STATE OF MICHIGAN

BEFORE THE SUPREME COURT

COMPLAINT AGAINST:	Case No. 159088
HON. BYRON J. KONSCHUH 40th Circuit Court 255 Clay Street Lapeer, Michigan 48446 .	Formal Complaint No. 100

Respondent Hon. Byron Konschuh's Petition for Review

Filed under AO 2019-6

Oral Argument Requested

COLLINS EINHORN FARRELL PC
Donald D. Campbell (P43088)
Trent B. Collier (P66448)
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Donald.Campbell@ceflawyers.com
Trent.Collier@ceflawyers.com
Attorneys for Hon. Byron J. Konschuh

Dated: September 2, 2020

Table of Contents

Index of Authorities

Cases

Statutes

Rules

Constitutional Provisions

Appendix Index

Appendix	Contents
1	June 30, 2019 (1-70) July 1, 2019 (71-213)
2	July 2, 2019 (214-345) July 3, 2019 (346-457)
3	July 8, 2019 (458-578) July 9, 2019 (579-768)
4	July 10, 2019 (769-946)
5	July 11, 2019 (947-1125)
6	July 12, 2019 (1126-1196) August 14, 2019 (1197-1389)
7	August 15, 2019 (1390-1579)
8	August 16, 2019 (1580-1770)
9	August 19, 2019 (1771-1935)
10	August 20, 2019 (1936-2022) August 21, 2019 (2023-2144)
11	August 26, 2019 (2145-2275) August 29, 2019 (2508-2694)
12	August 30, 2019 (2695-2749) September 4, 2019 (2750-2913)
13	September 5, 2019 (2913-3079) September 6, 2019 (3080-3209)
14	September 9, 2019 (3210-3387)
15	September 23, 2019 (3388-3494) Exhibit 1p (March 31, 2016 sentencing hearing) Exhibit 6e (Sherri Ohenley money order) Exhibit 6i (invoice voucher form) Exhibit 5c (request for new accounts) Exhibit 5b (deposit advice) Exhibit 5m (resolution) Exhibit 5k (adopted accounting procedures) Exhibit 93A (Corelogic Check) Exhibit 93E (Corelogic Check) Exhibits 103a-1030 (reimbursements for donuts) Exhibit 1a (felony complaint) Exhibit 1b (order – special prosecutor) Exhibit 1c (bindover documents) Exhibit 1i (stipulation) Exhibit 1t (motion for entry of order nunc pro tunc)

	Exhibit 1cc (March 8, 2016 hearing)
16	Exhibit 1f (plea agreement) Exhibit 1m (March 6, 2016 plea hearing) Exhibit 1p (March 31, 2016 sentencing hearing) Exhibit 112 (letter re: ethics expert) Exhibit 113 (response to letter) Exhibit 94f (response to JTC letter)
17	Exhibit 89 (Konschuh deposition) Master's Findings of Fact and Conclusions of Law Decision and Recommendation for Discipline *Grievance Administrator v Wax*

Statement of Jurisdiction

On the Judicial Tenure Commission's recommendation, this Court may censure, suspend, retire, or remove a judge for misconduct in office and "conduct that is clearly prejudicial to the administration of justice." Const. 1963, art VI § 30. A respondent may ask this Court to review the Commission's recommendation by filing a petition within 28 days after entry of the Commission's order. MCR 9.122(A)(1). Respondent Hon. Byron Konschuh filed this petition within 28 days of the Commission's August 5, 2020 *Decision and Recommendation for Discipline*.

Questions Presented

1. To resolve a criminal proceeding in which he was the defendant, the respondent agreed to a stipulation that did not include a criminal charge. The prosecutor then unilaterally added a misdemeanor charge prior to the plea, and respondent failed to object to the misdemeanor count at his plea hearing. He later filed a motion asking the court to change his plea from a misdemeanor to the originally stipulated plea. Did the respondent commit judicial misconduct?

   Respondent answers: No.

   The Master answered: No.

   The Judicial Tenure Commission answered: Yes.

   This Court should answer: No.

2. While acting as prosecutor, the respondent paid for lunches, coffee, and other treats for his office. He later reimbursed himself for these expenses with funds the prosecutor's office received through a bad-check program. Did the respondent commit judicial misconduct?

   Respondent answers: No.

   The Master answered: No.

   The Judicial Tenure Commission answered: Yes.

   This Court should answer: No.

3. While acting as prosecutor, the respondent paid for lunches, coffee, and other treats for his office. He later reimbursed himself for these expenses with funds the prosecutor's office received through training programs. Did the respondent commit judicial misconduct?

Respondent answers: No.

The Master answered: No.

The Judicial Tenure Commission answered: Yes.

This Court should answer: No.

4. The respondent recalled giving $60.28 to his legal assistant to forward to the county. The legal assistant recalled receiving only $45.28. Rejecting the Master's findings, the Commission concluded that the respondent must be lying and that he really pocketed $15. Did Disciplinary Counsel prove this claim by a preponderance of the evidence?

   Respondent answers: No.

   The Master answered: No.

   The Judicial Tenure Commission answered: Yes.

   This Court should answer: No.

5. The respondent did not make full disclosures of potential conflicts in every case, both substantive and non-substantive. He placed disclosures on counsel's tables and addressed conflicts only in substantive, contested cases. Did the respondent commit judicial misconduct?

   Respondent conceded this point below based on the Masters' finding of misconduct.

6. The respondent answered numerous requests from a police investigator and Disciplinary Counsel. The Commission later rejected the legal arguments underlying the respondent's answers. Does the Commission's disagreement with the respondent's legal position establish that he intentionally tried to mislead the investigator and Disciplinary Counsel?

   Respondent answers: No.

The Master answered: No.

The Judicial Tenure Commission answered: Yes.

This Court should answer: No.

7. The respondent failed to make complete disclosures of conflicts in some cases. He did so based in part on his chief judge's direction to address conflicts only in substantive, contested cases. Is the respondent's acknowledged misconduct subject to discipline greater than censure?

Respondent answers: No.

The Judicial Tenure Commission answered: Yes.

This Court should answer: No.

Introduction

The Judicial Tenure Commission's *Decision and Recommendation for Discipline* (the "Recommendation") makes a serious mistake. It asks this Court to remove Hon. Byron J. Konschuh based on his handling of funds as Lapeer County's prosecutor and his subsequent statements about those funds. In the Commission's view, Konschuh embezzled over a thousand dollars and then lied to cover up his actions. The Commission's conclusion is wrong—and contrary to findings from the Master and Judge Neithercut.

In fact, Konschuh spent thousands of his own dollars on refreshments, lunches, and other treats for staff in the prosecutor's office. He also believed that the prosecutor's office was a separate political unit from the county board of commissioners, and that the board could not control funds belonging to the prosecutor's office. So, when the prosecutor's office received funds through a public bad-check program and various trainings, Konschuh thought it was appropriate to reimburse himself for office-related expenses. As Judge Neithercut concluded, any funds that Konschuh used as reimbursement were less than his out-of-pocket payments on behalf of the prosecutor's office—which means the county didn't actually lose any money. Exhibit 1p, p 25 ("I don't think Lapeer County was denied the money. I think Lapeer County was denied the ability to account for it. That's what the charge was.").

Konschuh's approach to handling these funds was not unique; his predecessor, Justus Scott (now also a judge in Lapeer County), also kept funds that the prosecutor's office received. Even those who faulted Konschuh admitted that the law governing those funds is vague. As Lapeer County controller John Biscoe said, the rules applicable to these funds were "foggy," "fuzzy," "iffy," and "gray." Tr, pp 993, 1033. But there was nothing foggy about Konschuh's good faith and candor. The person best positioned to assess Konschuh's credibility—the late Hon. William Caprathe, whom this Court appointed as master—concluded that Disciplinary Counsel failed to establish misconduct for all counts save Count VII. *Master's Findings of Fact and Conclusions of Law* ("Master's Report"). The Master was correct; Konschuh did not engage in deliberate, fraudulent, or criminal conduct.

The Commission's analysis goes astray in three consistent ways. First, the Commission does not address evidence that contradicts Disciplinary Counsel's allegations—including evidence that Konschuh was reimbursing himself. By skipping evidence that supports Konschuh's assertions, the Commission recommends discipline based on an inaccurate narrative. The full record supports the Master's conclusions.

Second, the Commission treats any difference between Disciplinary Counsel's assertions and Konschuh's assertions as an intentional misrepresentation on Konschuh's part. That approach violates the rule that incorrect statements are judicial misconduct only if the respondent had wrongful intent. *In re Gorcyca,* 500 Mich 588, 639; 902 NW2d 828 (2017). There is no evidence of wrongful intent here. So there should be no finding of intentional misrepresentations.

Third, the Commission gave no deference to the Master's findings. True, deference is a matter of discretion. But the Master was the only decision-maker in the long history of this matter to hear Konschuh and the witnesses against him testify under oath. From this superior vantage point, the Master rejected most of Disciplinary Counsel's allegations as unproven. This fact should have weighed heavily in the Commission's analysis. Under the facts of this case, the Commission's decision to give *no* weight to the Master's findings was an abuse of discretion.

The adage "no good deed goes unpunished" might apply here, except the Commission does something far worse than recommend punishing Konschuh's good deeds. It asks the Court to ignore those good deeds—to take them out of the Court's analysis entirely—and analyze the case as if Konschuh was not reimbursing himself. (It does so even though it acknowledges that Disciplinary Counsel failed to prove misconduct under Count V, which involves reimbursement.)

The Court should reject that approach. Properly applied, the *Brown* factors indicate that Konschuh's misconduct warrants no more than censure. Accordingly, Konschuh asks this Court to address the full record, apply *Gorcyca,* and give some deference to the Master's findings.

Facts and Procedural History

a. Konschuh often bought refreshments for the office.

Konschuh joined the Lapeer Prosecutor's Office as an assistant prosecuting attorney in 1988. Tr, p 77. He became Lapeer County's prosecutor in 2000. *Id.,* p 78. He was appointed to the bench in 2013 and now sits on Michigan's 40th Circuit Court in Lapeer County. *Id.* at 76, 79.

Konschuh had a practice of buying refreshments for his office. He spent his own money to buy snacks, meals, and coffee for his staff. Tr, p 277. He kept receipts but didn't create a formal accounting. *Id.,* pp 262, 277. (Nor is there any evidence that Konschuh was legally required to do so.) For example, Konschuh took members of his staff to a local restaurant on various occasions. *Id.,* pp 522-24. He bought cookies for the office, and ice and refreshments for office events. *Id.,* pp 524, 529-30. He bought drinks and appetizers at post-trial celebrations. *Id.,* pp 699-70; 3087. Konschuh also purchased appliances for the office, such as a dishwasher and a coffeemaker. Tr, pp 2304, 3062-63. He bought another coffeemaker in 2011 and received $26.37 as reimbursement. *Id.,* p 375

Cathy Strong served the county for more than 40 years. She served 7 different prosecutors. She was Konschuh's former office manager. She recalled Konschuh buying lunches and snacks for crime victims who were working with the prosecutor's office. Tr, pp 2321-2322. Konschuh's wife, Lorraine Konschuh, corroborated his testimony about buying coffee for the office. *Id.,* p 280. (Others within the prosecutor's office would contribute toward coffee and water but those contributions were irregular and a source of controversy in the office. Tr, p 2304.)

Konschuh's expenditures for the prosecutor's office exceeded $7,700, as Judge Neithercut concluded. Tr, pp 714; 3318. Konschuh estimated that he paid over $16,000 in office-related expenses, although he lacks receipts for some of these expenses. *Id.,* pp 3318-3319. Konschuh's $16,000 estimate includes close to $1,800 that he spent on water. *Id.,* pp 709; 3102. He either spent office funds directly or reimbursed himself with BounceBack funds, as discussed below. *Id.,* p 717.

b. The prosecutor's office used Transmodus to collect on bad checks.

The first bad-check program at issue here is Transmodus. In 2008, while acting as prosecutor, Konschuh contracted with Transmodus to collect from individuals who passed bad checks. Tr, pp 157-58. Transmodus charged a $35 collection fee for each check. *Id.*, p 163.

Through this program, the prosecutor's office obtained a money order from Sherri O'Henley for $60.28, consisting of $25.28 for the underlying check and a $35 fee. Tr, pp 181-82, Exhibit 6e. The money order was payable to Byron J. Konschuh. Tr, pp 181-82. It sat on the desk of then Chief Assistant Prosecuting Attorney Michael Hodges for several months. *Id.*, pp 1689-91.

Konschuh believed that he could not sign the money order over to the county. Tr, pp 188-89; 2986. So, in May 2009, he decided to cash the money order and give the money to the appropriate parties. *Id.*, p 2986. Having cashed the money order into his own account, Konschuh gave cash to Patricia Redlin to forward to the county. *Id.*, p 191; Exhibit 6h. The county distributed that amount to the victim of the bad check. Tr p 192; Exhibit 6i.

The county only received $45.28 of the $60.28 total. *Amended Formal Complaint*, ¶68. Konschuh recalled giving $60.28 to Redlin. Tr p 195. He did not take the missing $15 and doesn't know what happened to it. *Id.*, p 2987. Redlin doesn't know either. *Id.*, p 2074.

c. The prosecutor's office switched to BounceBack.

The prosecutor's office felt that there were problems with Transmodus. It therefore looked for a new bad-check-collections company. Tr, p 161. In 2008, Konschuh entered into an agreement with BounceBack, Inc. that was similar to the agreement with Transmodus. *Id.*, p 220. BounceBack is a popular program with prosecutors in Michigan and other states. *Id.*, p 1757.

Before entering into this agreement, Konschuh spoke to Norm Early, a Colorado district attorney who used BounceBack. *Id.*, pp 702; 1681-83;

1756-57. Early told Konschuh that he used BounceBack funds for his office's benefit. *Id.* Konschuh recalled speaking to other prosecutors about the BounceBack program but couldn't remember their names. *Id.,* p 703. Mike Hodges corroborated Konschuh's testimony. *Id.,* pp 1681-1683.

BounceBack and the prosecutor's office entered into agreements in October 2008, December 2008, and January 2009. Tr, p 221. Offenders paid a $40 processing fee per check, a $25 payment plan fee, a $25 victim fee, and a $95 educational fee. *Id.,* p 227. The prosecutor's office received $5 from each processing fee paid. *Id.,* p 228. BounceBack sent checks payable to the prosecutor's office. *Id.,* p 229.

BounceBack contracts were with the prosecutor's office, not with Lapeer County. *Id.,* p 226. Biscoe confirmed that the BounceBack contracts were with the prosecutor's office—though, "in [his] opinion," they should have been with the county. *Id.,* pp 1112-13. Konschuh believed that the funds generated under the contract were his to use for the benefit of his office. *Id.,* p 3245.

At some point, Lapeer County had a policy requiring county departments and county elected officials to submit contracts to the county board of commissioners for review. Tr, p 167. Konschuh didn't receive a book of county policies when he joined the prosecutor's office. *Id.,* pp 209; 2984. Strong confirmed that the office didn't receive a binder. *Id.,* p 2296. She testified that the policies were available only via computer. *Id.* There is doubt about whether the contracts policy was even in effect in 2008. Biscoe testified that he didn't believe the policy existed in written form in 2008. *Id.,* pp 982-83. The county uploaded the policy in 2009—after Konschuh executed the BounceBack agreement. *Id.,* p 983.

Biscoe testified that a "Request for New Accounts" form (Exhibit 5C) was in effect when Konschuh was a prosecutor. Tr, p 900. That form doesn't address whether the BounceBack funds were county funds. Exhibit 5C. He testified that a deposit advice form (Exhibit 5B) was in effect "at least for part of the time … that Konschuh was the prosecuting attorney for Lapeer County." Tr, p 903. Similarly, this blank form doesn't address Konschuh's obligations concerning BounceBack funds. Neither the county's cash

receipts policy (Exhibit 5K) nor its claims-processing procedure (Exhibit 5M) identifies which funds belonged to the county and which did not. *Id.,* p 902.

The BounceBack program was public knowledge. Merchants had to sign up with BounceBack for restitution services. Tr, pp 2989-90. So Konschuh's office sent a notice to Lapeer County merchants to notify them about the new program. *Id.,* p 240. The program also received publicity in a local newspaper. *Id.,* p 241. Given this degree of publicity, Konschuh believed that the Board of Commissioners knew about the BounceBack program. *Id.,* p 238.

Konschuh treated the checks from BounceBack as reimbursements for expenses he already incurred for the prosecutor's office and deposited them into his own accounts. Tr, p 273; 2981. He also used one check to fund a post-work celebration for his staff at Abruzzo's restaurant. *Id.,* p 266. He received around 40 checks, totaling just over a thousand dollars over five years. *Id.,* p 248.

Konschuh did not view these funds as county monies subject to MCL 129.11. Tr, pp 250; 2959, 2989. And he was not alone. His chief assistant prosecuting attorney, Mike Hodges, testified that he couldn't recall thinking that the county commissioners had to review and approve the contract. *Id.,* p 1743.

d. The prosecutor's office received fees from the City of Lapeer.

From the early 1990s until 2008, attorneys from the Lapeer County Prosecutor's Office would assist the City of Lapeer with matters in the district court. Tr, p 331. City attorneys Ron Shamblin or Bruce Lawrence delivered checks for these services to the prosecutor's office. *Id.,* p 337. Konschuh estimated that his office received between $300 and $500 per year for this work while he was the prosecutor. *Id.* He also appeared at pretrials on behalf of the City of Lapeer. *Id.,* p 3097.

Mike Hodges confirmed that Konschuh personally covered cases for the City of Lapeer: "Konschuh did numerous Lapeer City pretrials." Tr, p 1736. Tom Sparrow confirmed Konschuh's work as a prosecutor as well:

"…Byron Konschuh would routinely come down and do pretrials." *Id.,* p 2173.

Konschuh deposited these checks for this work into his checking account as reimbursement for expenses he incurred to benefit the prosecutor's office. Tr, pp 338-339. He understood that his predecessor, Justus Scott, did the same thing. *Id.,* pp 338; 351. Unlike Scott, Konschuh shared these funds with the prosecutor's office. *Id.,* p 338.

e. The prosecutor's office established a budget line item corresponding to the Corelogic settlement fund.

In 2011 and 2012, the prosecutor's office represented the Lapeer County treasurer in litigation with a company called Corelogic. Tr, p 413. Steve Beatty, an assistant prosecuting attorney, handled the file. *Id.* The Corelogic litigation resulted in a settlement. *Id.,* p 414.

Corelogic issued two checks. Tr, p 414. One check, issued to "Lapeer, County of," was for $100,000. *Id.* at 416; Exhibit 93A. Steve Beatty added "Treasurer" to this check. *Id.,* p 2595. Corelogic issued a second check to "Lapeer, County of" for $5,000. *Id.,* p 416, 419; Exhibit 93E. This time, Beatty added "prosecutor" to that check. Tr, p 2596. He didn't tell Konschuh that he was altering these checks. *Id.,* p 2666.[1] He made these alterations based on his discussions with county treasurer Dana Miller. *Id.,* pp 2596-2598. The $5,000 check represented fees for Beatty's legal services. *Id.,* p 419. The prosecutor's office forwarded both checks to the county. *Id.,* pp 420, 423.

Beatty discussed how to use this $5,000 with John Biscoe, the Lapeer County controller. Tr, pp 424-25; 470. Konschuh wasn't involved in that discussion. *Id.,* p 471. (Although Biscoe believes that Konschuh was at his meeting with Beatty, *id.,* p 964, Beatty confirmed that he was not. *Id.,* pp 2668, 2684.) After talking to Biscoe, Beatty told Konschuh that he could use the $5,000 fund for the benefit of the prosecutor's office. *Id.,* pp 474-75. Konschuh understood that the $5,000 fund would become a special line item for discretionary use in the prosecutor's office budget. *Id.,* pp 423-25.

[1] Disciplinary Counsel accused Konschuh of altering these checks. See *Amended Formal Complaint,* p 63. The record disproved that allegation.

Biscoe testified that he believed the $5,000 fund was public but he stressed that was just "in [his] opinion." *Id.,* p 975.

f. The prosecutor's office provided trainings and updates for the Corrections Academy and local police.

The prosecutor's office also received compensation for training sessions. It conducted training sessions for the Law Enforcement Officers Regional Training Commission (the "Corrections Academy"). Tr, p 286. The Corrections Academy didn't pay the prosecutor's office for its training sessions until 2011. *Id.,* pp 508-9.

The prosecutor's office also conducted training sessions for local law enforcement. Tr, p 1318. It received payment for these training sessions, both while Konschuh was prosecutor and while his predecessor, now-Judge Justus Scott, was prosecutor. *Id.* Judge Scott kept all of the fees earned through these training sessions—in contrast with Konschuh, who used the fees to benefit the prosecutor's office. *Id.,* p 3304.

Although he was present through each session, Konschuh didn't train the entire time. Tr, p 739. When he was not training, Konschuh would attend each session so he could answer questions and know what his staff was teaching. *Id.,* pp 310-11. He also set up the room and cleaned afterwards. *Id.,* p 329. Beatty testified that Konschuh opened and closed 911 dispatch training and brought donuts. *Id.,* p 2654.

In 2011 and 2012, Cailin Wilson of the prosecutor's office conducted trainings at the Corrections Academy. Tr, pp 83; 285. Konschuh had a flextime approach to working hours in the prosecutor's office. *Id.,* p 353. He allowed staff to leave early when necessary because they often worked evenings and weekends without overtime pay. *Id.,* pp 353; 2630. Given this approach, Wilson didn't need to use vacation time when she presented to the Corrections Academy. *Id.,* p 283.

During Konschuh's tenure as prosecutor, the Corrections Academy issued a check for $300 and a check for $480. Tr, p 288. Both checks were payable to the Lapeer County Prosecutor's Office. *Id.* Konschuh gave $80 to Wilson as extra compensation for her work at the Corrections Academy. *Id.,*

pp 298; 1433. Wilson testified that she gave the remaining funds to Konschuh for office expenditures such as coffee, water, and meals. *Id.,* pp 1515-18.

Konschuh didn't keep a record of funds he received through training programs. *Id.,* p 326. He shared some of the funds from the Corrections Academy with his staff by taking them to a local restaurant. *Id.,* pp 324-25. He used remaining funds as reimbursement for office expenses. He later received 1099s for some of the Corrections Academy checks. *Id.* pp 324, 2292.

g. Konschuh organized staff lunches that had the dual purpose of training and social bonding.

The prosecutor's office has a longstanding tradition of hosting a holiday luncheon in December and an Administrative Professionals Day luncheon in April. Tr, p 388. These luncheons were both social events and opportunities to discuss and improve office operation. *Id.,* pp 390; 3048. Konschuh often implemented changes at the office based on discussions at these luncheons. *Id.,* p 391. Biscoe acknowledged that this dual-purpose approach was arguably permissible. *Id.,* p 1058.

From 2001 through 2012, Konschuh continued the tradition of taking office staff to lunch in April and December. Tr, pp 437-443. He didn't submit reimbursement requests for these lunches until December 2011. *Id.,* pp 443-44; 3085-86. He began seeking reimbursement nine months before the prosecutor's office established a $5,000 line item with funds from the Corelogic settlement. Biscoe approved all of those reimbursement requests.

Based on conversations with Steve Beatty, Konschuh understood that he should label any request for reimbursement as "training." Tr, p 495. Biscoe testified that "training" includes staff development. *Id.,* p 1065. Subsequently, Konschuh submitted various reimbursement requests, such as a December 2011 receipt for $125.25 from a holiday lunch. *Id.,* pp 389, 394-98, 427-429.

Disciplinary Counsel accused Konschuh of misconduct relating to these lunches. The Commission held that Disciplinary Counsel failed to prove these allegations by a preponderance of the evidence.[2]

h. Konschuh and his staff bought donuts for the office.

Attorneys in the prosecutor's office took turns being on-call for the week. Tr, p 488. An on-call attorney would be available at all hours to answer legal questions from police agencies. The on-call attorney received extra compensation for that week. *Id.* The prosecutor's office had a custom in which the on-call attorney for that week would buy donuts for the office on Fridays. *Id.,* pp 488; 1250. Konschuh continued that practice. *Id.,* p 489.

From 2001 to 2012, Konschuh did not submit reimbursement requests when he bought donuts. Tr, p 489. Beginning in 2012—after Biscoe approved the $5,000 line item for the prosecutor's office—Konschuh submitted reimbursement requests for donuts. *Id.,* p 490. His reimbursement requests included donuts that he purchased as well as donuts that other attorneys purchased. *Id.,* p 492. Those attorneys would receive reimbursements as well. Exhibit 103a-103o; Tr, p 2613.

Konschuh's staff would place the donuts on a table near Konschuh's office, toward the back of the suite. *Id.,* p 1251. Witnesses, victims, and police officers would often visit the office and a have a cup of coffee from the machine at the back of the suite. *Id.,* p 2306. They would also be free to help themselves to any donuts or snacks in that area. *Id.,* p 2571. That happened frequently, as Beatty testified. *Id.,* p 2572.

i. Konschuh spent funds on trophies and plaques.

The prosecutor's office had a tradition of buying plaques and trophies for law-enforcement officials and Konschuh decided to continue that tradition. Tr, pp 467; 3088. Apart from a plaque for Cathy Strong, all of the plaques were for law-enforcement officials. *Id.,* p 451. For example, in 2004, he purchased plaques for two deputy sheriffs. *Id.,* p 450. Konschuh

[2] The Commission held that Disciplinary Counsel failed to prove misconduct under Count VI. The brief does not address those allegations.

also used the BounceBack, the Corrections Academy, and City of Lapeer funds to reimburse himself for buying trophies and plaques. *Id.,* pp 449-51. Members of his office staff occasionally contributed to plaques and trophies, too. *Id.,* p 452.

j. Konschuh was prosecuted after his judicial appointment.

In July 2014, the Shiawassee County Prosecuting Attorney, acting as special prosecutor through the Michigan Office of the Attorney General, charged Konschuh with five counts of embezzlement by a public official over $50 in violation of MCL 750.175.[3] See *People v Konschuh,* Case No. 14-1779-FY 71-A District Court. See also Tr, pp 548-49; Exhibit 1a. Deana Finnegan was the special prosecutor. Tr, pp 81, 85; Exhibit 1b. She later noted that "[it]was never the goal of the prosecution to hang Mr. Konschuh with a felony. It was a goal to acknowledge that something adverse had happened." See March 31, 2016 transcript, attached to Exhibit 1t, pp 8-9.

Mike Sharkey and Tom Pabst represented Konschuh in the criminal matter. Tr, p 83. His preliminary examination was in September and October 2014. *Id.,* p 86. Sharkey argued that the funds at issue were not public funds. *Id.,* p 87. The district court disagreed and bound Konschuh for trial. *Id.,* pp 86, 88-89; Exhibit 1c.

The parties mediated the charges on March 8, 2016. Tr, p 2355. At the end of the mediation, the parties signed a stipulation that set forth their agreement. The stipulation did not mention a misdemeanor:

> In order to prevent further taxpayer expense of a trial in this matter, the parties have agreed that 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

[3] This section requires proof that the defendant "knowingly and unlawfully" appropriated public funds to their own use. See *People v Hopper,* 274 Mich 418, 423; 264 NW 849 (1936) (discussing section 175 of the Michigan Penal Code).

> Court, the matter will be dismissed with prejudice …

Tr, pp 101-102; Exhibit 1i. The parties' agreement did not involve a plea to MCL 750.485. *Id.,* pp 2368; 2963; 2772

After mediation, Finnegan arrived at court with an amended complaint. Tr, p 2368, Exhibit 1e. The amendment surprised Konschuh. *Id,* p 3218. It also surprised Tom Pabst, who believed that Finnegan "pulled a fast one" by adding the misdemeanor count. *Id.,* p 2858. The parties didn't even discuss adding a count under MCL 750.485, much less agree to do so. *Id.,* p 2368. The amended complaint produced at the hearing was the first time anyone raised that issue. *Id.*

Finnegan described the plea agreement in court, stating that Konschuh would plead to Count 6, a misdemeanor, and that the court would dismiss the charge if he successfully completed the delayed sentence. Tr, pp 105-6; Exhibit 1L; Exhibit 1cc. Konschuh signed a plea agreement stating that he was pleading no contest to "failure to account contrary to MCL 750.485." Tr, pp 98-100; Exhibit 1f. Judge Neithercut accepted this plea but indicated that he would keep the count open, pending completion of probation:

> … [T]he 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.*

Id., p 3238; Exhibit 1m at 12 (emphasis added). The court decided to "follow protocol," which meant getting a presentencing report and having Konschuh return for sentencing. Exhibit 1m at 13.

The court did not mention MCL 750.485 at the March 31, 2016 hearing. See Exhibit 1p. Instead, the court recited the agreement that

Konschuh worked out with the prosecutor and held that the county was not entitled to restitution. *Id.,* pp 23-25. Judge Neithercut added that the county did not lose any money through Konschuh's actions:

> I don't think Lapeer County was denied the money. I think Lapeer County was denied the ability to account for it. That's what the charge was.
>
> And I note that the restitution added up to $1,802. I have other information that Mr. Konschuh made contributions, out of his own funds at different times, of $7,783.63. I'm going to say that balances it out. The restitution is zeroed out.

Exhibit 1p, p 25. The Court then delayed sentencing until July 1, 2016. *Id.,* p 26. When that date arrived, the court dismissed the case with prejudice. *Id.,* p 133. Konschuh was never sentenced and did not "receive a criminal misdemeanor conviction." *Id.,* pp 2965-66; 3104.

k. Konschuh files a motion to modify the order.

In May 2017, Konschuh filed a civil action against certain individuals who worked for Lapeer County. Tr, p 140. The lawsuit included a malicious-prosecution count, which required proof that the underlying matter was resolved in the plaintiff's favor. *Id.,* p 140. Tom Pabst, Konschuh's attorney, argued that "the criminal proceedings terminated in Konschuh's favor with a no contest plea to an arguable misdemeanor that was ultimately dismissed." *Id.,* p 143.

In February 2018, Pabst filed a *Motion for Entry of Order Nunc Pro Tunc*. Exhibit 1T, 135. Konschuh did not see the motion before Pabst filed it. *Id.,* p 2978. The motion argued that Konschuh pleaded only 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." *Id.,* pp 136-37. It asked the court to correct the record by stating that Konschuh did not plead no contest to a misdemeanor. *Id.*

Pabst explained the rationale behind this motion: "I always felt that there was a mistake made here, that that stipulation controls the deal. That's the deal we had. I was thrilled at that deal. It did not include 750 or any misdemeanor whatsoever, period. And if there is any doubt about it, like any facilitation, like any mediation that's been reduced to writing, the writing controls. That's my view." Tr, pp 2776-2777. Consequently, the motion argued "that [Konschuh] didn't get the deal that he did agree to and stipulated to with the prosecutor[.]" *Id.,* p 2887. The court denied Konschuh's motion. Tr, p 144.

l. Konschuh disclosed a conflict with Sharkey in contested matters but usually not in uncontested matters.

Chief Judge Holowka suspended Konschuh in July 2014 after Finnegan charged him with five felony counts. Tr, p 549. Konschuh returned to the bench in July 2016. *Id.,* p 562. At that time, Konschuh asked Chief Judge Holowka to authorize retaining an ethics expert to assist with recusals and conflicts. *Id.,* p 2409; Exhibit 112. Judge Holowka denied that request. Tr, p 2409, Exhibit 113. He told Konschuh to "handle the criminal cases at the pretrial level, potential adjournments, scheduling, ministerial acts, … that if anything was going to be contested like a preliminary examination," he should recuse himself. *Id.,* p 3183.

In Lapeer County, "it was common knowledge" that Sharkey represented Konschuh. Tr, pp 603; 790. Sharkey appeared before Konschuh after becoming prosecutor in January 2017. *Id.,* p 562. Konschuh didn't have a policy of disqualifying himself from any case involving Sharkey. *Id.,* pp 563-65, 567. He made disclosures on the record—although not in every case. *Id.,* p 565. If a matter involved traffic offenses or probation, he didn't address his association with Sharkey. *Id.,* pp 565-66.

Some witnesses attested to cases in which Konschuh did not disclose any relationship with Sharkey. Tr, pp 652, 665, 675, 803. But Colleen Starr testified that she heard one of Konschuh's disclosures about Sharkey. *Id.,* p 590. She also noted that she had a written record of a disclosure in one case. *Id.,* p 597. Although Starr also mentioned files for which she lacked a disclosure, she acknowledged that those cases represented a "very small

percentage of the overall cases that [she] had in front of Konschuh[.]" *Id.,* pp 595, 609. Lawrence Gadd also testified that Konschuh discussed his background with Sharkey before a facilitation in which Sharkey was opposing counsel. *Id.,* p 2550.

In addition to statements from the bench, Konschuh placed disclosure statements on the attorneys' tables, as Starr testified. Tr, pp 588, 607-08. These disclosures were not always available. *Id.,* p 608. But Konschuh's court reporter, Michelle Schrader, testified that Konschuh referenced these disclosures from the bench every Wednesday during the court's criminal docket. *Id.,* p 2711.

Sharkey charged Konschuh $415,250 for legal services. Tr, pp 84; 552. Konschuh didn't receive his itemized bill until October 2017. *Id.,* pp 553; 2448. Until that time, Sharkey had not given Konschuh any billing statements and Konschuh had no idea how much Sharkey was going to charge him. *Id.,* pp 2399; 3198-99.

m. Konschuh disclosed a conflict with Tim Turkelson in contested matters but usually not in uncontested matters.

When Governor Snyder appointed Konschuh to the 40th Circuit Court in Lapeer County in 2013, Tim Turkelson took over the prosecutor's office. Tr, p 561. Konschuh and Turkelson have an acrimonious relationship—one reflected in emails from Turkelson calling Konschuh a "bitch" and a "[f]ucking dick." *Id.,* pp, 1341, 1343, 1349. But Turkelson sometimes appeared before Konschuh after losing his campaign for prosecutor in 2016. Tr, p 564. Konschuh did not have a blanket policy of disqualifying himself from any case involving Turkelson. *Id.,* pp 563-65. If a matter involved traffic offenses or probation, he didn't address his relationship with Turkelson. *Id.,* pp 565-66. Konschuh made disclosures on the record, although not in every case. *Id.,* p 565.

n. Konschuh did not disclose any conflicts involving Richardson.

Attorney David Richardson ran as a write-in candidate for the 40th Circuit Court in 2016. Tr, p 2917. Konschuh did not encourage Richardson

to run; to the contrary, he advised against it. *Id.*, pp 2917-18; 2524. Still, Konschuh endorsed Richardson at some point in the campaign. *Id.*, p 2918.

Richardson appeared occasionally before Konschuh but not on substantive matters. Tr, p 2927. Konschuh did not recall making any disclosures about his friendship with Richardson. *Id.*, p 567. But attorney Carol Ann Jaworski testified that she recalled Konschuh disclosing his work with Richardson. *Id.*, p 802.

As of July 2017, Konschuh was reassigned to the family court and did not handle non-juvenile criminal matters. Tr, p 3199.

o. Konschuh answers inquiries from the Michigan State Police.

In 2014, Finnegan told Mark Pendergraff, an investigator with the Shiawassee County Prosecutor's Office an retired police officer, that she needed him to investigate Konschuh. *Id.*, pp 1588, 1592, 1613. Konschuh first met with Pendergraff in April 2014. Tr, p 697. He told Pendergraff that he used BounceBack money to reimburse himself for office-related expenses. *Id.*, p 698. He also mentioned using BounceBack funds to buy refreshments for crime victims as well as celebratory items like flowers, cards, and cakes, and plaques. *Id.*, p 699. Konschuh spent close to $1,800 of his own money on water for the prosecutor's office. *Id.*, pp 709; 3102.

Despite the substantial passage of time, Konschuh did everything he could to provide information to Pendergraff. He gave Pendergraff a list of expenditures and copies of receipts. Tr, pp 380; 712. Pendergraff encouraged Konschuh to bring him more receipts. *Id.*, pp 1619, 1623-24. He acknowledged that Konschuh was cooperative. *Id.*, p 1615. He also spoke to others during his investigation—including Biscoe, who told Pendergraff that the rules applicable to the funds at issue were "foggy," "fuzzy," "iffy," and "gray." *Id.*, pp 993, 1033.

p. Konschuh answered inquiries from Disciplinary Counsel.

After the Judicial Tenure Commission received two requests for investigation concerning Konschuh, Disciplinary Counsel issued an initial

request for information on April 14, 2016. Konschuh submitted a timely response on July 6, 2016.

Konschuh cooperated with Disciplinary Counsel during its investigation. Disciplinary Counsel issued a "28-day letter" on December 14, 2016, outlining allegations and requesting a response; Konschuh submitted a lengthy written response on February 8, 2017. Disciplinary Counsel sent another request for information on January 25, 2017; Konschuh filed timely responses on March 3, 2017. Disciplinary Counsel subsequently made an informal request for additional information; Konschuh submitted a detailed letter on May 22, 2017. On February 26, 2018, Disciplinary Counsel issued another request for information; Konschuh responded on April 23, 2018. Disciplinary Counsel sent a second 28-day letter—its fifth request for responses—on October 3, 2018; Konschuh filed a timely response on January 14, 2019. Exhibit 94F. Finally, on February 6, 2019, the Commission filed a formal complaint. Konschuh filed a timely answer on April 2, 2019.

q. The Master rejected all allegations of misconduct save one.

The Master held hearings from June to September of 2019, hearing from 39 witnesses and examining 350 exhibits. *Master's Report* at 3. After receiving proposed findings of fact and conclusions of law from both sides, the Master issued his report on January 2, 2020. The Master concluded that Disciplinary Counsel failed to prove misconduct by a preponderance of the evidence except as to Count VII, which concerns Konschuh's disclosures and recusals. *Master's Report* at 12. He concluded that Disciplinary Counsel failed to prove (a) any intentional false statements, (b) any violation of governing law or policy when using funds from the prosecutor's office, (c) any misuse of fees from training programs, (d) any improper reimbursements, (e) any unbecoming or improper conduct with the Oysters, or (f) any misrepresentations.

r. The Judicial Tenure Commission rejected the Master's findings and recommended removal and a conditional suspension.

Disciplinary Counsel filed objections to the Master's report. On August 5, 2020, the Judicial Tenure Commission entered an order rejecting

almost all of the Master's conclusions and recommending that the Court remove Konschuh from the bench and impose a conditional, six-year suspension.

Konschuh's misconduct, according to the Commission, includes (a) making misrepresentations about whether he pleaded no contest to a misdemeanor, (b) embezzling county funds, (c) failing to disclose conflicts and disqualify himself as appropriate, and (d) making misrepresentations to the Commission and lower courts. Having found that Konschuh made misrepresentations, the Commission also recommends that the Court order Konschuh to pay $74,631.86 in fees.

The Commission agreed with the Master that Disciplinary Counsel failed to prove their allegations concerning the Oysters or administrative lunches by a preponderance of the evidence.

Standard of Review

This Court reviews the Commission's recommendations and findings of fact de novo. *In re Chrzanowski,* 465 Mich. 468, 478; 636 NW2d 758 (2001). Disciplinary Counsel must prove misconduct by a preponderance of the evidence. See *In re Noecker,* 472 Mich 1, 8; 691 NW2d 440 (2005), citing *In re Lloyd*, 424 Mich 514, 521-522, 384 NW2d 9 (1986).

Argument 1: Misdemeanor and Related Statements

Count I of the Amended Formal Complaint asserts that Konschuh made a false and misleading representation on February 19, 2018 when his attorney filed a *Motion for Entry of Order Nunc Pro Tunc*. See Exhibit 1t. This motion asserted that Konschuh did not plead to a misdemeanor under MCL 750.485 and asked the court to clarify that fact retroactively. *Amended Formal Complaint*, ¶¶33-37. The Master correctly held that Disciplinary Counsel failed to prove this alleged misconduct by a preponderance of the evidence. *Master's Report* at 5. Although the Commission found that Disciplinary Counsel proved this count by a preponderance of the evidence, that conclusion is mistaken.

1.1 The Master correctly held that the Commission failed to prove the allegations in Count I.

There is no dispute that Konschuh's attorney filed a brief on his behalf asking Judge Neithercut to find that Konschuh did not plead no contest to a misdemeanor. See Exhibit 1t. The Master gave three reasons for rejecting Disciplinary Counsel's argument that this motion made deliberate misrepresentations.

First, the Master applied this Court's opinion in *In re Gorcyca,* 500 Mich 588; 902 NW2d 828 (2017). Under *Gorcyca,* it is not enough for Disciplinary Counsel to establish that Konschuh made a false statement about the charges against him. They must prove that Konschuh made false statements with wrongful intent: "Even though there may be some instances in which a misrepresentation and a misleading statement are not based on an actual intent to deceive, we believe that, at a minimum, *there must be some showing of wrongful intent*." *Id.* at 639 (emphasis added). The Master concluded that Disciplinary Counsel failed to prove by a preponderance of the evidence that Konschuh had wrongful intentions when making these supposed misrepresentations. *Master's Report* at 5.

That conclusion was correct; there is no evidence of wrongful intent here. Konschuh didn't see the motion before his attorney filed it. Tr, p 2978. As the Master concluded, Konschuh could not have intended to mislead the court when he had no opportunity to review the allegedly misleading statements. *Master's Report* at 5.

Moreover, as the Master observed, the motion didn't hide the fact that Konschuh pleaded no contest to MCL 750.485. Exhibit 1t. It included two documents entitled "Motion/Order of Nolle Prosequi," both of which reference MCL 750.485. *Id.* The motion argued that including MCL 750.485 was a mistake but included a document in which Konschuh assented to a charge under MCL 750.485. Had Konschuh intended to mislead the Court, he would not have included documents showing that he pleaded no contest to MCL 750.485.

As the Master observed, the Attorney Discipline Board addressed similar facts in *Grievance Administrator v Wax* (Bd. Opinion, 98-112-Ga,

September 22, 1999) (*Attached*). There, the Grievance Administrator accused the respondent of lying about the contents of his appellate brief even though the respondent submitted a copy of his brief with the document that supposedly lied about it. *Id.* at 1-2. The hearing panel concluded—and the Attorney Discipline Board agreed—that, "If respondent intended to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer." *Id.* at 2.

The same rationale applies here. If Konschuh intended to mislead the court, he would not have included documents referencing MCL 750.485. *Master's Report* at 5. Disciplinary Counsel cannot satisfy the *Gorcyca* "wrongful intent" standard when the record disproves the notion that Konschuh was trying to deceive Judge Neithercut.

Finally, the Master correctly concluded that Konschuh's motion made a good-faith legal argument. *Master's Report* at 5. Konschuh's agreement with the prosecutor *was* limited to MCL 21.44 and they never discussed adding MCL 750.485 before the hearing. Tr, pp 101-102, 2368. The prosecutor *did* surprise Konschuh when she showed up for the post-facilitation hearing with a new complaint. *Id.*, p 3218. Konschuh was caught off-guard and railroaded into an outcome inconsistent with the mediated agreement. He properly brought the issue before Judge Neithercut—and he accepted the court's ruling when it didn't go his way. His *nunc pro tunc* motion was not misconduct.

1.2 The Commission's conclusions on Count I lack merit.

The Commission's conclusions differ sharply from the Master's. It concluded that Konschuh pleaded no contest to a misdemeanor and that he was trying to mislead Judge Neithercut when he argued that he didn't. The Commission's conclusions on this issue make the error errors cited above: (1) it fails to address evidence that contradicts its conclusions, (2) contrary to *Gorcyca,* it treats any discrepancy between the various accounts as proof that Konschuh lied, and (3) it gives no deference at all to the Master's firsthand observations.

Regarding the first error, the Commission didn't address one of the most important pieces of evidence concerning Konschuh's plea: Judge Neithercut's statement about the status of his plea. Judge Neithercut initially accepted Konschuh's plea but then decided that he would keep the count open, pending Konschuh's completion of probation:

> … [T]he 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.*

Tr, p 3238; Exhibit 1m at 12 (emphasis added). This statement could have prompted confusion about whether the court actually accepted Konschuh's plea. Yet the Commission's report doesn't address it.

The Commission may even have bought in to Disciplinary Counsel's rewriting of Judge Neithercut's statement. In the *Amended Formal Complaint*, Disciplinary Counsel used ellipses to obscure the fact that Judge Neithercut changed his mind about the plea. Disciplinary Counsel wrote:

> …[A]fter accepting respondent's nolo contendere plea, Hon. Geoffrey M. Neithercut stated that he: … accepts the plea and finds Mr. Konschuh guilty of count six, failure to account for county money.

Amended Formal Complaint, ¶26. Disciplinary Counsel's misquotation adds a period after "county money," which makes it seem that Judge Neithercut accepted Konschuh's plea. *Id.* But the full transcript, quoted above, reveals that Judge Neithercut left the count open. Tr, p 3238; Exhibit 1m at 12. At the very least, there were grounds for confusion about the status of Konschuh's plea.

The Commission's error goes beyond its failure to address this passage. It never addresses Konschuh's core argument: that the parties

agreed to a limited plea and he was caught off-guard when the prosecutor added a misdemeanor count. The parties' original agreement did *not* include a misdemeanor plea under MCL 750.485. Tr pp 2963; 2772. The parties hadn't even discussed adding a count under MCL 750.485. *Id.* at 2368. Finnegan added that requirement when she amended the complaint after mediation. *Id.* Konschuh consented to a stipulation that did not include a criminal count, only for the prosecutor to show up with a new complaint that included a misdemeanor count he had never seen before. He didn't address the new addition during the plea hearing, which necessitated the motion that Pabst later filed.

Between Judge Neithercut's confusing statement and the prosecutor's unilateral addition to the plea agreement, Konschuh had a good-faith basis to challenge his plea. He could legitimately argue that he didn't intend to agree to a misdemeanor, that Finnegan added that count in an unexpected revision to the complaint, and that the Court should grant retroactive relief. Tr pp 2963; 2772. Approving a motion along those lines is not misconduct.

The Commission failed to apply *Gorcyca.* There, this Court held that "both a misrepresentation and a misleading statement generally include an actual intent to deceive." *Gorcyca,* 500 Mich at 639. So, "[e]ven though there may be some instances in which a misrepresentation and a misleading statement are not based on an actual intent to deceive, … at a minimum, there must be some showing of wrongful intent." *Id.* at 639. In contrast to *Gorcyca,* the Commission treated Konschuh's statements about his plea as misrepresentations even with no evidence that Konschuh intended to deceive Judge Neithercut.

There can be no finding of wrongful intent on this point because Konschuh's *nunc pro tunc* motion did not hide that Konschuh pleaded no contest to MCL 750.485. Exhibit 1t. The motion included two documents entitled "Motion/Order of Nolle Prosequi," both of which reference MCL 750.485. *Id.* Although the motion argued that including MCL 750.485 was a mistake, the motion included a document in which Konschuh assented to a charge under MCL 750.485. Had Konschuh intended to mislead the court, he would not have included documents showing that the plea he entered

after Finnegan revised the complaint included MCL 750.485. The motion put the facts before the Court and presented a legal argument about how the court should interpret them. That is not misleading under *Gorcyca*—and *Wax* explains why.

That leaves the Commission's third error: paying insufficient heed to the Master's findings. Again, deference to the Master is optional. *In re Chrzanowski,* 465 Mich 468, 481; 636 NW2d 758 (2001). But deference is warranted here, particularly in light of the Master's "superior position to observe the witness' demeanor and assess their credibility[.]" *In re James,* 492 Mich 553, 569; 821 NW2d 144 (2012). The Master was the only decision-maker to hear directly from Konschuh about what he understood at the time of his plea agreement and why he asked the court to hold that he didn't plea to a misdemeanor. The Master could see that Konschuh spoke honestly about his understanding of the plea agreement and that his motion was a legitimate attempt to clarify that he did not intend to plead to a misdemeanor. That's why the Master held that Disciplinary Counsel failed to prove its claim by a preponderance of the evidence.

The Commission's rationale turns entirely on credibility: it could not have found misconduct without finding Konschuh's explanations incredible. Yet it afforded no deference at all to the Master's conclusions. That was a mistake. If the cold record painted a different picture for the Commission on an issue of credibility, the only reasonable approach is to afford some deference to the Master's findings.

Correcting these three errors—addressing all the relevant evidence, applying *Gorcyca,* and giving some weight to the Master's findings—leads to the conclusion that Disciplinary Counsel failed to carry its burden on Count I.

Argument 2: Hartland Money Order

In Count II, Disciplinary Counsel assert that Konschuh failed to comply with Lapeer County accounting and contracting procedures. *Amended Formal Complaint*, ¶¶ 52-53. They also assert that Konschuh improperly deposited a money order into his personal checking account

and then forwarded only $45.28 of the $60.28 total to the county. *Id.,* ¶68. In other words, they accuse Konschuh of illegally pocketing $15. The Master correctly held that Disciplinary Counsel failed to establish this alleged misconduct by a preponderance of the evidence. *Master's Report* at 5. Although the Commission reached a different conclusion, its analysis makes the same three errors that applied to Count I.

2.1 The Master correctly rejected Disciplinary Counsel's claims of policy violations and embezzlement.

Regarding Disciplinary Counsel's charge that Konschuh failed to comply with governing policies, the Master correctly found that Disciplinary Counsel failed to prove that those policies really existed at the relevant time. John Biscoe—the county controller—testified that he didn't think the relevant policy existed in written form in 2008. Tr, pp 982-83. That testimony was fatal to Disciplinary Counsel's argument.

Disciplinary Counsel tried to salvage this claim by relying on state treasury guidelines, but those guidelines are neither binding nor authoritative. Tr, pp 358; 1006-7. Biscoe described the treasury publication as "a guideline." *Id.,* p 1008. And Konschuh never even saw a copy of those guidelines. *Id.,* p 362. Cary Vaughn, Disciplinary Counsel's expert in accounting, was unfamiliar with Lapeer County's policies. Tr, p 1945. But Vaughn confirmed that state treasury guidelines are "for training purposes only and should not be considered a legal interpretation of the items presented." *Id.,* p 1951. He added that he couldn't say when these guidelines first appeared on the Treasury's website and that the Treasury removed them in 2004. *Id.,* pp 1973-74.

In contrast to this testimony from the county controller and Disciplinary Counsel's own expert, Disciplinary Counsel offered the testimony of Tim Turkelson, Konschuh's political rival. Turkelson was willing to speculate that *some* accounting policy was in effect in 2005 and that it precluded Konschuh's actions. *Id.,* p 1212. But he provided no specifics. Moreover, he was not a credible witness, as the Master concluded. *Master's Report* at 6. Turkelson blames Konschuh for his election loss in

2016. *Id.,* pp 1350-51. He also sent emails that called Konschuh a "bitch" and a "fucking dick." *Id.,* pp 1341, 1349.

With Clark's hesitant testimony and Turkelson's lack of credibility, the Master correctly relied on the testimony of John Biscoe, Clark's supervisor: "Biscoe's testimony carries greater weight than that of his subordinate, especially since much of Clark's testimony was equivocal." *Master's Report* at 6. He correctly concluded, in other words, that Disciplinary Counsel failed to prove by a preponderance of the evidence that the policy existed in 2008. The Court should not fault Konschuh for violating a policy that was unavailable to him.

The Master was also correct to reject Disciplinary Counsel's claim that Konschuh stole $15 from a Transmodus check. Disciplinary Counsel faulted Konschuh for depositing the money order in his personal account. But Konschuh credibly testified that, to his understanding, he couldn't sign a money order over to the county. Tr, pp 188-89; 2986. That's why he deposited the $60.28 money order into his account. *Id.,* p 2986. He then gave Redlin $60.28 in cash with the understanding that she would forward it to the appropriate authority. *Id.,* p 195. Konschuh's office forwarded $45.28 to the county, which distributed that amount to the victim. Exhibit 6h; Tr, pp 191-92.

The record does not clarify who received the $15 difference between $60.28 and $45.28. Konschuh testified that he didn't keep any portion of the $15. Tr, p 3126. Disciplinary Counsel wanted the Master to conclude that Konschuh must have taken it but no one testified that Konschuh kept the missing $15. Nor did the testimony allow that inference. It is not reasonable to conclude that Konschuh would handle the bulk of the money order appropriately but risk his career for $15. The Master correctly held, therefore, that disciplinary counsel did not prove the allegations in Count II by a preponderance of the evidence.

2.2 The Commission erred in finding misconduct under Count II.

The Commission reached a very different conclusion than the Master. Again, however, its conclusions suffer from consistent errors.

First, there is the Commission's failure to address evidence supporting Konschuh's arguments. It concludes that "the subject county policy existed and [Konschuh] was well aware of it, and was even responsible at times for reviewing county contracts and for training others in his office on the policy." *Recommendation* at 13. In reaching this conclusion, the Commission relied on vague, general statements—including statements from deeply conflicted witness Tim Turkelson—and gave no weight to testimony that got into specifics.

For example, the Commission cites Doreen Clark, John Biscoe's assistant, who testified that she thought the policy dated to 1996. Tr, p 1915. Clark believed she had a policy in a binder. *Id.,* pp 1915-16. But she didn't recall the grants, contracts, and agreements policy at issue here. She only recalled policies *in general:* "I definitely remember all the flow charts that we had at that time back in 1996. There were, like I said, several. And there were different ones pertaining to how budget amendments were going to be handled, because they—again, this kind of went back to how they had to have different people doing different functions and not—especially with the finance department staff and how they handled entering data and all that." Tr, p 1915.

Clark's memory was even fuzzier when asked about the state of this policy during the relevant timeframe—2007 to 2008, when Konschuh entered into the BounceBack agreement. Clark couldn't say that the policy was available via computer: "I cannot, I guess, confirm or deny that, because we did try to have a majority of our policies all on that J drive. But they were also, because of a ransomware, wiped completely off. But that was not till I think later." Tr, p 916.

By relying on Clark's general statements and overlooking the gaps in her knowledge about specifics, the Commission reached the wrong conclusion about the policy's existence. More troublingly, the Commission didn't address testimony from John Biscoe—Clark's supervisor—that the contracts policy was *not* available to Konschuh:

> Q. So I want to start, first of all, in 2008 there was no specific policy that would forbid

> my client from entering into a contract with a company like BounceBack; correct? Is that true?
>
> A. *There was no specific policy,* but there certainly was a statutory obligation to the county board and I believe the authority is given to the county board to enter into contracts with the county.
>
> So we did not have a written policy that I recall. In 09 it got put on the server in terms of contracts going in front of the board. And it certainly was practice across the whole system. All contracts went through the board.

Tr, pp 983-984 (emphasis added). This specific testimony from Clark's supervisor undermines Clark's testimony. By addressing only Clark's vague testimony and skipping Biscoe's specific testimony, the Commission reached the wrong conclusion.

Just as the Commission relied on Clark's testimony without addressing the more specific testimony from Biscoe, it concluded that Konschuh "did not disclose" contracts without addressing evidence that the BounceBack contract was actually public knowledge. *Recommendation* at 13; compare Tr, pp 240-1; 2989-90. Konschuh needed local merchants to participate, and mailed a notice about the new program to local merchants. Tr, p 240. A local newspaper also covered the program. *Id.*, p 241. With all this publicity, Konschuh believed that the Board of Commissioners knew about the BounceBack program. *Id.*, p 238. Regardless whether the Board of Commissions had actual knowledge, the Commission erred in treating the BounceBack program as a secret, as well as presuming that Konschuh somehow benefitted from secrecy. The program was *not* a secret.

The Commission also fails to address the fact that the prosecutor and the county board of commissioners are separate political entities. Counties are corporate bodies with "powers and immunities provided by law" See Const. 1963, art. VII, § 1. Prosecutors are county officers and members of the executive branch. Const. 1963, art. VII, § 4. The board of supervisors

holds legislative authority. Const. 1963, art. VII, § 8. As a constitutional matter, their powers are separate. See Const. 1963, art. 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."). Konschuh understood, therefore, that funds received by the prosecutor's office belonged to the prosecutor's office.

Aside from failing to address these critical points, the Commission's analysis also goes astray because it fails to give any weight to the Master's credibility findings. The Master—not the Commission—had an opportunity to gauge witnesses' credibility. With the benefit of firsthand knowledge, he concluded that Tim Turkelson's credibility was "questionable." *Master's Report* at 6. Yet the Commission cited Turkelson's testimony about the existence of a contract policy without addressing this critical issue or even acknowledging the Master's conclusion. *Recommendation* at 13 (citing Tr, pp 1205-1212).

Acknowledging the Master's credibility findings is also important when evaluating claims about the missing $15 in Hartland fees. Konschuh testified that he gave $60.28 to Patricia Redlin, his assistant. Tr, p 195. He also testified that he did not take the missing $15. *Id.,* p 2987. But the Commission concludes that Konschuh actually gave Redlin only $45.28, relying on Redlin's testimony. *Recommendation* at 15 (citing Tr, pp 2032-2035). It doesn't address the fact that the Master—the only decision-maker to see both Konschuh and Redlin testify on this issue—concluded that Disciplinary Counsel failed to carry its burden. The Master could only have reached that conclusion if he believed that Konschuh was being honest. (It doesn't follow that Redlin was dishonest; Konschuh and Redlin testified about their actions from over a decade ago—a time lag that is hardly conducive to precise memories.) That credibility assessment deserved the Commission's attention.

Moreover, Redlin never testified that Konschuh took the $15. She said that she didn't know what happened to it. Tr, p 2074. The Commission took Redlin and Konschuh's "I don't know" responses and concluded that Konschuh must be lying. The record does not support that conclusion.

With these consistent errors, the Commission's analysis departs from the record, relies on false presumptions, and therefore reaches a fundamentally flawed conclusion. The Master was correct to conclude that Disciplinary Counsel failed to establish misconduct under Count II.

Argument 3: BounceBack Checks

Count III concerns the BounceBack program. Disciplinary Counsel allege that Konschuh entered into the program without following county policies. *Amended Formal Complaint*, ¶76. They also assert that Konschuh deposited BounceBack checks into his personal checking accounts. *Id.*, ¶84. The complaint cites 42 checks, all listing the Lapeer County Prosecutor as payee. Konschuh deposited each check into his own account.

The Master correctly found that Disciplinary Counsel failed to establish misconduct in Count III. Again, the Commission went off track by overlooking critical evidence and failing to afford proper weight to the Master's credibility findings.

3.1 The Master correctly found that Disciplinary Counsel did not establish misconduct under Count III.

Regarding Disciplinary Counsel's assertion that Konschuh did not follow the necessary policies when entering into a contract with BounceBack, the Master echoed his Count II finding—that Disciplinary Counsel failed to prove that the relevant policy actually existed in 2008. *Master's Report* at 6. John Biscoe—the county controller and the person best qualified to speak on this issue—testified that he did not believe the policy was in effect in 2008. Tr, pp 982-83. This specific testimony from the most qualified witness is much stronger evidence than his assistant's vague recollection of having binders of unidentified policies since 1996.

As for depositing the checks, Konschuh never disputed that he deposited these funds in his personal accounts. He testified, however, that he spent over $7,783 on the prosecutor's office. Tr, p 714. He used the BounceBack funds to reimburse himself for a small fraction of that amount. Tr, pp 273; 2981. His expenditures and right to reimbursement should be

beyond dispute at this point. The Commission found that Disciplinary Counsel failed to prove any misconduct under Count V—a count involving Konschuh's reimbursements for office lunches. *Recommendation* at 6; *Amended Formal Complaint,* pp 59-65.

Below, Disciplinary Counsel relied on MCL 48.40, a statute governing county treasurers. That citation did them no good. A county treasurer must "receive all money belonging to the county, from whatever source they may be derived…" MCL 48.40. BounceBack issued funds under a contract with the prosecutor's office, not the county. Tr, pp 1112-13. Whether the funds "belong[ed] to the county" is vague enough that Disciplinary Counsel failed to carry their burden.

These ambiguous laws are exactly why John Biscoe told Pendergraff that the rules applicable to the funds at issue were "foggy," "fuzzy," "iffy," and "gray." Tr, pp 993, 1033. Even Dana Miller, the county treasurer, testified that she couldn't define "public money." *Id.,* pp pp 2137-38.

In this context, Konschuh formed the good-faith view that BounceBack funds were outside the definition of public money and, therefore, that they belonged to the prosecutor's office. Tr, p 2989. Disciplinary Counsel failed to prove misconduct by a preponderance of the evidence.

3.2 The Commission erroneously omits testimony supporting Konschuh and gives insufficient weight to the Master's credibility findings.

One of the central issues in this case—if not *the* central issue—is whether Konschuh legitimately believed that he was reimbursing himself for office expenses when he cashed BounceBack checks. There was a great deal of testimony on this point. The Commission's recommendation devotes only four sentences to this central fact—and fails to address any of the relevant testimony. *Recommendation* at 17-18. The Commission's summary dismissal of Konschuh's arguments is in sharp contrast with Judge Neithercut's conclusion in the criminal proceeding. He found that Lapeer County was *not* denied any funds because any amount Konschuh took as reimbursement was less than his own contributions to the

prosecutor's office. Exhibit 1p, p 25. The Commission did not address that finding at all.

The Commission did more than summarily reject Konschuh's explanation (along with both Judge Neithercut and the Master's acceptance of his explanation). It removed his explanation entirely, and then analyzed the case as if Konschuh never offered explanation. For example, at the outset of its recommendation, the Commission states that Konschuh "took the position in this proceeding that he committed no misconduct in taking public money and putting it in his personal accounts, without accounting for it, and converting it to his own use." *Recommendation* at 2. But that's not Konschuh's position. In fact, Konschuh took the position that he properly used office funds to reimburse himself for office expenses.

Likewise, the Commission "reject[ed] Respondent's implausible and unsupported justification for taking the money that the Bounce Back contract was not a 'county' contract, and therefore the funds received under it were not county money …." *Recommendation* at 17. Again, that was not Konschuh's argument. Rather, he understood that the funds belonged to the prosecutor's office, not the county, and that he could properly reimburse himself for expenses related to the prosecutor's office.

When the Commission finally addresses something resembling Konschuh's argument, it writes: "… [T]here is nothing in the elements of the embezzlement statute to suggest that it is a defense that the person doing the appropriation was compensating himself, under his own rules, for expenses, he incurred with respect to the entity from which he embezzled." *Recommendation* at 18. The Commission is wrong again.

Section 175 of the Michigan Penal Code addresses embezzlement by a public officer. MCL 750.175. It states: "Any person holding any public office in this state … who *knowingly and unlawfully* appropriates to his own use, or to the use of any other person, the money or property received by him in his official capacity or employment, the value of 50 dollars or upwards, shall be guilty of a felony …." *Id.* (emphasis added). A person who believes he is taking office funds only as reimbursement for office expenses is not "knowingly and unlawfully appropriat[ing]" money to his

own use. His understanding *is* relevant to the statute, which includes an element of criminal intent. As this example shows, the Commission's failure to address the full evidentiary record goes hand-in-hand with serious errors in its legal analysis.

As with other counts, the Commission abused its discretion in failing to give weight to the Master's credibility judgments. Take, for example, the Commission's wholesale rejection of Konschuh's testimony that he understood he was reimbursing himself for office expenses. The Commission brushed this critical point aside with two sentences: "The Commission is not persuaded by Respondent's position that the funds he deposited in his own private back accounts would or should be off set [sic] by money he is alleged to have spent on the prosecutor's office over the years. Respondent kept no ledger of deposits or expenses." *Recommendation* at 17-18.

Although the record failed to persuade the Commission, the Master evidently found enough truth in Konschuh's explanation that he found that Disciplinary Counsel failed to carry its burden. Given this sharp difference of opinion between those who didn't hear directly from the witnesses (the Commission) and the one decision maker who did (the Master), the Commission should have given some weight to the Master's findings. At the very least, it should have better reasons for rejecting that testimony than simply asserting that it is "not persuaded" and noting that Konschuh didn't keep a ledger.

Although the Commission failed to do so, this Court can give proper deference to the Master's findings. *In re Lloyd,* 424 Mich 514, 535; 384 NW2d 9 (1986). Given the sharp difference of opinion between those who had no opportunity to assess credibility firsthand (the Commission) and the only person who did (the Master), the Court should give substantial weight to the Master's credibility determinations. Instead of summarily rejecting Konschuh's explanation as the Commission's recommendation does, the Court should find that Konschuh acted in good faith and with the honest belief that he was reimbursing himself. Even if the Court concludes that Konschuh should have kept a ledger and that the funds really belonged to

the county, there is no evidence of corrupt intent here. And that makes a significant difference when applying the *Brown* factors.

Accordingly, the Court should reject the Commission's recommendation about Count III and instead adopt the Master's finding of no misconduct.

Argument 4: LEORTC and City of Lapeer

In Count IVA, Disciplinary Counsel allege "financial improprieties" related to fees that the prosecutor's office received from the Corrections Academy. They assert that Konschuh did not participate in the 2011 and 2012 seminars and improperly kept fees from the Corrections Academy. *Amended Formal Complaint*, ¶¶349, 358. In addition, they assert that Konschuh improperly deposited checks from the Corrections Academy. *Id.*, ¶361. In Count IVB, Disciplinary Counsel assert that Konschuh improperly deposited fees from the City of Lapeer into his personal accounts. *Id.*, ¶¶372-373. They also allege that Konschuh failed to report these funds for tax purposes. *Id.*, ¶376.

The Master correctly rejected these allegations and concluded that Disciplinary Counsel did not establish financial improprieties. The Commission's findings are mistaken.

4.1 The Master correctly concluded that Disciplinary Counsel failed to prove misconduct under Count IV.

There are few factual disputes concerning the Corrections Academy or "LEORTC" fees. The prosecutor's office provided training during business hours for the Corrections Academy. Presenters did not need to take vacation or sick time. The Corrections Academy paid the prosecutor's office and Konschuh used those funds to reimburse himself for expenses related to the prosecutor's office. Tr, pp 338-339. As Mike Hodges testified, Konschuh handled these fees in the same manner as his predecessor, Justus Scott. *Id.*, pp 1733-36. The questions were whether this conduct was improper and whether Konschuh acted with improper intent.

Disciplinary Counsel did not prove that this conduct was improper. They failed to cite any law or regulation that was both (a) in effect at the time and (b) contrary to Konschuh's handling of the Corrections Academy funds. Even Disciplinary Counsel's accounting expert, Cary Vaughn, was unfamiliar with Lapeer County's policies. Tr, p 1945. Although Disciplinary Counsel relied on treasury policies in an attempt to call into question Konschuh's handling of these funds, Vaughn confirmed that these policies are "for training purposes only and should not be considered a legal interpretation of the items presented." *Id.,* p 1951.

Furthermore, Konschuh used these fees to reimburse himself for funds he expended on behalf of the prosecutor's office. Tr, pp 288-89. The prosecutor's office provided the training and the prosecutor's office received the benefits. There is no evidence that Konschuh's handling of these funds violated the law or benefitted Konschuh personally. Disciplinary Counsel rely on a policy that did not exist at the relevant time and treasury guidelines that, according to Disciplinary Counsel's own expert, are not authoritative. *Id.,* pp 982-83, 1951. The Master correctly held, therefore, that Disciplinary Counsel failed to prove misconduct by a preponderance of the evidence.

4.2 The Commission erroneously concludes that Disciplinary Counsel established misconduct under Count IV.

Again, the Commission jettisons the Master's findings in favor of its own interpretation of the record. Its analysis doesn't address Konschuh's explanation that he spent funds on the office and believed that he could properly reimburse himself. Having dismissed that detailed explanation with a few short lines, the Commission presumed that Konschuh had no reason to believe that he was reimbursing himself with Corrections Academy and City of Lapeer fees.

That was a mistake for all the reasons cited above. A proper analysis considers the whole record, not just the facts that support one side. And it is unreasonable to disregard the Master's findings on an issue that depends

so heavily on credibility. The Commission is correct that Konschuh didn't keep a ledger. But that single fact is not the alpha and omega of credibility.

Indeed, unlike the Commission, the Master could observe Konschuh directly to gauge whether his comments about office expenses and reimbursements were sincere. By giving no weight to those findings, the Commission reached a conclusion at odds with the facts. The Court should correct that error, give proper weight to the Master's conclusions, and find that Disciplinary Counsel failed to establish misconduct under Count IV.

Argument 5: Disclosure/Disqualification

Count VII alleges that Konschuh failed to disclose conflicts and improperly failed to disqualify himself in cases involving Dave Richardson, Mike Sharkey, and Tim Turkelson. *Amended Formal Complaint*, ¶¶ 457, 476. Konschuh explained below that he doesn't oppose the Master's findings on this count. He also accepts the Commission's conclusion. But the Commission omits an important fact that should play a role under the *Brown* factors.

That fact concerns the reason Konschuh only addressed disqualification in cases raising substantive disputes: he understood that he was following instructions from his chief judge by making disclosures and addressing recusal only in contested, substantive matters. Tr, pp 565-66, 2917, 3183. Konschuh spoke to Chief Judge Holowka about potential conflicts in criminal matters and decided to disclose his potential conflicts in any contested matter. *Id.,* p 3183. If a matter was uncontested, he believed he could handle it without disclosures or recusals. *Id.,* pp 565-66, 2917, 3183. (As court reporter Michelle Schrader testified, Konschuh also made an announcement at the beginning of docket calls. *Id.,* p 2711.)

Konschuh should have taken additional steps to raise and address potential conflicts, as the Master concluded. A judge must disclose potential conflicts in all cases, whether contested or not. Konschuh accepted below that he committed misconduct by failing to do so. But Konschuh's error here does not involve bad faith or intentional acts of deceit. He failed to address conflicts only in uncontested or non-substantive matters. Tr, pp

565-66, 2917, 3183. He left information about conflicts on counsels' tables. *Id.,* pp 588, 607-08. He also understood that the whole matter was common knowledge in the local bar. *Id.,* pp 603; 790. His actions were insufficient—but not in bad faith. Accordingly, although the Court should affirm the Commission on this count, it should also clarify that Konschuh did not act in bad faith.

Argument 6: Alleged Misrepresentations

Count VIII asserts that Konschuh made misrepresentations to the Michigan State Police—that is, to Pendergraff—and to the Judicial Tenure Commission. The Master correctly held that Disciplinary Counsel failed to prove these allegations by a preponderance of the evidence.

This Court clarified the standard applicable to allegations of judicial misrepresentation in *Gorcyca,* 500 Mich at 588. One of the allegations against the respondent in *Gorcyca* was that she circled a finger around her ear when referring to a minor—a sign, Disciplinary Counsel asserted, that she was calling this minor insane. The respondent argued that she was just talking with her hands, and that the circular gesture referred to "forward movement" through the minor's therapy. *Id.* at 636. The Master concluded that the respondent was being dishonest. But the Commission disagreed, writing that not every inaccuracy is a product of dishonesty. *Id.* at 637. Indeed, it wrote that "it would be unfair to impute motives of deception or falsehood to everyone who says something that someone else finds incredible, or that proves to be incorrect." *Id.* (quoting Commission opinion).

This Court agreed with the Commission. Citing the definitions of "misrepresent" and "mislead," the Court concluded that "both a misrepresentation and a misleading statement generally include an actual intent to deceive. While the definitions do not categorically exclude a lesser *mens rea,* [the Court] believe[d] that respondent makes a solid point that "it is inconsistent to find one without the other as both seemingly require a wrongful intent to misdirect." *Gorcyca,* 500 Mich at 639. The Court therefore imposed a "wrongful intent" standard: "Even though there may be some instances in which a misrepresentation and a misleading statement are not

based on an actual intent to deceive, we believe that, at a minimum, *there must be some showing of wrongful intent*." *Id.* at 639 (emphasis added).

The Master correctly held that Disciplinary Counsel did not prove wrongful intent by a preponderance of the evidence. The Commission's conclusions to the contrary are the product of overlooking key evidence, misapplying *Gorcyca,* and giving insufficient deference to the Master's unique ability to assess credibility.

First, the Commission concludes that Konschuh "falsely denied that he pled to a crime in his criminal case" and in response to Disciplinary Counsel's 28-day letter. *Recommendation* at 26. That conclusion misses a critical point: Konschuh's motion included records citing MCL 750.485. See Exhibit 1t, "Motion/Order of Nolle Prosequi." The suggestion that Konschuh hid his initial conviction under MCL 750.485 is false. Moreover, the motion argued that Konschuh understood that his plea would be consistent with the March 8, 2016 *Stipulation and Agreement Between the Parties*. *Id.* The point was not that Konschuh never pleaded to MCL 750.485 but that he never *agreed* to plead to MCL 750.485. If the motion presented that argument unartfully, the fault does not lie with Konschuh. He never saw the motion before his attorney filed it. Tr, p 2978. With these facts, Disciplinary Counsel did not prove by a preponderance of the evidence that Konschuh filed the motion with an intent to mislead, as required under *Gorcyca,* 500 Mich at 639.

In the same way, the Commission erred when it concluded that Konschuh made a misrepresentation in his answer to the January 14, 2019 28-day letter. *Recommendation* at 26. The Commission faults Konschuh for "claim[ing] he understood he was only pleading 'no contest … to an interpretation of MCL 21.44." *Id.* But the Commission has misstated Konschuh's response. He did *not* just assert his understanding based on the plea agreement. Rather, Disciplinary Counsel's question asked whether he pleaded no contest under MCL 750.485. Before discussing his "understanding," Konschuh expressly acknowledged that the transcript reflects a plea to MCL 750.485:

> *It does appear that this is one reading of the transcript;* however, Judge Konschuh's understanding at the time was that the plea of nolo contendere was entered in conjunction with the agreement set forth in the stipulation that was entered between the parties at mediation. Judge Konschuh understood that he was pleading only to MCL 21.44.

Tr, pp 3113-3114 (emphasis added). So Konschuh acknowledged the relevance of MCL 750.485. The Commission fundamentally erred by failing to address Konschuh's full answer.

The Commission emphasizes a letter that Konschuh's subsequent attorney wrote to the Attorney Discipline Board to notify it about the criminal proceedings. *Recommendation* at 27. This letter, as the Commission notes, stated that Konschuh was "convicted of the misdemeanor offense of Failure to Account for County Money contrary to MCL 750.485…." *Id.* This letter "makes no reference to MCL 21.44," in the Commission's words. But nothing in the letter is inconsistent with Konschuh's other assertions about his plea. He would not have filed a motion to change his plea unless the original plea actually cited MCL 750.485. That was the point: the court accepted a plea that was inconsistent with the parties' agreement.

The Commission also faults Konschuh for asserting in his deposition that he didn't plead no contest to a crime. The Commission's recommendation does not quote the relevant passage and therefore omits the full context of Konschuh's statement. Initially, opposing counsel asked Konschuh if he pleaded to a misdemeanor. Exhibit 89, p 65-66. Konschuh accurately stated that it was "a dismissal with prejudice. *Id.* Opposing counsel asked whether it was really "a no-contest misdemeanor." *Id.* At that point, Konschuh's attorney objected. *Id.*

Later in the deposition, in response to his attorney's questioning, Konschuh stated that he did not "plead no contest to any type of crime, including a misdemeanor[.]" Tr, p 219. This answer came after the exchange cited above, which showed that opposing counsel knew about the substance of the plea agreement. Konschuh therefore asserted his legal

argument—that the plea should be construed as limited to MCL 21.44. He had no wrongful intent—a necessity under *Gorcyca*—because he knew that opposing counsel had the full context for his legal arguments. *Gorcyca,* 500 Mich at 639. He was no more trying to deceive a fully informed attorney than he was trying to mislead Judge Neithercut about the court's own rulings. Consequently, these statements do not establish misconduct.

The Commission concludes that Konschuh "testified falsely that he was unaware of Lapeer County's 'Grants, Contracts, and Agreements' policy." *Recommendation* at 27. The Commission's conclusion on this point is difficult to square with the record. It was unclear whether the policy existed at all, much less whether Konschuh had access to it. Biscoe even testified that he didn't think the policy existed in 2008 when Konschuh entered into the BounceBack agreement. Tr, pp 982-83. Doreen Clark—the star witness in the Commission's analysis—was unsure whether the policies were available online in 2009. Tr, p 1916. The Commission may believe that the policy actually existed but there is far too much uncertainty in the record to conclude that Konschuh testified falsely. Biscoe's testimony is proof that Konschuh did *not* testify falsely.

Next, the Commission asserts that Konschuh lied when he said he gave $60.28 to Pat Redlin instead of $45.28. *Recommendation* at 28. The relevant testimony on this issue comes solely from Redlin (who thinks Konschuh gave her $45.28) and Konschuh (who thinks he gave Redlin $60.28). The Commission picked one side of this credibility dispute and concluded that Konschuh must be lying. But that conclusion does not follow at all—a fact the Commission itself made clear in *Gorcyca.* There, the Commission wrote that "it would be unfair to impute motives of deception or falsehood to everyone who says something that someone else finds incredible, or that proves to be incorrect." *Gorcyca,* 500 Mich at 637. That point applies here, too. The Commission's decision to believe Redlin—despite the Master's conclusions—does not mean that Konschuh acted with wrongful intent.

The Commission rejects Konschuh's testimony about paying for meals, flowers and cakes, and plaques. "These statements were false," it concludes, "in that crime victims' meals were paid by victims' services, …

flowers and cakes were paid for by staff, … and plaques were paid for with office contributions." *Recommendation* at 29. But the record established that Konschuh *also* paid for these items. Cathy Strong testified that Konschuh purchased lunches and snacks for crime victims. Tr, pp 2321-2322. And Konschuh testified that he bought refreshments for crime victims as well as celebratory items like flowers, cards, and cakes, and plaques. *Id.*, p 699. There may have been other sources of funding at times, but it doesn't follow that Konschuh was lying about spending his own funds, too. Again, the Commission's zero-sum approach to this issue is inconsistent with *Gorcyca*'s "wrongful intent" standard. *Gorcyca,* 500 Mich at 639.

The Commission concludes that Konschuh made misrepresentations in this proceeding as well. It concludes that he "falsely testified before the Master that Judge Neithercut did not accept his plea to MCL 750.485." *Recommendation* at 29. The evidence on this point is much more two-sided that the Commission acknowledges. As explained above, Judge Neithercut changed his mind midstream about whether to accept Konschuh's plea. Tr, p 3238; Exhibit 1m, p 12 (emphasis added). Disciplinary Counsel even had to alter this quotation in its Amended Formal Complaint to make it appear that Judge Neithercut unambiguously accepted the plea. See *Amended Formal Complaint,* ¶26. The Court may nevertheless conclude that Judge Neithercut actually accepted Konschuh's plea. But the record is ambiguous enough that it cannot fault Konschuh for holding a different view.

Next, the Commission accuses Konschuh of falsely testifying that he was unaware of the "Grants, Contracts, and Agreements" policy. *Recommendation,* p 29. As explained above, the evidence on this point is far more conflicted than the Commission acknowledges. Biscoe testified that he didn't think the policy existed in 2008 when Konschuh entered into the BounceBack agreement. Tr, pp 982-83.

The Commission concludes that Konschuh falsely stated that his assistants handled trials, including jury trials, for the City of Lapeer. It asserts that Konschuh's testimony was false because, according to Disciplinary Counsel's witnesses, the City of Lapeer only tried two cases between 1996 and 2013, and the prosecutor's office handled neither case. *Recommendation* at 29. The Commission's conclusions overlook Konschuh's

testimony that he was using the term "trials" to include formal hearings. Tr, pp 3100-01. Disciplinary Counsel did not argue, much less prove, that there were no formal hearings during the relevant timeframe.

Moreover, Disciplinary Counsel do not—and cannot—dispute that the prosecutor's office handled non-trial matters for the City of Lapeer. Tr, pp 331-32. These included pre-trials. Tr, p 332. So there is no dispute that the prosecutor's office did, in fact, earn fees from the City of Lapeer. At worst, therefore, Konschuh made a non-material error about whether any of the cases at issue went to trial. That is not a misrepresentation under *Gorcyca*'s "wrongful intent" standard.

Konschuh did not make any knowing misrepresentations. Even if the Court rejects Konschuh's substantive testimony on these issues (and it shouldn't), it should find that there are no misrepresentations under *Gorcyca.* The Commission itself made this point forcefully in that case: it is "unfair to impute motives of deception or falsehood to everyone who says something that someone else finds incredible, or that proves to be incorrect." *Gorcyca,* 500 Mich at 637.

The Commission's report "impute[s] motives of deception or falsehood" to Konschuh based solely on its determination that Konschuh's arguments are "incredible." *Gorcyca,* 500 Mich at 637. As a result, it misconstrues Konschuh's actions, misstates his arguments, and fails to address critical evidence.[4] This Court should correct those errors by applying *Gorcyca* and rejecting Disciplinary Counsel's allegations of misrepresentation.

Argument 7: Disciplinary Analysis

The record establishes that the Master was correct. Konschuh engaged in misconduct—albeit unintentionally—when he recused himself

[4] The Commission has an incentive to find a misrepresentation because that allows the Commission to recoup costs and fees from Konschuh. See MCR 9.202(B). It is noteworthy, therefore, that the Master—who did *not* have an incentive to find a misrepresentation—rejected Disciplinary Counsel's arguments regarding Count VIII.

only in substantive matters. The remaining question for the Court is what discipline to impose for this error.

In re Brown, 461 Mich 1291; 625 NW2d 744 (2000), is the leading case in Michigan on judicial sanctions. This Court held that judicial discipline must be proportionate, and that similar misconduct should receive a similar sanction. *Id.* at 1292. Recommended discipline in one case must be commensurate with recommendations in other cases: "[I]t is incumbent upon the [Commission] that it undertake a reasonable effort … To ensure a consistent rule of law with respect to its constitutional responsibilities as well as to enable this Court to effectively carry out its own constitutional responsibilities." *Id.* at 1295.

Brown provides a non-exclusive list of factors to guide this analysis. The first *Brown* factor states: "Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct[.]" *Brown,* 461 Mich at 1292. In this case, the misconduct at issue is Konschuh's failure to recuse himself or disclose conflicts in all cases involving Sharkey, Richardson, and Turkelson. This misconduct was neither an "isolated instance of misconduct" nor a "pattern or practice." Rather, Konschuh's recusal decisions arose from a unique set of circumstances—criminal proceedings on charges Konschuh believed to be politically motivated. Those circumstances are neither common nor likely to repeat.

Second, *Brown* provides that "misconduct on the bench is usually more serious than the same misconduct off the bench." *Brown,* 461 Mich at 1292. Here, the misconduct took place on the bench.

Third, *Brown* states that "misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety[.]" *Brown,* 461 Mich at 1293. In this case, there is no evidence that the misconduct was actually prejudicial to the administration of justice. Following instructions from Chief Judge Holowka, Konschuh skipped disclosure and recusal only in uncontested or non-substantive matters. Tr, pp 565-66, 2917, 3183. Disciplinary Counsel does not allege that Konschuh's alleged bias affected any particular case.

Fourth, "misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does not." *Brown,* 461 Mich at 1293. Generally, this factor focuses on the *appearance* of prejudice rather than actual prejudice. *In re Haley,* 476 Mich 180, 188; 720 NW2d 246 (2006). Given the Master's findings regarding conflicts, the misconduct here arguably implicated the administration of justice.

Fifth, "misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated." *Brown,* 461 Mich at 1293. Konschuh's decisions on recusal and disclosure were not spontaneous. Their deliberation, however, reflects Konschuh's desire to do the right thing: he asked his chief judge to hire an ethics expert and, when the chief judge declined to do so, Konschuh follows the chief judge's instructions. Tr, p 2409; Exhibits 112-113, 3183.

Sixth, "misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery." *Brown,* 461 Mich at 1293. Konschuh's disclosure and recusal decisions did not affect truth-finding in any way. He skipped disclosure and recusal issues only in non-substantive or uncontested matters. Tr, pp 565-66, 2917, 3183.

Seventh, "misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship." *Brown,* 461 Mich at 1293. There are no allegations that Konschuh's misconduct involved discriminatory intent of any kind. *Id*. at 1292-1293.

Based on the complete record, five of the seven *Brown* factors call for a less severe sanction. Caselaw supports this conclusion as well. Applying the *Brown* factors, this Court has removed judges only for the most severe misconduct—and when, at a minimum, those judges made misrepresentations. See *In re Brennan,* 504 Mich 80; 929 NW2d 290 (2019) (removing judge who hid the extent of her relationship with a witness,

failed to disqualify herself from her own divorce proceeding, destroyed evidence, and made false statements under oath); *In re McCree,* 495 Mich 51; 845 NW2d 458 (2014) (removing judge who had affair with witnesses, engaged in ex parte communications, and lied under oath); *In re Adams,* 494 Mich 162; 833 NW2d 897 (2013) (perjury); *In re James,* 492 Mich 553; 821 NW2d 144 (2012) (misuse of public funds, misrepresentations during disciplinary process, violation of anti-nepotism policy); *In re Justin,* 490 Mich 394; 809 NW2d 126 (2012) ("fixing" tickets, false statements under oath); *In re Noecker,* 472 Mich 1; 691 NW2d 440 (2005) (false statements after drunk driving accident).

The Court has also imposed a lesser sanction when a judge makes a misrepresentation. In *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001), the Court suspended a judge for a year when the judge appointed an attorney with whom she was having an intimate relationship to act as counsel in 56 cases. The judge didn't disclose the relationship in those cases. *Id.* at 470. She also made false statements to a detective who was investigating the murder of the attorney's wife. *Id.* at 472. Likewise, in *In re Simpson,* 500 Mich 533, 571; 902 NW2d 383 (2017), a judge received a nine-month suspension for interfering with a police investigation of his judicial intern and making an intentional misrepresentation.

Less serious misconduct has resulted in shorter suspensions. See, e.g., *In re Nebel,* 485 Mich 1049; 777 NW2d 132 (2010) (suspending a judge for 90 days because he drove while intoxicated); *In re Hathaway,* 464 Mich 672; 630 NW2d 850 (2001) (suspending judge for 60 days where judge conducted arraignment without prosecutor, threatened to jail defendant if he did not waive jury right, and had a pattern of untimeliness and adjournments). See also *In re Post,* 493 Mich 974; 830 NW2d 365 (2013) (imposing 30-day suspension where judge refused to allow invocation of Fifth Amendment and jailed attorney who counseled client to remain silent); *In re Halloran,* 486 Mich 1054; 783 NW2d 709 (2010) (suspending judge for 14 days based on dishonesty in managing courtroom and reporting to State Court Administrator's Office).

Finally, this Court has censured judges for less serious errors that do not involve dishonesty. See *In re Gorcyca,* 500 Mich 588; 902 NW2d 828

(2017) (censuring judge for discourteous conduct to children involved in parents' divorce and custody proceedings); *In re Servaas,* 484 Mich 634; 774 NW2d 46 (2009) (censuring judge who moved outside of judicial district and drew lewd pictures); *In re Haley,* 476 Mich 180; 720 NW2d 246 (2006) (censuring judge who accepted football tickets in court); *In re Moore,* 472 Mich 1207; 692 NW2d 834 (2005) (censuring judge for eighteen-month delay between arraignment and trial); *In re McCree,* 493 Mich 873; 821 NW2d 674 (2012) (censuring judge for texting shirtless photo of self); *In re Logan,* 486 Mich 1050; 783 NW2d 705 (2010) (censuring judge for arranging another elected official's release on bond); *In re Fortinberry,* 474 Mich 1203; 708 NW2d 96 (2006) (censuring judge for sending defamatory letter).

The misconduct at issue here—failing to recuse or notify litigants of potential conflicts in non-substantive and uncontested matters—is most similar to the misconduct that led to censure. Although it occurred on the bench, it did not affect the substance of any case, just like the misconduct at issue in *Haley,* 476 Mich at 180 (addressing judge who accepted football tickets on the bench). It's a matter of bad form rather than corrupt intent. It doesn't involve dishonesty, which appears to be necessary for removal or a lengthy suspension.

The Court held in *Morrow* that "dishonest or selfish conduct warrants greater discipline than conduct lacking such characteristics." *In re Morrow,* 496 Mich 291; 854 NW2d 89 (2014). There is no evidence that Konschuh was acting from a "dishonest or selfish" motive when making recusal decisions. To the contrary, he was following instructions from Chief Judge Holowka: "Based upon the direction from the chief judge and the State Court Administrator's Office, I was instructed to handle the criminal cases at the pretrial level, potential adjournments, scheduling, ministerial acts such as taking a plea and a sentence in a minor misdemeanor-type case, that if anything was going to be contested like a preliminary examination and the prosecutor requested that I recuse myself I would do so." Tr., p 3183. So censure is the appropriate remedy.

Disciplinary Counsel urged the Commission to follow *James,* 492 Mich at 553, and to remove Konschuh. James was removed for misusing funds *and* using a clothing policy to deny access to court *and* rehiring an

unqualified magistrate *and* violating an anti-nepotism policy *and* making misrepresentations during the disciplinary process. *James,* 492 Mich at 557. *James* is nothing like this case.

In short, the Master correctly determined that Konschuh's only misconduct was failing to fully disclose potential conflicts or recuse in all cases involving, Sharkey, Turkelson, and Richardson, including uncontested and non-substantive matters. The correct discipline is censure.

Conclusion

For the foregoing reasons, the Court should reject the Commission's analysis and follow the Master's conclusions instead. As the Master held, Disciplinary Counsel only established misconduct under Count VII. The proper remedy for that error is censure.

Respectfully submitted,

Collins Einhorn Farrell PC

/s/ Donald. D. Campbell

Donald D. Campbell (P43088)
Trent B. Collier (P66448)
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Trent.Collier@ceflawyers.com
Attorney for Defendants-Appellants

Dated: September 2, 2020

Verification

I, Hon. Byron J. Konschuh, certify that the information contained in this petition is correct to the best of my information, knowledge and belief.

9-2-2020

Hon. Byron J. Konschuh

Certificate of Compliance

I certify that this application for leave to appeal complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 12-point proportional font (Book Antiqua), and the word count for this brief is 15,349.

Respectfully submitted,

Collins Einhorn Farrell PC

/s/ Trent B. Collier
Donald D. Campbell P43088
Trent B. Collier (P66448)
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Trent.Collier@ceflawyers.com
Attorneys for Hon. Byron Konschuh

Dated: September 2, 2020