Neithercut denied that motion. (E's Exh. 1ee; E's Exh. 1(l)) In addition, in his November 15, 2017, deposition in his civil case, respondent claimed he did not plead no-contest to any crime including a misdemeanor. (p. 717-718) Respondent's under-oath testimony was a lie.

Respondent is responsible for the Motion Nunc Pro Tunc. At the hearing before the Master he admitted that he was in agreement with the filing of the motion and that he knew what it was going to claim. (p. 136) He even admitted that the representation made in the motion, that he did not plead to a misdemeanor, was "not completely true, no....It's not completely true." (p. 137; see also p. 110-111 and p. 3243) His admission was itself evasive. There was *no* truth to the representation. Further, when Mr. Pabst argued that respondent did not plead no contest to violating MCL 750.485 at the March 5, 2018, hearing before Judge Neithercut, respondent made

absolutely no effort to correct the record. He was complicit in misleading Judge Neithercut, and violated every attorney's duty of candor to the tribunal. (MRPC 3.3) (E's Exh. 1(l); E's Exh. 1ee)

In yet another blatant attempt to deceive, respondent offered a new claim during his testimony before the Master – that Judge Neithercut never accepted his plea. (p. 2973; p. 2976; p. 3238-3239) Respondent's sole support is Judge Neithercut's statement – "well no, wait a minute" – in the following portion of the plea hearing:

> THE COURT: Okay. Given these facts that People—or the Court accepts the plea and finds Mr. Konschuh guilty of count six, failure to account for county money, and dismisses without prejudice counts, -- well no, wait a minute. When am I supposed to do the dismissal, now or later? This says a delayed sentence with a dismissal with prejudice upon successful completion, so I guess that means I'm supposed to keep those open for the time being.
>
> MS. FINNEGAN: You only keep the count six charge open. I'm prepared to dismiss counts one through five today.
>
> THE COURT: Okay.
>
> MS. FINNEGAN: Okay? That's our deal. And the count six charge would be dismissed or disposed of at the conclusion of the delay period if he complies with whatever this Court orders, and that would be dismissed with prejudice.
>
> THE COURT: On your motion, one through five are dismissed.

(E's Exh. 1 cc-page 17)

Two things are patently obvious from this excerpt, even stripped of any context: Judge Neithercut absolutely did accept respondent's plea and found him guilty of the criminal misdemeanor and respondent lacked any good faith basis for his contrary testimony under oath to the Master. Judge Neithercut's comment, "--well, no, wait a minute," was immediately followed by his question of "when am I supposed to do the dismissal, now or later?" (E's Exh. 1cc-page 17)

The comment "—well, no, wait a minutes," was clearly said to ascertain whether to dismiss counts 1-5 that day or at the end of the delay period.

Of course, there is context, and the context further demonstrates how divorced from reality is respondent's testimony. In his Answer to the JTC Complaint respondent admitted that Judge Neithercut accepted his nolo contendere plea. (R's Ans. ¶26) Immediately following the exchange on which respondent now relies, Judge Neithercut referred him to the probation department for a presentence investigation and report. (E's Exh. 1cc-pages 17-18; E's Exh. 1n) That referral made no sense unless Judge Neithercut had first accepted respondent's plea.

As the Hon. Shalina Kumar stated, in part, in her opinion summarily dismissing respondent's civil complaint;

> While the Special Prosecutor ultimately dismissed the five felony embezzlement counts, that was in exchange for Konschuh pleading no contest to "Public Officer – Failure to Account for County Money" in violation of MCL 750.485. Judge Neithercut stated on the record that he found Konschuh "guilty" of this misdemeanor and sentenced him accordingly. Thus, even though Konschuh pled no contest, the criminal proceedings were not necessarily "terminated in his favor" when he was sentenced on a misdemeanor conviction.

(p. 146; E's Exh. 142-page 14).

Respondent's arguments that he was not guilty of a crime because the funds he had embezzled were not county or public was rejected by the district court, two circuit courts, the Court of Appeals and the Supreme Court. The evidence proved that respondent pled to the crime of failure to account for county money, then lied about having done so in his Motion Nunc Pro Tunc and in other instances.

## COUNTS II, III, IV, and V

The evidence clearly established that respondent engaged in a long term embezzlement by depositing county funds into his personal bank accounts. These were funds generated by contracts

he entered into in his capacity as the Prosecuting Attorney without the county's knowledge and approval (Counts II and III), funds a law enforcement agency paid for trainings he and the LCPO legal staff conducted on county time (Count IV), funds the City of Lapeer paid for him and his legal staff to make court appearances on its behalf on county time (Count IV), and funds he obtained by submitting false reimbursement vouchers to the county (Count V). The evidence also established that respondent made numerous misrepresentations to the Michigan State Police, the Commission, and to the Master about his embezzlement.

Lapeer County is governed by a Board of Commissioners. (p. 848-851) The Board sets the county's budget and manages its finances. (p. 848-851) In 1988, the Board appointed John Biscoe as the county's Administrative Controller. (p. 840-841) Mr. Biscoe has served in that capacity ever since. (p. 840-841) Mr. Biscoe's principal functions were to take charge of the county's property and financial accounts and to implement the policies established by the Board. (p. 841)

The County's operations are organized under various departments. Six of the departments - the sheriff, the treasurer, the register of deeds, the clerk, the drain commissioner, and the prosecuting attorney - are headed by an elected official. (p. 846) Lapeer County is the funding unit for all county departments and pays the salary of all its employees, including the elected officials. (p. 841-854; p. 931; p. 1088)

Counts II AND III - Heartland and Bounce Back

Lapeer County's "Adopted Accounting Procedures" policy provides, in part, that:

> All Grants, Contracts and Agreements involving the County, County Department, County Elected Official, Appointed Department Head or Employee of the County SHALL be reviewed and approved by the County Board of Commissioners. All revenues or Reimbursements SHALL be deposited with the County Treasurers Office per the Cash receipting Procedures within 24 hours of receipt. Cash receipts are all moneys which shall come into the hands of any office of the County or an employee or elected official of that office

> (including Cash, Check, Debit/Credit, Electronic Transfer, and ACH), through the operation of County business or authority of that office. (emphasis in original)

(E's Exh. 5j) The same policy calls for all proposed contracts to be reviewed by the prosecuting attorney before they are submitted to the Board of Commissioners. (p. 168; E's Exh. 5j-¶7; E's Exh. 5k) The policy defines cash receipts as "all moneys which shall come into the hands of any office of the County or an employee or elected official of that office…through the operation of county business or authority of that office." (E's Exh. 5j; E's Exh. 5k) The clear intent of this policy, which has been in use in Lapeer County since at least 1996, (p. 1914-15; p. 1928) is to promote public transparency and accountability of all governmental contracts. (p. 899) The LCPO is considered a *pass through* for all funds/monies that flow into it and does not maintain its own checking account. (p. 1260; p. 1749; p. 1785)

In 2008 respondent (R's Ans. FC, par. 50) entered into a verbal agreement with a check collection company, Heartland/Transmodus (Heartland), to utilize their "Stop Loss" program for LCPO's bad check cases. (p. 157-160; p. 162-165; R's Ans. ¶50-51; E's Exh. 6a) Respondent admitted he entered into the Heartland agreement in his capacity as the Lapeer County Prosecuting Attorney. (p. 157-158; p. 3246; R's Ans. ¶51) He also admitted that he did not submit the Heartland contract for approval by the Board of Commissioners and did not notify any County officials or departments of the contract's existence. (p. 175-176; R's Ans. ¶53) This was a clear violation of the county policy.

Under the "Stop Loss" program select cases designated by the Prosecuting Attorney were referred to Heartland which sought to collect the face amount of the dishonored check plus a $35 collection fee. (p. 177-178; R's Ans. ¶56) All case referrals were made before any criminal charges were issued against the check writers. (R's Ans. ¶55) The Heartland agreement was in

effect in 2008 and part of 2009. (p. 157-158; R's Ans. ¶54) The program was supervised by respondent's chief assistant, Michael Hodges. (p. 157-160)

In the early part of 2009, on a case that had been referred for collection to Heartland, the LCPO received a Western Union Money Order as payment in full for a dishonored $25.28 check written by Sherri Ohenley to the Past Tense Country Store in Lapeer, Michigan. (p. 163; p. 182-185; p. 1689-1690; R's Ans. ¶57-¶62; E's Exh. 6e; E's Exh. 6f) The money order, in the amount of $60.28, represented the face amount of the check plus Heartland's $35 fee. (p. 182-187; Exh. 6b) On May 14, 2009, respondent cashed the Ohenley money order and deposited the entire $60.28 into his and his wife's personal bank account at Lapeer County Bank & Trust. (p. 188; R's Ans. ¶65; E's Exh. 6g)

On May 15, 2009, Pat Redlin, a clerical employee of the LCPO, forwarded $45.28 together with a deposit advice form to the Lapeer County Treasurer's Office. (p. 2032-2034; R's Ans. ¶68; E's Exh. 6h) The deposit advice identified the $45.28 as restitution for the Past Tense Country Store. (E's Exh. 6h) On the same day, respondent authorized an invoice voucher directing the Lapeer County Finance Department to disburse $45.28 to the Past Tense Country Store. (p. 190-192; p. 2033-2036; R's Ans. ¶71; E's Exh. 6i). The remaining $15 from the Ohenley money order was never received by the Lapeer County Treasurer's Office. (p. 1898-1902; E's Exh. 149; E's Exh. 150)

Respondent admitted he deposited the entire $60.28 into his personal bank account. (E's Exh. 6g) He testified he gave $60.28 to Ms. Redlin to voucher to the appropriate parties. (p. 191-192; p. 195; p. 196) That was false. Ms. Redlin testified that the only money respondent gave her was the $45.28 she forwarded to the treasurer's office. (p. 2034-2035; E's Exh. 6i) Respondent's

insinuation that Ms. Redlin kept the missing $15 demonstrates his willingness to cast blame on others for his own misconduct. (p. 192-198)

In his Answer respondent stated he gave the "equivalent of Sherri Ohenley's money order to the Lapeer County Treasurer's Office to voucher to the appropriate parties." (R's Ans. ¶73) Respondent's testimony and Answer to the Complaint are false. As Ms. Redlin testified, respondent did not give her the entire $60.28. Respondent admitted that the only two "appropriate parties" were Past Tense Country Store and Heartland. (p. 198) In light of respondent's failure to comply with the Grants, Contracts, and Agreements policy, the county never knew about Heartland, could not designate it as a vendor, and could not consider it as an "appropriate party" entitled to the disbursement of any funds. (p. 198-199) Respondent had ensured that Heartland was invisible to the county by failing to disclose his contract with them. There is no evidence that respondent did anything with the $15 other than keep it.

Also false is respondent's testimony that the only reason he cashed the Ohenley money order was because he was "trying to expedite getting the restitution to a victim," (p. 197) and that he needed to cash the money order because it was made payable to him and therefore the treasurer's office could not accept it. (p. 188-189) This was refuted by Dana Miller, the county treasurer. The money order was cash (p. 2111-2112) regardless of who was the designated payee or whether the payee was undesignated. (p. 2112-2113)

Further undercutting respondent's claim that he was merely trying to expedite payment to the victim is the fact that he received the money order four months before he had cashed it, and during that four months he failed to answer Chief Assistant Hodges' inquiries as to "what should be done with it." (p. 1691) It was not until Mr. Hodges was leaving the LCPO for private practice

that respondent took possession of the money order, cashed it, and deposited it into his personal account.[7] (p. 1964)

Not satisfied with the effectiveness of Heartland's "Stop Loss" program (p. 160-161), on December 31, 2008, respondent entered into a written contract with Bounce Back, a collection company he became aware of a few years before during a prosecutors conference held on Mackinac Island. (p. 217-221; p. 3247; R's Ans. ¶75; E's Exh. 7a) Respondent admitted entering into the Bounce Back contract in his capacity as the Lapeer County Prosecuting Attorney. (p. 3247; R's Ans. ¶75)

The new contract, in effect as of January 1, 2009, granted Bounce Back the sole authority to operate a check enforcement program "under the Prosecuting Attorney's name, authority, and control." (p. 223-226; E's Exh. 7a-§1a) Under the Bounce Back program, known as the "Lapeer County Bad Check Enforcement Program," (p. 225-228; E's Exh. 7a) the LCPO was to receive a $5 fee from each $40 processing fee Bounce Back collected. (p. 227-228; E's Exh. 7a)

As with Heartland, respondent did not submit the Bounce Back contract to the Board of Commissioners. (p. 922-923) He also did not notify the Board of Commissioners, the County Controller, the County Treasurer's Office, or the County Finance Department of the existence of the contract or of the $5/check fee the LCPO was receiving from Bounce Back. (p. 231-237) Respondent justified not telling the county about the contract on the basis that the contract was not a county contract (p. 178; p. 180; p. 225-226; p. 248; p. 250) and that the county did not have the right to control him. (p. 251)

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[7] According to Mr. Hodges, when he received the Ohenley money order, the payee line was blank. (p. 1692) At the time respondent cashed it, his name was written as the payee. (E's Exh. 6f) Mr. Hodges, Mr. Turkelson, and Leigh Hauxwell testified that they recognized the name on the Ohenley money order as having been written/printed by respondent (p. 1693; p. 1786; p. 1309) Regardless of who wrote respondent's name, respondent cashed the money order and deposited it into his personal bank account.

Between September of 2009 and April of 2013, respondent cashed 42 checks sent to the LCPO by Bounce Back. These checks, totaling $1022, represented various aggregate amounts of the $5 fee paid to the LCPO. (p. 252; R's Ans. ¶82; ¶83; E's Exh. 8; E's Exh. 8a) Each check was made payable either to "Lapeer County Prosecuting Attorney's" or the "Prosecuting's Attorney's Office." (p. 228-229; R's Ans. ¶83) Respondent admitted he deposited each of the 42 checks into his personal bank accounts he held with his wife and son at Lapeer County Bank & Trust, Chase Bank, or Independent Bank. (p. 264; R's Ans. ¶93-¶346; E's Exh. 9-74) He cashed the last of the 42 checks after he was informed he was appointed to the bench. (p. 269-271; R's Ans. ¶346; E's Exh. 74) Respondent did not so much as keep a copy of any of the 42 checks, nor did he maintain even the most basic of accounting ledgers to show the receipt and use of these funds. (p. 256-260; p. 260-265; p. 277-278)

Respondent does not challenge the accuracy or existence of the Adopted Accounting Procedure's "Grants, Contracts, and Agreements" policy or the "Cash Receipt" policy. (p. 173; E's Exh. 5j) Rather, he claims he did not follow these policies because he was never made aware of them. (p. 172-173; p. 3270; R's Ans.¶45-¶48; R's Ans. ¶52) Respondent also claims that the Heartland and Bounce Back contracts were not county contracts (p. 178; p. 180; p. 225-226; p. 248; p. 250) and that the funds these contracts generated were not county money. (p. 248; p. 250; p. 259-260) Respondent's representations are false and his arguments without merit.

The "Grants, Contracts, and Agreements" policy has been in effect in Lapeer County since 1996. (p. 1914-15; p. 1928) Prior to 2002, the county's policies were provided to each county department in a binder. (p. 897; p. 1207) Beginning in 2002, the county also made its policies available to all employees on its computer "J" drive. (p. 1926; p. 1929; p. 2110; Exh. 5 L) Questions about any policies were directed to Mr. Biscoe. (p. 1207) Information regarding the

adoption of new county policies/practices or any changes in existing policies/practices was also regularly disseminated and discussed during monthly department head meetings. (p. 897) Respondent admitted attending the county's department head meetings. (p. 246; p. 849)

More significantly, as the Prosecuting Attorney respondent also served as the Lapeer County Corporation Counsel on all except labor issues. (p. 79; p. 149) In that capacity, he reviewed contracts proposed by other county departments for legal sufficiency and the potential cost and liability to the county. (p. 149; p. 172) Respondent first performed this function when he was the chief assistant to then-prosecutor Justus Scott, and had accompanied Scott in his appearances before the Board of Commissioners with regards to the contracts they had reviewed. (p. 149-156)

After becoming the elected prosecutor, respondent continued reviewing or participating in the review of contracts submitted by other county departments. (p. 149-156) Respondent shared that responsibility with Timothy Turkelson, who served as respondent's chief assistant from 2001 until 2005. (p. 1205-1208) In fact, it was respondent who explained the purpose of the "Grants, Contracts, and Agreements" policy to Mr. Turkelson and "walked" him "through the process" to be followed. (p. 1205-1212) Under these circumstances, respondent's feigned ignorance of the policies and procedures of the county he was employed by and represented for decades is clearly false and misleading.

Respondent's knowledge and awareness of the county's policies/procedures was proven conclusively by his own testimony under oath in his November 15, 2017, deposition taken in conjunction with the civil action he had had filed against the County and several of its employees. In that deposition, when asked whether he was aware that the county had a policy requiring him to notify the Board of Commissioners about all contracts, respondent admitted, "If it involved the county, yeah." (p. 174-175)

The Heartland and Bounce Back contracts clearly involved the county. The companies operated in the county by the authority and under the name of one of its departments - the Prosecutor's Office; they were designated as the exclusive agent for providing collection service to Lapeer County Prosecutor's Office (p. 3246-3249); and they relied on the power of the LCPO to compel payments of restitution to victims of bad checks. (E's Exh. 7a §3; E's Exh. 7a §1(a)) The contracts also involved a fundamental function of the Prosecutor's Office, the handling and disposition of criminal offenses. Respondent admitted that he authorized the Heartland and Bounce Back contracts for use in Lapeer County in his capacity as the Lapeer County Prosecutor and that Heartland and Bounce Back were the collection agencies for Lapeer County Prosecutor's Office. (p. 225; p. 349; p. 3246-3247; p. 3249)

The Heartland and Bounce Back contracts were clearly county contracts that respondent was required to submit to the Board of Commissioners' for review and approval. This conclusion is supported by the testimony of respondent's successor, Timothy Turkelson (p. 1288-1291) and Michigan Department of Treasury audit manager, Cary Vaughn. (p. 1964-1965) It was also the conclusion of county controller John Biscoe. (p. 1113; p. 1117) Mr. Biscoe testified that these were not county contracts *only* because they were never presented to the Board of Commissioners. Mr. Biscoe was clear that they "should have been." (p. 1112-1113; p. 1117-1118)

Respondent makes yet another novel argument to evade responsibility for his embezzlement. He claims that under MCL 129.11, any collection not pursuant to a specific provision of law cannot be deemed public or county money. He claims that this statute puts the Heartland and Bounce Back money outside the scope of "public money." (p. 1288-1289) Respondent's argument is absurd. The funds generated by the Heartland and Bounce Back

contracts were unquestionably public or county money. As Michigan Department of Treasury audit manager Cary Vaughn testified, county or public funds are:

> Any money that comes into the coffers of a local unit of government, whether that be through a department head or through the treasurer, whatever avenue it came into the coffer that would be a government, that would be public funds.

(p. 1949)

This is consistent with the county policy that defines cash receipts as "...all moneys which shall come into the hands of any office of the county or an employee or an *elected official* of that office ...through the operation of county business or *authority of that office*. " (emphasis added) (E's Exh. 5j) As Mr. Vaughn explained, collecting funds without any legal authority is "collecting illegal money." (p. 918; p. 1982) Respondent's claims to the contrary are deliberately and knowingly false.

Respondent's credibility is destroyed by his own contradictory testimony. He denied he was a county employee though he admitted he was paid by the county. (p. 78-79) He was reluctant to admit that the prosecutor's office was a division of the county (p. 180-181), though he admitted that his office was a department within the county. (p. 79) He admitted that Lapeer County is the funding unit for the Prosecutor's Office. (p. 181) As the funding unit the County sets each department's budget and pays the salary of each department head, elected or otherwise. (p. 181; p. 849-853) Respondent does not contest that his salary was paid by the County. (p. 78-79; p. 181) Respondent also does not contest that as a department head he was notified of, received agendas for, and attended monthly department head meetings to discuss various county issues. (p. 245-246). Respondent also attended the Board of Commissioners' budget hearings and was allowed, as a department head, to address the Board regarding any budget items he may have felt were important to his office. (p. 851)

Whether respondent was a county employee, a department head, or an elected official the Grants Contracts and Agreement policy explicitly provides that it is applicable to "All Grants, Contracts and Agreement Involving the County, County Department, *County Elected Official, Appointed Department Head* or *Employee of the County*." (emphasis provided) (E's Exh. 5j) Respondent's obligation was to follow that policy and to deposit all funds from the Heartland and Bounce Back contracts with the Treasurer's Office. Respondent's argument that these were not county contracts and that the money they generated were not public money is ludicrous. Respondent's pocketing those money amounted to embezzlement.

COUNT IV - LEORTC and City of Lapeer

For many years the LCPO APAs provided legal instruction at training sessions/seminars/legal updates sponsored and paid for by the LEORTC. (p. 282-283) This included legal updates offered at the 911 dispatch center in the City of Lapeer and at corrections academies in Flint/Fenton. (p. 1223-1224; p. 1411-1415) Preparation for the trainings took place at the LCPO using office equipment and supplies. (p. 1417-1420) Each training was conducted during business hours and the participating APAs did not take any vacation, sick, or compensatory time from their county positions to prepare for or to participate in it. (p. 283-284)

In October and again in December of 2000, while still the chief assistant under Justus Scott, respondent participated with other LCPO APAs in two LEORTC training sessions. (R's Ans. ¶366-¶370) Following each session respondent submitted a cost documentation sheet designating himself as the sole recipient of any compensation. Respondent admitted having received two checks from LEORTC for a total of $600, both of which he deposited into his personal accounts. (p. 320-321; R's Ans. ¶366) Respondent also admitted he did not notify the County Board of Commissioners, the County Controller, or the County Treasurer's Office of the training funds the

LCPO had received and that he did not maintain any accounting records/ledgers showing how these funds were used. (R's Ans. ¶369; ¶370)

After respondent was sworn in as the elected Prosecutor, he and his legal staff continued to participate in the LEORTC sponsored training sessions. (p. ¶361) Between 2001 and 2011, respondent and the LCPO APAs participated in 16 LEORTC training sessions most of which were conducted at the 911 dispatch center in Lapeer, Michigan. (p. 302; R's Ans. ¶361) For each session, respondent submitted a cost documentation sheet designating only *himself* as the recipient of all compensation. (p. 304) Respondent deposited 16 checks, totaling $4850, into his personal bank accounts. (p. 323; R's Ans. ¶361; E's Exh. 92d) Respondent admitted that he did not notify the County Board of Commissioners, the County Controller, or the County Treasurer's Office of the funds that LEORTC was paying for the training sessions. (p. 316-317) Respondent also admitted that he did not maintain any accounting records/ledgers to show how these funds were being used. (R's Ans. ¶365)

In September of 2011 and again in September of 2012, APA Cailin Wilson provided legal instructions at LEORTC sponsored corrections academy in Flint/Fenton, Michigan. (p. 1415-1428; R's Ans. ¶348) Respondent did not participate in either session. (p. 283; R's Ans. ¶349) Pursuant to APA Wilson's request on the cost documentation forms (p. 1426), the LEORTC issued two checks, for $300 in 2011 and for $480 in 2012, made payable to the Lapeer County Prosecutor's Office. (p. R's Ans.¶356-¶357; E's Exh. 92k) Respondent deposited these checks into his personal bank accounts. (p. 287-289; R's Ans. ¶359; E's Exh. 92k) Respondent did not notify the County Board of Commissioners, the County Controller, or the County Treasurer's Office of the funds the LCPO had received for APA Wilson's legal instructions and did not set up or maintain any accounting ledgers showing how those funds had been used. (p. 287-289) Although in 2012

respondent gave APA Wilson $80 for the additional hours she spent in preparing for that year's training session (p. 1428; p. 1432) he directed her to submit her mileage expenses to the county. (p. 1428; p. 1432) In October of 2012, respondent approved APA Wilson's mileage reimbursement voucher for $65.10. (p. 1432; E's Exh. 92h)

Between 2001 and 2008, respondent and the LCPO APAs also made court appearances on behalf of the City of Lapeer. (p. 331; p. 1467; R's Ans. ¶372) City Attorney Ron Shamblin, followed by Bruce Lawrence, paid respondent for every case covered. (p. 331; p. 336-338) Respondent admitted that between 2001 and 2008 he had received $100 to $300, each year, for his and his staff's appearances on behalf of the City of Lapeer. (p. 338) The LCPO APAs performed the work on county time and did not take any vacation, sick, or compensatory time from their county employment to make said appearances. (p. 337-338) As with the funds paid by the LEORTC, respondent deposited the City of Lapeer funds in his personal bank accounts without notifying the Board of Commissioners, the Treasurer's Office, or the county controller John Biscoe. (p. 338-340; R's Ans. ¶372; R's Ans. ¶374) Respondent also did not set up any accounting ledgers or any other methods of keeping track of how the City of Lapeer funds were being spent. (p. 338-340; R's Ans. ¶375)

Respondent attempted to justify pocketing the LEORTC and City of Lapeer money in two ways. First, respondent testified that his participation in the training sessions and in the appearances on behalf of the City was part of his outside employment which he was allowed as an elected official. (p. 319; p. 352) He offered that testimony *as part* of the justification for depositing the LEORTC and City of Lapeer funds into his personal bank accounts. (p. 353) Second, respondent testified that the LEORTC training sessions and the City of Lapeer case coverage was

conducted by his APA staff during their "flex time." (p. 353-355) Respondent's assertions are illogical and his testimony false and misleading.

As noted above, respondent's theft of the LEORTC funds goes back to at least 2000 *before* he was the elected prosecutor and was just the chief assistant. (p. 355-357) As an appointed county employee respondent was not entitled to keep money for work he did on county time. (p. 932) While respondent was not barred from maintaining separate employment after he became the Lapeer County Prosecutor, such employment had to have been separate and distinct from his position as an elected official. (p. 1955; p. 1957) The LEORTC trainings were inherently connected to the LCPO. They were attended by police and corrections officers (p. 282-284); covered issues brought to respondent's or his APAs' attention by law enforcement personnel (p. 305-306; p. 1443-1444); and had guest speakers from the Prosecuting Attorneys Association of Michigan (p. 307).

The City of Lapeer appearances were also connected to respondent's position as the elected prosecutor. The cases were conducted on county time; the files and payments were delivered to the LCPO; and respondent's authority to make plea offers was based on his position as a prosecuting attorney. There was no clear separation line between respondent's position as the County Prosecutor and his appearances in the City cases. Any compensation for these trainings was public or county funds that respondent should have submitted to the Treasurer's Office. (p. 932-936; p. 1954-1959)

Respondent's second justification for pocketing the money for work performed by his APAs on county time was that he allowed the staff to have flex time. (p. 353-355) Respondent testified that Ms. Wilson's 2011 and 2012 trainings were "...all flex time. It was all her time." (p. 355) APA Wilson refuted that. (1485-1486) Ms. Wilson, Mr. Turkelson, and Mr. Hodges testified

that the trainings and City of Lapeer coverage was done on county time. (p. 1244; p. 1467; p. 1712-1716) It is both shameless and illogical for respondent to pocket money for work he claims his APAs did on their own time.

COUNT V - Improper Reimbursements

In addition to the funds from the LEORTC and City of Lapeer, respondent also deposited into his personal accounts money he received by submitting reimbursement vouchers for his staff's Christmas and Secretary/Administrative Assistant Day luncheons and other food items. In each voucher he falsely represented that the expense was incurred as part of "training." (E's Exh. 97aa; E's Exh. 97bb; E's Exh. 97hh; E's Exh. 103a-103o)

As a long standing tradition the LCPO staff participated in annual Secretary/Administrative Assistant Day and Christmas luncheons.[8] (p. 388) These lunches were not an expense the county would reimburse. (p. 976) Between 2001 and 2011 respondent did not seek reimbursement from the county for any of the luncheon expenses.[9] In 2011 and 2012 he sought reimbursement for three luncheons: two Christmas luncheons and one Secretary/Administrative Professional Day luncheon. (R's Ans. ¶383-385; ¶389-392; ¶413-415; E's Exh. 97aa; E's Exh. 97bb; E's Exh. 97hh)

On December 16, 2011, the luncheon tab was $174.70 of which $49.45 represented tip and/or alcohol. (p. 408; R's Ans. ¶382; E's Exh. 95-page 159) On December 20 respondent signed and submitted an "invoice voucher" to the Finance Department seeking reimbursement of $125.25 from the LCPO's General Fund. (R's Ans. ¶383; E's Exh. 97aa) In that voucher respondent represented that the $125.25 expense was incurred during a "Legal Updates/Training Luncheon." Based on that false representation, the county approved respondent's voucher. (p. 955)

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[8] Although respondent testified before the Master that he had paid for each of the luncheons, he told Sgt. Pendergraff that the luncheons were paid for, in part, by the LCPO APAs. (E's Exh. 90d-page 13)

[9] Respondent did, however, improperly include them in Exhibit 95. See discussion infra.

On April 25, 2012, the luncheon tab was $217.21 of which $33 represented gratuity. (p. 410; R's Ans. ¶390-391; E's Exh. 97bb) On the same day, respondent signed and submitted an "invoice voucher" to the Finance Department seeking reimbursement of $174.61 from the LCPO's General Fund. (E's Exh. 97bb) In the voucher respondent represented that the $174.61 expense was incurred during a "Staff Development Luncheon." Based on that false representation, which was false, the county approved respondent's voucher. (p. 960; E's Exh. 97bb)

On December 14, 2012, the luncheon tab was $180.66 of which $34 represented gratuity. (p. 429; R's Ans. ¶413-414) On December 17, 2012, respondent signed and submitted an "invoice voucher" to the Finance Department seeing reimbursement of $180.66 from the Corelogic 5000 Account (as discussed below). (R's Ans. ¶415; E's Exh. 97hh) Respondent's voucher represented that the $180.66 expense was incurred in connection with "training." (R's Ans. ¶ 416; E's Exh. 97hh)

Shortly after respondent submitted the December 17, 2012, voucher to the Finance Department, county controller John Biscoe contacted respondent by phone to inquire whether the event was a Christmas luncheon. Mr. Biscoe explained that if the event was a Christmas luncheon, the expense was not reimbursable by the county. (p. 968-970) Respondent advised Mr. Biscoe that the event was "training." (p. 968-970) Mr. Biscoe accepted respondent's representation "at face value" as the county's chief law enforcement officer and authorized the reimbursement. (p. 970)

Beginning in November 2012 respondent also instructed his legal staff to seek reimbursements for donuts and other breakfast items purchased each Friday morning by the APAs assigned to a rotating week-long on-call duty. (p. 1472; R's Ans. ¶608-¶610) Each voucher represented that the expense was incurred as part of "training" and requested payment from the Corelogic 5000 Account. (p. 973-976; E's Exh. 103a – 103o) This account was funded with $5,000

paid by Corelogic Tax Services, LLC, as part of a settlement agreement[10] (p. 420; E's Exh. 148) reached in a forfeiture case regarding property located in Lapeer County. (R's Ans. ¶400) APA Steve Beatty, as corporation counsel, represented Treasurer Miller and her office in that matter. (p. 413-419; R's Ans. ¶398)

Respondent's claims that the luncheon expenditures incurred in 2011 and 2012 and the November 2012 through April 2013 donut purchases were properly submitted to the county for reimbursement are false. In order to be reimbursable, the luncheons and donuts had to be for training. (p. 974-975; p. 976; p. 1058; p. 1951; p. 1991) Contrary to respondent's representations (p. 485; p. 496; R's Ans. ¶385; ¶393; ¶416' ¶610; E's Exh. 97aa; E's Exh. 97bb; E's Exh. 97hh; E's Exh. 103a-103o), the 2011 and 2012 luncheons did not include any training or "general discussions of the operation of the office." That is clear from respondent's own words. When he was initially questioned by Det/Sgt. Pendergraff about these expenses, he never mentioned any training component. Rather, he repeatedly referred to them as "Secretary's Day lunches and Christmas," to which he treated his staff as a reward for hard work and lack of pay raises. (p. 497; E's Exh. 90c-page 5; E's Exh. 90c-page 7; E's Exh. 90d-page 13; E's Exh. 90e-page 2; E's Exh. 90e-page 4)

The circumstances surrounding the luncheons confirm what respondent told Det/Sgt. Pendergraff. There were no memos, agendas, or emails to advise the participants of the topics to be covered. (p. 390-391; p. 398-399; p. 430-432; p. 1718) At least one office calendar listed a December event as "Office Christmas Lunch." (p. 391-392; E's Exh. 96j) Respondent's explanation that the purpose of the luncheons was to allow employees to freely voice their grievances or to discuss any "festering issues" is also negated by his purchase of gift cards for

[10] The total amount of the settlement was $105.000. (R's Ans. ¶401)

those who did not attend, confirming that the luncheons were a reward, not a training session.[11] (p. 398-399; p. 442; p. 496; p. 3325; E's Exh. 90d-page 2) It was clearly established by numerous witnesses, including respondent's long time office manager, Cathy Strong, that *all* of the LCPO's Christmas and Secretary/Administrative Assistant Day luncheons were nothing more than social events in recognition of a holiday or the LCPO support staff. (p. 640-642; p. 1478-1480; p. 1716-1718; p. 1789-1793; p. 2322)

The evidence also established that the LCPO did not conduct any training for which the APAs purchased donuts. Respondent testified that the donut vouchers submitted to the county starting in November of 2012 were properly labeled as "training" because they were made available to victims, witnesses, police officers, and other county employees. (p. 3291-3294) That testimony is false. The vouchers (E's Exh. 103a-103o) were only labeled as training because respondent instructed the officer manager, Leigh Hauxwell, to do so. (p. 1812) The one and a half to two dozen donuts/pastries were purchased by the on-call APAs for the LCPO's 14 to 16 staff members. (p. 1468; p. 1471-1472; p. 1725-1726; p. 1809-1813) These items were placed in the private back hallway by respondent's office near a door that required a key or a key card to access. (p. 1470; p. 1809-1812) Public funds can only be used for a public purpose. (p. 975; 1952-1954) The fact that an occasional police officer, witness, or victim, was not prohibited from taking one of the pastries does not change the purpose behind their purchase to "public" or for "training." (p. 1954)

Respondent also claims the luncheon and donut vouchers were properly submitted for reimbursement from the Corelogic 5000 Account because the account was intended to be used for

[11] Respondent's claim that he only purchased gift cards for members of the support staff in recognition of Secretary/Administrative Assistant Day is contradicted by his Christmas luncheon receipts, and subsequent testimony, showing the purchase of gift cards. (p. 442; p. 3325)

anything that he, in his sole discretion, considered of "benefit to his office." (p. 478-479; p. 964-966) That testimony was also false. For one thing, the Corelogic 5000 Account did not even exist when respondent submitted the December 2011 and April 2012 luncheon vouchers. The account did not exist until fall of 2012. (p. 963-964; p. 2102) Rather, those two vouchers were submitted for reimbursement from the LCPO's general fund account, over which respondent can claim no *sole discretion* to spend as he pleased. (E's Exh. 97aa; E's Exh. 97bb)

Respondent's claim that he was not aware which account was listed on the first two vouchers is false. (R's Ans. ¶384; R's Ans. ¶392) Again, the Corelogic 5000 Account – the *only* account over which respondent claims *sole discretion* – did not even exist when he submitted the first two vouchers. (p. 963-964; p. 2102) He could not have been confused about that. Respondent personally identified the accounts he wished his reimbursement vouchers to be charged against. (p. 1790-1791) Further, he had worked for the county for decades and was the chief assistant before he became prosecutor. In those capacities he reviewed county contracts, appeared at county department head meetings, and interacted with the county in budget negotiations. It is not plausible that he was unaware of any distinctions between accounts.

Respondent's claim is also beside the point. There was *no* account from which he was entitled to be reimbursed for parties and donuts. It did not matter whether he thought he was defrauding Account A or Account B. In either case, he was defrauding the county.

Respondent's testimony is false for another reason. Mr. Biscoe and Ms. Miller testified that the Corelogic 5000 Account was not created for respondent to spend in his sole discretion but was created for future trainings in the area of foreclosure and other civil matters of relevance to the county. (p. 964-966; p. 2102) That makes sense. The funds in the Corelogic account were generated as the result of a foreclosure case in which APA Beatty provided legal representation to

the Treasurer's Office. It is logical for the LCPO staff to be more versed in corporation counsel matters. Mr. Biscoe's and Ms. Miller's testimony about the purpose of the account is consistent with good sense and good county practices. Respondent's claim that the account was for his sole discretion is consistent with neither.

Respondent's affirmative defense that all reimbursements were not misconduct because they were approved by Lapeer County is baseless. County Controller John Biscoe testified that "...in any county, even as small as we are, the whole system is built on trust. The signatures are authenticating that it is a proper expenditure." (p. 956) Mr. Bisoce trusted his department heads (870, p. 956) and trusted respondent when he said the expenditures involved training." (p. 956) As Mr. Biscoe stated, "..if the chief law enforcement officer said it was training, I took his word for it." (p. 960) The only reason that the county approved the reimbursements was because of respondent's misrepresentations.

Also false and misleading are respondent's claims regarding the out of pocket expenses he personally incurred as the Prosecuting Attorney. (E's Exh. 95; E's Exh. 126) At the outset it is important to note that even if respondent did incur some legitimate out of pocket expenditures, it does not follow that he was entitled to help himself to reimbursements, especially years after the fact and with no records of the money he received or what they were spent for.

In his July 7, 2016, answer to the Commission's request for comments, respondent provided, as Tab C, receipts he asserted represented his out of pocket expenditures. Tab C has been marked and admitted as Examiner's Exhibit 95. He also provided a three page list of these alleged expenditures, together with an explanatory cover page (E's Exh. 126; also part of Exhibit 95). He used these receipts and the list in his argument against restitution before Judge Neithercut and during his testimony before the Master. In truth, the exhibits represent respondent's desperate

after-the-fact attempt to justify pocketing money to which he was not entitled. Respondent's claimed expenditures are riddled with errors and falsehoods. An examination of respondent's list demonstrates that it is filled with expenses that are not subject to reimbursement, expenses he did not pay for, and expenses for which he was already reimbursed by the county.

Page one of respondent's list contains $7,783.66 of supposed office expenses he claims he paid for out of his own pocket and for which he claims he found receipts. (E's Exh. 126) Respondent presented this figure to Judge Neithercut when arguing against Ms. Finnegan's request for restitution. (E's Exh. 1cc; E's Exh. 1p; E's Exh. 1(l)) Included in this figure is more than $3,000 in Christmas and Secretary/Administrative Assistant Day luncheons for which, as noted previously, public funds cannot be used. Also included on the first page is more than $500 in plaques respondent purchased between 2004 and 2008 for retiring police officers. (E's Exh. 126; E's Exh. 145) Not only were these officers not employed by the LCPO, these expenditures cannot properly be deemed as having been made for a public purpose for which public money can be used. (p. 906; E's Exh. 107-page 9)

The $7,783.66 figure also includes $1834.25 in office "water cooler bills." (E's Exh. 126) This figure was the subject matter, in part, of respondent's motion for partial summary disposition in which he requested the dismissal of paragraphs 549 and 552 in the Complaint on the grounds that they falsely accused him of having told the Commission he was "solely" responsible for the entire cost of the LCPO water fund.[12] As is shown below, the evidence presented at the formal hearing not only established the basis for paragraphs 549 and 552, it also exposed respondent's

[12] The two paragraphs alleged that respondent lied when he told the Commission he had spent "in excess of $1800 of his own money on water cooler bills." (FC, ¶549, ¶552) The Master took that part of the motion under advisement until the conclusion of the Formal Hearing. That part of respondent's motion must be denied.

misrepresentations to Det/Sgt. Pendergraff, to the Commission, to the Master, and to Judge Neithercut in respondent's criminal case. (p. 3322-3323)

When questioned by Det/Sgt Pendergraff, respondent claimed he had *personally* spent over $1800 in water cooler expenses. (E's Exh. 90f-page 7) He made the same assertion to the Commission by listing the $1834.25 as expenditures on which he had spent his own money. (E's Exh. 95; E's Exh. 126) At the formal hearing before the Master, he admitted making that representation to Sgt. Pendergraff and insisted that the statement was true. (p. 709; p. 710) Respondent also testified at the formal hearing that the receipts he provided to the Commission were his "out of pocket expenses." (p. 3321-3322; E's Exh. 126) After making these unequivocal statements, respondent testified that he "contributed" to the water expense and that his contribution was "close to all of" the $1834.25 figure. (p. 3102-3103)

First and foremost, water for the staff cannot be a public purpose expense. (p. 1952-1953) As with the Friday morning food items, the non-public status of the water does not change because police officers, victims, or witnesses, when present at the LCPO, were not barred from drinking it. (p. 1954) Second, contrary to respondent's repeated statements including his under-oath testimony, evidence established that water for the office cooler was actually purchased with contributions from the staff (p. 1474; p. 1520; p. 1722-1729) and that respondent did not make *any* contributions to that fund. (p. 1802-1803; p. 1830-1831) He was in possession of the invoices and receipts from the Spring Mountain Water Company only because he issued a personal check for each invoice after receiving a like amount in cash from the office manager who maintained the staff's fund. (p. 1806-1807; p. 1830)

Also included in the $7,783.66 figure is $375.77 of what respondent described as "Coffee and Cookies." (E's Exh. 126) Respondent purchased these items for his own investiture to the

judiciary, held on May 6, 2013, almost a month *after* he was sworn in as a judge. (p. 271-273) He testified that he included this expenditure on his three page list because the day after his investiture the leftover cookies and coffee were made available to everyone in the building. (p. 271-273) He also admitted that he did not submit this expenditure for reimbursement from the circuit court budget because he didn't think that the court would pay it. (p. 729-731)

The second page of respondent's three-page list (E's Exh. 95; E's Exh. 126) contains $3050.73 in expenditures that include additional Christmas and Secretary/Administrative Assistant luncheon expenses, more than $200 in flower/plant expenses for funerals, and $665 for a child's playground slide.[13] (p. 3330-3331) Public funds clearly cannot be used for these expenditures. (p. 1951-1953)

Public funds also cannot properly be used to pay for the $122.45 which respondent describes as "unreimb. portion of X-mas" and "unreimb. portion of Ad. Prof. Day lunch." (E's Exh. 95-page 159; E's Exh. 126) This amount represents the gratuity and alcohol purchased at the 2011 and 2012 Christmas and Secretary/Administrative Assistant Day Luncheons which respondent falsely billed to the county as "training sessions." The county, relying on respondent's representations, approved all but the gratuity and alcohol portions. (p. 870; p. 956; p. 960; p. 970) He could not honestly claim alcohol and gratuities as a proper reason to help himself to county money, having previously admitted to Sgt. Pendergraff and testified before the Master, that he knew the county did not reimburse for either. (p. 363; p. 408; p. 409; E's Exh. 90e-page 5-6)

Likewise, respondent should not have included, as bases to help himself to unrecorded reimbursements, a bar receipt stamped at 9:06 pm on a Friday night (p. 522-523; E's Exh. 95-page 1); other bar receipts for personal lunches he had with a few APAs (p. 523-524; E's Exh. 95-page

[13] Respondent testified that he felt this was a proper office expenditure because the slide was damaged at a social function at the home of one of the APAs. (p. 3331)

6; E's Exh. 95-page 13) and receipts that are marked as "Training Check. Do Not Pay." (p. 530; E's Exh. 95-page 170)

Also improper are the $6,000 in "estimated" expenditures that respondent claims he personally paid for that he included on the last page of his three-page list. (E's Exh. 95-page 162; E's Exh. 126) As noted above, the $1000 respondent claims he had spent on coffee for his office is not a proper public fund expenditure. (E's Exh. 107) Neither is the $500 in paczkis, Girl Scout Cookies and Cider that respondent alleges he had purchased for his staff.

Finally, respondent's inclusion of an "estimated" $400 per year as his personal contribution to the "Flower/Cake/Card fund" is a blatant misrepresentation. First, public funds cannot be used for such expenditures. Second, the "flower/cake/card" ledger (E's Exh. 106) maintained by Leigh Hauxwell clearly demonstrated the staff's contributions exceeded the expenses of the "flower/cake/card" fund. (E's Exh. 106) Respondent never contributed any money to that fund. (p. 1802-1803; 1830-1831)

## COUNT VI

During the November, 2016, election, Attorney David Richardson, respondent's friend and law school classmate, was a write-in candidate for the 40th Circuit Court against the incumbent, Hon. Nick Holowka. (p. 532-533) Respondent believed that Judge Holowka was in a "conspiracy" against him with other members of his bench and other county officials and the county sheriff. (p. 3368-3370) He blamed Judge Holowka, at least in part, for having the criminal case filed against him in 2014. (p. 3364) Respondent made phone calls on Mr. Richardson's behalf and assisted with building and distributing his campaign signs. (p. 534-536)

On October 4, 2016, respondent placed a "Dave Richardson for Circuit Court" campaign lawn sign on the corner of Roods Lake Road and Haines in City of Lapeer/Mayfield Township, an

easement to the home of Mr. and Mrs. Ed Oyster. (p.536; R's Ans. ¶431) Respondent admits he had not discussed the placement of the campaign sign at that location with the Oysters. (R's Ans. ¶432) At the time respondent put the sign up, Judge Holowka's sign was already there. (p. 1153)

On the afternoon/early evening of October 5, 2016, as respondent was driving past that location, he realized that the sign had been removed. (p. 536) He immediately proceeded to the Oyster residence. (p. 538) When Mrs. Oyster, 81, appeared at the front door, he began to question her about the whereabouts of the sign. (p. 538-538) Mrs. Oyster denied having any information regarding it. (539-540) Soon thereafter, Samuel Oyster, Mrs. Oyster's son, 61, approached the front door. Samuel Oyster likewise denied having any knowledge about the Richardson campaign sign. (p. 541)

Mrs. Oyster informed respondent that other people asked for permission before placing campaign signs on the corner from her house. (p. 1136-1137) Respondent advised Mrs. Oyster that Beth Knowlton told him he could place the sign at that location (p. 1134; p. 1136) and that no one had the right to take the sign down. (p. 1136) Using a loud and belligerent tone of voice (p. 1136; p. 1164) and profanities that frightened and intimidated Mrs. Oyster and Samuel (p. 1140; 1164; p. 1167), and while pacing at Mrs. Oyster's front door (p. 1138) respondent continued to demand that Mrs. Oyster and Samuel tell her who had removed the sign and when. (p. 1134; p. 1139)

While at Mrs. Oyster's front door respondent also advocated on behalf of Mr. Richardson (p. 1190), while making disparaging comments about a member of his own bench, Hon. Nick Holowka. Respondent claimed that Judge Holowka had been a "pain [or a thorn] in his ass for the past 30 years." (p. 1138; p. 1171)

Respondent testified at the formal hearing that he did not use the word "ass" when speaking to Mrs. Oyster and her son. (p. 3360-3364) His testimony is unpersuasive. When first asked by the Commission about that statement[14] he categorically denied having made *any* part of the comment. (p.3363) He changed his story before the Master, to admit the comment and deny only the word "ass." (p. 3360-3364; R's Ans. ¶444))

As a result of respondent's conduct Mrs. Oyster felt intimidated (p. 1140; p. 1141, line 22) and began to shake and cry. (p. 1140; p. 1172) Respondent's testimony before the Master that Mrs. Oyster was not upset and did not cry in reaction to his conduct and behavior is false. (p. 544-546; p. R's Ans. ¶445) His false testimony about his interaction with the Oysters is typical of his widespread false statements to avoid responsibility for his misconduct.

## COUNT VII

As a result of the criminal charges, on July 21, 2014, respondent was placed on administrative leave from the bench. (E's Exh 3a; E's Exh. 3b; E's Exh. 3c) He was reinstated in April of 2016 (E's Exh. 3e) and resumed his judicial duties in July of 2016 after the criminal case was dismissed. (p. 554) Respondent was represented in the criminal case by Michael Sharkey. (R's Ans. ¶459-460) Mr. Sharkey's legal fee, still outstanding in its entirety, is $415.250. (R's Ans. ¶461-462; E's Exh. 2e)

During the 2016 election year, before and after returning to the bench, respondent became involved in two election campaigns. One, discussed in the preceding section, was of his long-time friend and law school classmate, David Richardson. (p. 532-533; p. 2917; R's Ans.¶450; R's Ans. ¶451) The other was that of his criminal attorney, Michael Sharkey. (p. 3340; R's Ans. ¶459-460)

[14] Respondent's January 14, 2019, answers to the Commission's 28-Day Letter, Question no. 827-830. (p. 3360-3362)

In April of 2016, Mr. Sharkey declared his candidacy for the office of the prosecuting attorney against the incumbent Timothy Turkelson. (R's Ans. ¶468)

Respondent admitted that during the 2016 campaign he expressed his support for Mr. Richardson's bid for the 40th Circuit Court. (R's Ans. ¶453a) He was also openly supportive of Mr. Sharkey's attempt to defeat Mr. Turkelson in violation of Canon 7(A)(1)(b). (R's Ans. ¶469) Respondent made phone calls to potential voters regarding the placement of the candidates' campaign signs (p. 3339; R's Ans. ¶453d; R's Ans. ¶454; ¶471) and put up campaign signs on various public and private properties. (R's Ans. FC, ¶453d; ¶454; ¶471) Respondent's claim that he did not express his opposition to Judge Holowka's reelection (R's Ans. FC, ¶453b) and was not critical or hostile to individuals who expressed their support for Judge Holowka (R's Ans. FC, ¶453c) was proven false by his October 5, 2016, conduct towards Mrs. Oyster and her son Samuel. Respondent's claim was also refuted by David Best, (p. 680) who testified that at the 2016 Labor Day Parade respondent told him that "Holowka's got to go." (p. 682)

From the time he returned to the bench in July of 2016 until August of 2017 respondent presided over numerous civil and criminal cases in which Mr. Richardson was the attorney of record. (p. 460-465; R's Ans. ¶454; E's Exh. 137)[15] Respondent also presided over Mr. Sharkey's criminal and civil cases before Mr. Sharkey became the county prosecutor (p. 562; R's Ans. ¶463; R's Ans. ¶475), and presided over the criminal cases after Mr. Sharkey became the county prosecutor. (p. 563) Between April and December of 2016 respondent also presided over cases in which Mr. Turkelson, a prosecution witness in respondent's criminal case, (p. 564-565; R's Ans. ¶467) was the attorney of record as the county prosecutor. (R's Ans. ¶473)

[15] Mr. Richardson was unsuccessful in his bid for Judge Holowka's judicial seat.

Records from more than 100 civil and criminal cases, and an accompanying stipulation, established that respondent did not disqualify himself from Mr. Richardson's, Mr. Sharkey's, or Mr. Turkelson's cases. (p. 564; p. 565; p. 566; E's Exh. 137; E's Exh. 138; E's Exh. 139) He also did not provide sufficient on-the-record disclosures of his relationships with these individuals in cases in which they were the attorneys of record, and did not obtain written or on-the-record waivers of any potential conflict of interest from the parties as required by MCR 2.003 (E).

Respondent claims that there was no "requirement or need for disqualification." (R's Ans. to FC, R's Ans ¶457, R's Ans ¶464, R's Ans ¶474; R's Ans ¶476, R's Ans ¶478, R's Ans ¶480) That assertion is false. Canon 3(C) of the Michigan Code of Judicial Conduct (MCJC) requires judges to raise the issue of disqualification whenever there is "cause to believe that grounds for disqualification may exist under MCR 2.003(C)." The grounds for disqualification, listed in MCR 2.003(C), include situations where a judge is biased for or against a party or attorney (MCR 2.003(C)(1)(a)), and those where:

> The judge, based on objective and reasonable perception, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey,* [citations omitted], or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Conduct.

MCR 2.003(C)(1)(b). Canon 2 obligates members of the bench to "avoid all impropriety and appearance of impropriety" and calls for judges to "observe the law and to engage in conduct and manner that promotes public confidence in the integrity and impartiality of the judiciary." (Canons 2(A), 2(B))

Respondent's relationships with Mr. Turkelson, Mr. Sharkey, and Mr. Richardson, albeit vastly different, clearly fit within the concerns expressed by MCR 2.003 and the Canons. Respondent's bias against Mr. Turkelson is obvious and profound. He opposed Mr. Turkelson's

appointment as the Prosecuting Attorney, (p. 556) was critical of Mr. Turkelson's prosecutorial and hiring/firing decisions, (p. 561) became convinced that Mr. Turkelson was involved in a conspiracy to have him removed from his judicial seat, (p. 3367-3370) and accused Mr. Turkelson of conducting an improper criminal investigation of him. (E's Exh. 114a; E's Exh. 114b; and E's Exh. 114c)

As of March of 2016, and certainly by July of 2016, respondent was also considering filing a grievance with the Attorney Grievance Commission and a "libel per se" lawsuit against Mr. Turkelson. (p. 561-562; E's Exh. 114a) Indeed, on May 17, 2017, respondent did file a civil action against, among others, Mr. Turkelson alleging libel/slander and malicious prosecution. (p. 561; E's Exh. 114a; E's Exh. 142) Under these circumstances, respondent was clearly biased against Mr. Turkelson and should have disqualified himself from presiding over all criminal cases in which Mr. Turkelson was the elected prosecutor. The same circumstances created a clear appearance of impropriety which also called for respondent's disqualification.

Even more obvious is respondent's obligation to disqualify himself from all cases in which Mr. Sharkey was the attorney of record whether as a private practitioner or as the county's prosecuting attorney. During the two years as respondent's attorney, Mr. Sharkey devoted an inordinate number of hours to respondent's criminal case routinely working late into the evening and weekends. (p. 2444-2447) During the same two years, respondent encouraged Mr. Sharkey to declare his candidacy against Mr. Turkelson (p. 555) and permitted Mr. Sharkey to use respondent's name on fundraising literature. (E's Exh. 114d) Mr. Sharkey's work and effort produced a very favorable outcome for respondent: a no contest plea to a misdemeanor with a deferred sentence and a dismissal at the end of a short non-reporting probation. It also resulted in

an outstanding bill for $415,250 in legal fees that respondent has yet to begin paying. (p. 571-572; p. 2448- 2449)

Respondent's testimony that he was not aware of the amount of his financial obligation to Mr. Sharkey is not plausible. (p. 571-572) While Respondent may not have received Mr. Sharkey's invoice until November of 2017, (p. 553-554) he was told of Mr. Sharkey's hourly rate of $250 as early as July of 2014. (p. 2440; E's Exh. 2e) On numerous occasions, he offered to start making payments to Mr. Sharkey (p. 2442), and in social settings he openly spoke about the fact that he "owe[d] a lot of money" to Mr. Sharkey and that Mr. Sharkey's legal representation was "going to cost a fortune." (p. 604)

Mr. Sharkey was respondent's attorney. The social, professional, and financial relationship between respondent and Mr. Sharkey created not only a significant appearance of impropriety but a significant risk that respondent was biased in Mr. Sharkey's favor. As such, respondent had an absolute duty to disqualify himself from Mr. Sharkey's cases. He failed to comply with that duty.

Respondent also failed in his duty to provide timely and adequate disclosure of his relationship with Mr. Richardson, Mr. Sharkey, and Mr. Turkelson. Respondent claims that he complied with his duty to disclose by placing written notices, giving his version of his criminal case and its disposition, on counsels' tables. His claim is preposterous. (p. 566-573)

Respondent's written notices, placed on counsels' tables in the courtroom were woefully inadequate. (E's Exh. 114a; E's Exh. 114b; E's Exh. 114c) In the first notice, dated July 18, 2016 (E's Exh. 114a), respondent did not even refer to Mr. Sharkey's representation of him or the debt he owed Mr. Sharkey. Rather, respondent used the 40th Circuit Court's letterhead to accuse his attorney's political opponent of prosecutorial misconduct. At the time, the campaign between Mr.

Sharkey and Mr. Turkelson was in full swing. Respondent's alleged notice was less of a disclosure of a potential conflict of interest than it was campaign literature on behalf of Mr. Sharkey.

In the second and third notice, dated December 7, 2016, and January 3, 2017, respondent disclosed that Mr. Sharkey was his attorney in the criminal case. (E's Exh. 114b; E's 114c) However, he omitted the crucial fact that he owed Mr. Sharkey nearly a half million dollars. He also continued his accusations of prosecutorial misconduct and fabrications against Mr. Turkelson. (E's Exh. 114b; E's Exh. 114c) Each notice also made false allegations that Mr. Turkelson "conducted a felony criminal investigation and initiated a prosecution" against respondent and that "in March of 2016, all … charges brought against [respondent] were dismissed." (E's Exh. 114a; E's Exh. 114b; E's Exh. 114c)

In addition to being inadequate in content, these notices were not properly disclosed or made available to the litigants. (p. 652-653; p. 665-666; p. 676) It is unreasonable to expect that in pro per litigants will enter the attorney arena, scrutinize documents on each counsels' table, understand the significance of respondent's notices, and then raise the issue of disqualification on the record. On many occasions the notices were entirely absent from the attorneys tables. (p. 607-610; p. 659; p. 667; p. 676-677; p. 780; p. 808)

It is irrelevant whether the Lapeer County legal community was aware of the details of respondent's criminal case, his animosity towards Mr. Turkelson, or his assistance in Mr. Richardson's campaign. Disclosure is for the benefit of litigants. (MCJC Canon 1(A)) The knowledge of the Lapeer legal community was useless to attorneys from other counties.

It is also irrelevant whether Mr. Sharkey and Mr. Richardson believed there was a conflict of interest between them and respondent. The duty to disclose belonged to respondent. While

judicial disqualification may be waived, any waiver must be in writing or placed on the record. (MCR 2.003(E); MCJC Canon 3(C); Canon 3(D))

Respondent testified that "quite often" he had made a statement disclosing his potential conflict of interest at the start of the day's docket. (p. 3346) Such a disclosure is insufficient. First, even if respondent's testimony was accurate, "quite often" is not every day nor is it in every case. Second, at the start of the day's docket not all litigants or their counsel would be present in court to hear any announcement. (p. 1404-1405)

Exhibits 137, 138, and 139 list over 100 cases involving Mr. Turkelson, Mr. Richardson and Mr. Sharkey, in which respondent did not disqualify himself and did not obtain written or on-the-record waivers. Respondent presented testimony through his secretary/court recorder, Michelle Schrader, of only three post-January 2017 criminal cases when Mr. Sharkey was the Prosecuting Attorney in which he requested counsel to acknowledge the notice and place a waiver on the record as required by MCR 2.003 (E). (p. 2698 et seq.) Those were the only three cases for which respondent requested Ms. Schrader prepare transcripts. Respondent provided no evidence of any cases involving Mr. Turkelson or Mr. Richardson in which he followed the court rule.

It is audacious for respondent to claim there was no conflict of interest and no appearance of impropriety in these cases that required his disqualification, or at the very least a full disclosure and a written or on-the-record waiver. The evidence proved respondent failed to comply with his judicial responsibilities and under the Court Rules and the Michigan Code of Judicial conduct.

## COUNT VIII

The evidence proved that respondent made numerous misrepresentations to the Michigan State Police, to the Judicial Tenure Commission, to Judge Neithercut, and in his testimony during the hearing.

**False Statements to the Michigan State Police**

Respondent did not tell the truth when first questioned about the Bounce Back, LEORTC, and City of Lapeer funds by Det/Sgt. Pendergraff. (E's Exh. 90c; E's Exh. 90d; E's Exh. 90e; E's Exh. 90f) He falsely claimed that the reason he had deposited those funds in his personal bank accounts was to reimburse himself for money he claimed he had spent out of his own pocket on the LCPO. Respondent told Det/Sgt. Pendergraff that his out of pocket expenses included his staff's lunches/meals, lunches for victims, contributions he had made to the office flower/card/water fund, including more than $1800 in water expenses, and plaques for retiring police officers. Respondent knew these items were not reimbursable.

**False Statements regarding the misdemeanor plea**

Respondent made serious and material misrepresentations with regards to his March 8, 2016, plea in his criminal matter. In his January 14, 2019 answers to the Commission's 28-Day Letter, in his civil case deposition, in a Motion Nunc Pro Tunc filed before Judge Neithercut, in his Answer to the Amended Formal Complaint, and during his testimony before the Master, respondent persistently claimed he did not plead no contest to a criminal misdemeanor, under MCL 750.485, but to a civil accounting statute under MCL 21.44. Respondent also made false and material misrepresentation when he testified that Judge Neithercut did not accept his plea to MCL 750.485. As outlined above, the evidence proved that respondent pled to a criminal misdemeanor statute. His denial of that is a lie. Respondent admitted the lie in his own testimony. He admitted that the argument in his Motion Nunc Pro Tunc that he did not plead to a misdemeanor was "not completely true." (p. 137) He later admitted that he did tender a plea to a misdemeanor. (p. 110-111; p. 3243)

**False Statements regarding financial improprieties:**

As discussed in the sections addressing Counts II – V, respondent made a multitude of serious and material misrepresentations regarding the allegations in those counts. Among the most egregious are:

- That he was not aware of Lapeer County policies.
- That he did not have to follow the County's policies because he was an elected official.
- That he was not a department head.
- That the LCPO was not part of the county.
- Heartland and Bounce Back contracts were not county contracts.
- That he had no duty to inform Lapeer County of the Heartland and Bounce Back contracts or the funds they generated.
- That the funds generated by the Heartland and Bounce Back contracts were not county/public money.
- That he was entitled to deposit the funds from Heartland and Bounce Back contracts into his personal bank accounts.
- That he did not tell Mrs. Hauxwell not to forward the Bounce Back checks to the county.
- That he did not tell Mrs. Hauxwell to give all Bounce Back checks to him.
- That he could reimburse himself for the expenses included in Exhibit 95.
- That the $7,783.66 he presented to Judge Neithercut in his criminal case was accurate.
- That the $7,783.66 he presented to Judge Neithercut represented expenditures for which he could be reimbursed.
- That he contributed an estimated $400 per year for a total of $3200 to the LCPO staff contributory flower/cake/card fund.
- That he paid $1834.25 for office water for the water cooler.
- That he cashed the Ohenley money order to expedite getting the funds to the "appropriate parties."

- That he could not forward the Ohenley money order to the county because his name was on it.

- That he gave the entire amount of the Ohenley money order to Pat Redlin to forward to the county.

- That he was entitled to pocket money based on work his staff did for LEORTC and/or City of Lapeer on county time.

- That he could pocket the LEORTC and City of Lapeer funds because his APAs had flex time.
- That the Corelogic 5000 Account was not for training expenses.

- That the Corelogic 5000 Account could be used for anything within his discretion.

- That the post-2012 on-call donuts expenses were properly labeled as training.

- That the Friday morning donuts were purchased for the public.

- That the LCPO APAs appeared on behalf of the City of Lapeer in jury trials. (p. 334; p. 3393-3395; p. 3404-3405; E's 153; E's Exh. 154; E's Exh. 155)

- That the 2011 and 2012 luncheons included a "training" component.

- That he was entitled to reimbursement for the 2011 and 2012 luncheons.

**False Statements Regarding Respondent's Demeanor – Count VI**

- That he was not confrontational, aggressive, and/or belligerent with the Oysters.

- That Mrs. Oyster did not become visibly upset and cried.

- That he accepted Mrs. Oyster's statement denying any knowledge of the Richardson for Circuit Court campaign sign.

- That he did not make derogatory comments about Judge Holowka.

# CONCLUSION

The evidence overwhelmingly proved that Respondent engaged in improper and illegal conduct and that he made misrepresentations to the MSP, to the Commission, in his deposition, and in his testimony before the Master.

There is no question that respondent pled to a criminal misdemeanor under MCL 750.485. There is also no doubt that Judge Neithercut accepted respondent's no contest plea to that crime. Respondent's arguments to the contrary are false and reveal an attempt to do what he and his attorneys falsely accused Mr. Finnegan of doing on March 8, 2016 – trying to "pull a fast one."

The "Stipulation and Agreement Between the Parties" (E's Exh. 1i) was not a plea agreement but a stipulation to a fact necessary to establish the factual basis for a no-contest plea. The actual plea agreement was set out in the plea agreement forms (E's Exh. 1f; E's Exh. 1h) that respondent and his attorneys executed in court and affirmed on the record before Judge Neithercut. (E's Exh. 1cc; E's Exh. 1(l)) These forms and the court record unequivocally proved that respondent knowingly stipulated to the addition of the criminal misdemeanor to the amended complaint/information and that he knowingly pled to the no contest plea to that misdemeanor. Respondent lacks a criminal record only because the misdemeanor was dismissed by the prosecutor pursuant to the plea and sentence agreement. (E's Exh. 1f; E's Exh. 1k) The fact that respondent no longer has a criminal conviction on his record is irrelevant to whether he entered the no contest plea to a misdemeanor in 2016.

It is indisputable that respondent deposited money into his personal bank accounts that was generated by contracts/agreements with Heartland, Bounce Back, LEORTC, and City of Lapeer. Respondent entered into these contracts/agreements *only* by virtue of his elected position as the Lapeer County Prosecuting Attorney. This rendered these contracts county contracts. It is

implausible that respondent was unaware of the county's policies that required him to submit all contracts/agreements to the Board of Commissioners and to forward all funds to the Treasurer's Office. It is also incredible that respondent would have thought that he did not have to follow county policies. He clearly did. Respondent's inability to even admit that he was a county employee, despite acknowledging that the county paid his salary, demonstrates the breadth of his lies to escape taking responsibility for his actions. Respondent even waffled about whether he was as county department head. (See for example, p. 3274, 3275)

Respondent never thought that his embezzlement would be discovered. Only when confronted by the criminal investigation and the knowledge that Det/Sgt. Pendergraff had his bank records did he attempt to justify taking the money. His justifications are all false.

Respondent claims that the funds were not public money. Respondent received this money *only* by virtue of his official public position as the county prosecutor. His argument that it was not public money was rejected by District Court Judge Dignan, thrice by Circuit Court Judge Neithercut (in his denial of two motions to quash and the Motion Nunc Pro Tunc), by Circuit Court Judge Kumar in the civil case, by the Court of Appeals, and by the Michigan Supreme Court. The Master should also reject respondent's argument.

His biggest lie to justify pocketing the money was that he was reimbursing himself for money he spent on his office years before. Nearly all of his alleged expenditures were not permissible reimbursements. The evidence proved that some of the alleged expenditures did not even come from respondent's pocket.

Respondent was a public official, yet kept absolutely no records or accounting of the money he pocketed or how he had spent it. By keeping no records or accounting he prevented any oversight or scrutiny of his actions. It is implausible that, with a law and a master's degree in

business administration/finance, he did not understand the public nature of these funds or the importance of maintaining accurate records or ledgers of the expenditures they were used for. It is indefensible that respondent kept no records or accounting and now claims he was entitled to take the money. His lack of records demonstrates his guilty intent.

In keeping with his pattern of taking money to which he was not entitled, respondent submitted falsely labeled vouchers for reimbursements for items that he knew were not properly subject to reimbursement.

Respondent continued his misconduct after he took the bench. He mistreated Mrs. Oyster and disparaged a member of his own bench. His denials of such are not credible and his conduct reprehensible. Respondent also failed to comply with the court rules and the Canons by failing to properly disclose and disqualify himself from matters in which he had a clear duty to do so.

Respondent argued that the Master's report was already written by incessantly repeating a Judge Neithercut quote as his mantra. It is true that Judge Neithercut, when taking respondent's no contest plea stated:

> I'm not going to take time today. Cause what I remember is when Mr. Konschuh was a county prosecutor he came into possession of a small amount of money which was not accounted for in the way that the county treasurer wants, and was not an exact record kept of that money.

This quote was made for the sole purpose of finding the factual basis under which Judge Neithercut accepted respondent's plea to a misdemeanor and found respondent guilty. This quote refers only to the criminal case and does not address, nor is relevant to any other allegations in the Amended Formal Complaint.[16]

[16] This quote has no relevancy to the Ohenly money order, the 2000 through 2011 LEORTC checks, the false reimbursement vouchers, respondent's treatment of the Oysters, the failure to disclose/disqualify, and the misrepresentations.

Respondent's actions constitute:

(a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.202(B);

(b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.202(B); MCR 9.104(1)

(c) Conduct in violation of the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A);

(d) Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCE 9.104(2)

(e) Conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3)

(f) Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, in violation of MRPC 8.4 and MCR 9.104(4).

(g) Conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);

(h) Conduct that violates a criminal law of a state or of the United States, contrary to MCR 9.104(5), including but not limited to MCL 750.175 (embezzlement by a public official over $50), MCL 750.485, (public official – failure to account for public money), and MCL 750.249 (uttering and publishing)

(i) Conduct involving fraud, deceit, or intentional misrepresentations, contrary to MCR 9.202(B); MRPC 8.4(c).

(j) Conduct involving intentional misrepresentations and misleading statements to the Judicial Tenure Commission, contrary to MCR 9.202(B);

(k) Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

(l) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

(m) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;

(n) Failure to respect and observe the law, contrary to MCJC Canon 2(B);

(o) Failure to be faithful to the law and maintain professional competence in it, contrary to MCJC 3(A)(1);

(p) Failure to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

(q) Failure to treat people with courtesy and respect, contrary to MCJC Canon 2 (B).

(r) Use of the prestige of office to advance personal business interests or those of others, contrary to MCJC Canon 2(C);

(s) Failure to disqualify, contrary to MCJC Canon 3(C) and MCR 2.003(C);

(t) Failure to disclose possible grounds for disqualification, contrary to MCJC Canon 3(C) and MCR 2.003;

(u) Public endorsement of a candidate for non-judicial office, contrary to MCJC Canon 7.

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