

STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. BRUCE U. MORROW
3RD Circuit Court
Detroit, Michigan

MSC Case No. 161839
Formal Complaint No. 102

Oral Argument Requested

**THE JUDICIAL TENURE COMMISSION'S REPLY TO RESPONDENT'S
PETITION TO REJECT OR MODIFY COMMISSION'S RECOMMENDATION**

ORAL ARGUMENT REQUESTED

Pursuant to MCR 9.251(C), the Michigan Judicial Tenure Commission (the “Commission” or “JTC”), by Commission counsel, hereby replies to the Petition to Reject or Modify Commission’s Recommendation (the “Petition”) by respondent Hon. Bruce U. Morrow (“Respondent”). For the reasons stated below and in the accompanying brief, and as set forth more fully in the Commission’s June 17, 2021 Decision and Recommendation for Discipline (the “Decision”), the Commission asks this Court to: (1) deny Respondent’s Petition; and (2) adopt the Commission’s recommendation in its entirety, including censure and suspension of Respondent from the Michigan judiciary without pay for a period of twelve months.

The Amended Formal Complaint (“FC”) charged Respondent with three counts of misconduct. Count I charged that Respondent used inappropriate sexually graphic language toward a female assistant prosecuting attorney (“APA”) in the courtroom at counsel table during a brief break in a homicide jury trial on June 11, 2019. Count II charged that Respondent used inappropriate sexually graphic language toward another

female APA in Respondent's chambers on June 12, 2019 while the jury deliberated in the same homicide jury trial. Count III charged that Respondent committed misconduct by questioning these female attorneys about their physical characteristics in the courtroom following the chambers meeting set forth in Count II.

The Commission unanimously accepted and adopted the master's findings of fact and conclusions of law that Respondent committed the misconduct alleged in Counts I, II, and III of the FC after: reviewing the transcript, the exhibits, the master's report (the "Master's Report"), disciplinary counsel's brief in support of the master's findings, Respondent's objections to the Master's Report, Respondent's response to disciplinary counsel's brief in support of the master's findings, and disciplinary counsel's response to Respondent's objections to the Master's Report, and considering the oral arguments of counsel. The Commission unanimously accepted and adopted the master's conclusions of law that Respondent's misconduct in Counts I and II violated Canons 2(B), 3(A)(3), and 3(A)(14) of the Michigan Code of Judicial Conduct, and that Respondent's misconduct in Count III violated Canons 3(A)(3) and 3(A)(14). In addition, the Commission found that (a) Respondent's misconduct in Count III also violated Canon 2(B); (b) Respondent's misconduct in all three counts also constituted a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c); and (c) Respondent's unfair and discourteous treatment in all three counts was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

Therefore, on June 17, 2021, the Commission unanimously recommended this Court censure Respondent and suspend him from the office of judge of the 3rd Circuit Court without pay for a period of twelve months on the basis of his misconduct.

WHEREFORE, for the foregoing reasons, and based on the supporting facts and argument in the accompanying reply brief and in the Commission's June 17, 2021 Decision and Recommendation for Discipline, the Commission asks that this Court reject Respondent's Petition, and instead accept in full the Commission's recommendations.

DYKEMA GOSSETT PLLC

Dated: August 3, 2021

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**BRIEF IN SUPPORT OF THE JUDICIAL TENURE COMMISSION'S REPLY
TO RESPONDENT'S PETITION TO REJECT OR MODIFY COMMISSION'S
RECOMMENDATION**

ORAL ARGUMENT REQUESTED

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Dated: August 3, 2021

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JURISDICTION

At all material times Hon. Bruce U. Morrow (“Respondent”) was a judge of the 3rd Circuit Court in Wayne County, Michigan, subject to all the duties and responsibilities imposed on him by this Court, the canons of the Michigan Code of Judicial Conduct (“MCJC” and the “Canons”), and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.202. Pursuant to Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.202(B)(2) and MCR 9.211, the Judicial Tenure Commission (the “Commission” or “JTC”) had and has jurisdiction over Respondent’s conduct. This Court has authority to act upon the recommendation of the Commission. Const. 1963, Art 6, §30; MCR 9.251 through 9.253; *In re Chrzanowski*, 465 Mich 468, 483-86; 636 NW2d 758 (2001); *In re Del Rio*, 400 Mich 665, 682-84; 256 NW2d 727 (1977); *In re Mikesell*, 396 Mich 517, 527-531; 243 NW2d 86 (1976).

STANDARD OF PROOF

The standard of proof in judicial disciplinary proceedings is the preponderance of the evidence. *In re Haley*, 476 Mich 180, 189; 720 NW2d 246 (2006); *In re Morrow*, 496 Mich 291, 298; 854 NW2d 89 (2014); MCR 9.233(A).

STANDARD OF REVIEW

This Court reviews the Commission’s findings of fact and recommendation *de novo*. *In re Jenkins*, 437 Mich 15, 18; 465 NW2d 317 (1991); *In re Hathaway*, 464 Mich 672, 684; 630 NW2d 850 (2001); *In re Morrow*, 496 Mich at 298. “Although [this Court] review[s] the JTC’s recommendations *de novo*, this Court generally will defer to the JTC’s recommendations when they are adequately supported.” *In re Haley*, 476 Mich at 189.

COUNTER-STATEMENT OF PROCEEDINGS

On August 11, 2020, the Commission filed Formal Complaint (FC) 102 against Respondent (the “Complaint”). On August 25, 2020, Respondent filed his answer to the Complaint together with his affirmative defenses (Respondent’s “Answer,” cited as “R’s Ans.”). On September 17, 2020, this Court appointed Hon. Betty R. Widgeon as the master (“Master”). Disciplinary counsel filed an amended complaint (“FC”) on October 21, 2020 to correct certain dates alleged. Respondent relied upon his original Answer.

The five-day virtual public hearing (the “Hearing,” with cites to the Transcript as “Trans”) commenced on November 13, 2020 and concluded on December 15, 2020. The parties filed Proposed Findings of Fact and Conclusions of Law and responses by January 15, 2021. On February 9, 2021, the Master issued a report containing her findings of fact and conclusions of law (the “Master’s Report”, cited as “MR”). On May 10, 2021, the Commission held a public hearing on objections to the Master’s Report pursuant to MCR 9.241, which was conducted via Zoom video based upon various executive orders by the Governor and administrative orders of this Court relating to the ongoing COVID-19 pandemic. The Commission issued its Decision and Recommendation for Discipline pursuant to MCR 9.244 on June 17, 2021 (the “Decision”).

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Was the Commission's finding that Respondent committed the misconduct charged in Count I of the FC adequately supported by a preponderance of the evidence that Respondent used inappropriate sexually graphic language toward a female assistant prosecutor in the courtroom during a brief break in a homicide jury trial on June 11, 2019?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

2. Was the Commission's finding that Respondent committed the misconduct charged in Count II of the FC adequately supported by a preponderance of the evidence that Respondent used inappropriate sexually graphic language toward a female assistant prosecutor in Respondent's chambers on June 12, 2019 while the jury deliberated in a homicide jury trial?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

3. Was the Commission's finding that Respondent committed the misconduct charged in Count III of the FC adequately supported by a preponderance of the evidence that Respondent inappropriately questioned female prosecutors about their physical characteristics in the courtroom?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

4. Is the Commission's disciplinary recommendation of censure and a twelve month suspension without pay reasonably proportionate to the conduct of the Respondent, including in light of prior warnings Respondent received and his gender bias in committing the misconduct, and reasonably equivalent to the action that has been taken previously in equivalent cases?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

5. Do Respondent's challenges to the constitutionality and conduct of these proceedings virtually lack merit?

The Commission answers: Yes.

Respondent answers: No.

This Court should answer: Yes.

INTRODUCTION

Respondent admits every material fact constituting his conduct that the Master and the Commission found to be misconduct. He admits the inappropriately sexually charged and graphic language he used toward two female attorneys, assistant prosecuting attorneys (“APAs”) Ms. Ashley Ciaffone (“Ciaffone”) and Ms. Anna Bickerstaff (“Bickerstaff”), over the course of a multiday homicide trial, and that he questioned them about their bodies in the courtroom. His only defenses to the undisputed facts are his erroneous belief that he should be able to behave that way without discipline, his incredible and irrelevant explanations (and in some cases, denials) of the meaning and context of his inappropriate language, and his attacks upon the credibility of a female victim in a way which is largely irrelevant to his misconduct even if accepted, and which was not a basis for the Commission’s Decision.

Respondent continues to deny any culpability and asks this Court, alternatively, to do no more than censure him if he is to be disciplined. In making this request, Respondent submits a “proportionality” argument which mischaracterizes the analyses set forth in the Commission’s Decision, wholly ignores his multiple warnings and past inappropriate conduct, which the Commission appropriately considered in fashioning a recommended sanction, and then applies precedent in an inapposite manner without regard to all of the pertinent facts. As set forth in the Commission’s Decision and discussed below, the recommended sanction of censure and suspension for twelve months without pay is proportionate to the conduct of the Respondent and reasonably equivalent to the action that has been taken previously in equivalent cases, and should be ordered by this Court.

Finally, to deflect from his *admitted* conduct forming the basis for the Commission's findings of misconduct, Respondent focuses his Petition on arguing that the proceedings never should have happened. He argues that he was denied due process because Michigan's judicial disciplinary system is unconstitutional and he was entitled to an in-person hearing rather than a virtual hearing. These arguments are meritless sideshows. Therefore, in this reply brief, the Commission maintains its focus on the facts, Respondent's misconduct, the *Brown* factors, and the proportionality of the recommended sanctions, while addressing at the end of this brief Respondent's unfounded legal attacks upon the proceedings.

FACTS AND PROCEDURAL HISTORY

The Commission set forth detailed facts and the procedural history in its June 17, 2021 Decision, (Decision pp. 5-16), which is fully incorporated herein and which the Commission will not repeat here, except that the Commission will reiterate certain evidence cited in its Decision as necessary to address Respondent's arguments in the below Argument section. The Commission objects to Respondent's statement of "Relevant Facts" (Petition pp. 15-24), to the extent it is argumentative, selectively includes only information Respondent deems helpful to his positions, cites the record out of context, and/or omits evidence the Commission expressly relied upon in its Decision in concluding that Respondent committed misconduct as alleged in Counts I, II, and III of the FC.

ARGUMENT

I. Respondent Used Inappropriate Sexual Language To A Young Female Prosecutor, As Charged In Count I.

The Commission set forth its findings of fact and conclusions of law as to Count I at pages 5 to 9 of its Decision. Little more needs saying here because Respondent admits what he said and did. (Petition (cited as “Pet.”) pp. 18-20.) Respondent admits that, when APA Bickerstaff asked for feedback about her questioning of the medical examiner during the trial, Respondent intentionally left the bench to sit directly next to her, knowing and stating aloud that what he had to say to her would make her “blush.” (Pet. pp. 18-19.) Respondent admits that, on his own accord, he chose to “illustrate[]” his feedback “by using the development of intimate relationships as an analogy.” (Pet. p. 19.) Ms. Bickerstaff’s request for feedback was not an invitation for dirty talk from a judge in a courtroom during a short recess of a murder trial.

Respondent further admits the exact nature of this “intimate relationship” analogy he formulated. Perhaps even more telling than Respondent’s inappropriate language is the confusion and reluctance with which it was met by Ms. Bickerstaff. Respondent admits that she did not at first understand what Respondent meant when he posed, “When a man and a woman start to get close, what does that lead to.” (*Id.*) APA Bickerstaff *did not understand*, so Respondent *repeated it*. (*Id.*) Only Respondent was thinking in a sexual manner at this point. Ms. Bickerstaff needed clarification from Respondent, “do you mean sex?” (*Id.*)

Indeed Respondent meant sex, because Respondent then said that foreplay leads to sex, and then posed another sexual question to Ms. Bickerstaff, this time at a

personal level: “Would *you* want foreplay before or after sex?” (*Id.*, emphasis added.) Respondent contends he meant this question generally, not personally. (*Id.*) It is inappropriate either way. In response, Ms. Bickerstaff said *nothing*, resulting in Respondent *again repeating a sexual question for a second time.* (*Id.*) In response to Respondent pressuring an answer by asking the question for the second time, Ms. Bickerstaff answered with only one word: “before.” (*Id.*)

Respondent did not stop. He “stated that the climax of the medical examiner’s testimony is the cause and manner of death.” (*Id.*) In his Petition, Respondent continues to deny that he meant the word “climax” in a sexual manner, but then he incredibly admits *in the very next sentence* that he said “all the testimony crescendos to the cause and manner of death, *which is the sex of the testimony.*” (Pet. pp. 19-20, emphasis added.) In other words, Respondent admits his view and statements that the cause and manner of death elicited from the medical examiner is both the “climax” and the “sex” of the testimony, yet he would have the Master, Commission and this Court believe that only when he explicitly described it as “the sex” did he mean it sexually, but not when he described it as the climax, even though he began the entire analogy as the “intimate relationship between a man and woman” that starts with foreplay and leads to sex.

Respondent’s bare denial of sexual intent as to the word climax does not preclude the Commission’s finding that he was not credible in light of the preponderance of the evidence, including the context of his overall analogy. Not only is Respondent’s denial not credible and indicative of his refusal to take responsibility for

his conduct, it is also irrelevant, since he admits he separately described the testimony as the “sex of the testimony” besides being the climax, which was also inappropriate.

It is not hard to visualize how awkward this situation was for Ms. Bickerstaff, as demonstrated by her reluctance to provide answers to Respondent’s sexual questions the first time he posed them and then her minimalistic responses when further pressed. She testified as such. As set forth in the Decision, she testified that she felt “frozen” when Respondent used his explicitly sexual analogies while seated with her at the prosecution table. (Decision pp. 25-26.) She had two nightmares following this incident. (*Id.*) His actions made her feel uncomfortable coming to work because of the possibility she may see him in the common areas of the courthouse. (*Id.*) She sometimes encountered him on her way into the building, and due to his conduct in court she did her best to avoid having contact with him on these occasions, including once exiting an elevator she was on because he had entered it. (*Id.*)

Respondent continues in his Petition, as he did below, to attack Ms. Bickerstaff’s credibility based solely on whether she did or did not think or say that Respondent was “hitting on her” when he used inappropriate sexual language with her and commented on her body, both in the courtroom, and whether she timely corrected a report of the incident in that regard. (Petition pp. 54-56.) The Master found Ms. Bickerstaff’s testimony credible, which the Commission adopted. (Decision p. 37; Master’s Report pp. 5-6.)¹ This Court’s “power of review de novo does not prevent [it] from according proper

¹ The Master stated she “agrees that the appropriate course of action would have been for Bickerstaff to have told Chief Bivens of the error,” but the Master did “not find that Bickerstaff’s failure to do so automatically destroys the credibility she otherwise had,

deference to the master's ability to observe the witnesses' demeanor and comment on their credibility." *In re Noecker*, 472 Mich 1, 9-10; 691 NW2d 440 (2005), citing *In re Loyd*, *supra* at 535; *In re Jenkins*, 437 Mich at 22 (same).

In any event, Respondent and Ms. Bickerstaff *agree* on Respondent's conduct that formed the basis for the Commission's finding of misconduct in Count I, as set forth above. Notably, no part of the Master's or Commission's findings of fact or conclusions of law hinged on whether Respondent was "hitting on" Ms. Bickerstaff. His sexual discussion was inappropriate itself. Respondent cites no evidence to support his incorrect contention that the "narrative" became that he was hitting on her.

Respondent also falsely claims that the Commission is advocating for a harsher sanction simply because Respondent took issue with the notion that he was "hitting" on Ms. Bickerstaff. (Petition pp. 54, 56.) This argument is not faithful to the Commission's actual findings and recommendations. Rather, the Commission found, as manifestly borne out of Respondent's own testimony and arguments, that he is not repentant and refuses to accept responsibility *for any of his misconduct*, including that which he admits throughout his Petition consisting of multiple inappropriate sexual statements and analogies and assessments of the female prosecutors' bodies. (Decision pp. 27-28, 35, 37.) As set forth in the Decision, this Court has adopted as a relevant factor in determining a proportionate sanction whether a respondent is repentant. (*Id.* pp. 27-

especially given her candor in admitting to her failure to correct that mistake." The Commission agrees. The Commission also deems credible and understandable Ms. Bickerstaff's and Ms. Ciaffone's testimony that Ms. Bickerstaff was reluctant to correct the mistake (although she should have) because it would mean further engaging in an already uncomfortable situation caused by Respondent.

28, citing cases.) As discussed later in this reply brief under the section addressing proportionality and reasonableness of the recommended discipline, Respondent's reliance on *In re Hocking*, 451 Mich 1; 546 NW2d 234 (1996) is misplaced. *Hocking* neither immunizes him from discipline for his undisputed conduct nor supports a more lenient sanction than recommended by the Commission. The Commission's finding of misconduct as to Count I based upon undisputed conduct of the Respondent was more than adequately supported, and should be adopted by this Court.

II. Respondent Used Inappropriate Sexual Language To Young Female Prosecutors In His Chambers, As Charged In Count II.

As with Count I, Respondent admits the inappropriate sexual things he said in his chambers forming the basis for the Commission's finding of misconduct in Count II.² He admits that he brought up sex or used vulgar sexual language in at least five different contexts while in this meeting in chambers. (Pet. pp. 20-21.) As set forth in detail in the Decision (pp. 9-14), which Respondent does not dispute, Respondent said that certain evidence the prosecutor sought to introduce showed only that the defendant and the victim "fucked." (Pet. p. 20.) He turned the defendant's admission about having "non-traditional" sex with the victim into an opportunity to comment on Ms. Ciaffone's own perceived lack of sexual experience and bias. (*Id.* p. 21) He hypothesized that defendant's reference to non-traditional sex meant "doggy style" sex. (*Id.*) He laughed off the assertion and made light of the size of defendant's genitalia

²The Commission rejected, and so should this Court, Respondent's contention that the attorneys were "free to decline" his invitation to chambers, (Pet. p. 20), as both irrelevant and not realistic. Accepting a judge's invitation to chambers, while hardly viewed as discretionary by most attorneys, the Commission expects, is not an acceptance of whatever inappropriate discourse the judge determines to inject in what

when Ms. Ciaffone argued that non-traditional sex must mean something other than vaginal penetration to the defendant because the defendant was concerned about hurting the fetus in the victim. (*Id.*) Respondent then created yet another sexual analogy out of whole cloth to demonstrate voir dire, including how to ask the right questions to achieve sex on a first date. (*Id.*) Thus, the Commission's finding of misconduct as to Count II based upon undisputed conduct of the Respondent was more than adequately supported, and should be adopted by this Court.

III. Respondent Inappropriately Commented On The Young Female Prosecutors' Bodies In The Courtroom, As Charged In Count III.

As with Counts I and II, Respondent does not dispute his conduct the Commission found to be misconduct under Count III relating to his comments and assessments about the female APAs' bodies in the courtroom immediately following his sexually charged conversations in chambers discussed above under Count II. (Pet. pp. 21-22.) Respondent went to counsel table to ask Ciaffone how tall she was: "What are you, like five-one or five-two?" (Pet. p. 22.) Ciaffone said words to the effect of, "No, but I accept that, Judge." (*Id.*) Bickerstaff volunteered, "Judge, I'm five-three for context." (*Id.*) Respondent then estimated Ciaffone's height as four feet, ten inches. (*Id.*) Ciaffone said that she is "four-eleven and a half." (*Id.*) Respondent then asked if Ciaffone weighed around 105 pounds. (*Id.*) Ciaffone said words to the effect of "Judge, you're not supposed to ask a girl her weight." (*Id.*)

But Respondent continued anyway, asking Bickerstaff if she was 117 pounds. (*Id.*) Bickerstaff said, "That's very generous, but no, Judge." (*Id.*) Respondent

should be a professional setting.

responded, “Well, I haven’t assessed you for muscle mass yet.” (*Id.*) During this conversation, Respondent looked Ciaffone up and down once and then looked Bickerstaff up and down once, which Ciaffone felt was, together with the height and weight discussion, “entirely improper.” (*Id.*) Thus, the Commission’s finding of misconduct as to Count III based upon undisputed conduct of the Respondent was more than adequately supported, and should be adopted by this Court.

IV. Disciplinary Analysis.

As set forth above, Respondent’s Petition concedes all of the conduct forming the Commission’s finding of misconduct. Besides challenging the proceedings (discussed later in this reply), Respondent focuses almost exclusively on whether and in what way he should be disciplined for the undisputed conduct. He incorrectly contends that either his foul language and body assessments directed at female attorneys in the courtroom and in chambers was immune from discipline or, alternatively, he deserves a slap on the wrist of no more than censure. Respondent is incorrect. Under the *Brown* and other pertinent factors, the Commission’s recommendation of censure and suspension for twelve months without pay should be adopted by this Court.

A. The *Brown* Factors.³

In his Petition, Respondent provides almost no analysis of the factors set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999) (the “*Brown* factors”). On pages 51 o 52 of the Petition, he provides a bullet point list reciting the factors and then summarily concluding that each one merits either no sanction or a less severe

³ As set forth in the Commission’s Decision, the third and sixth *Brown* factors do not appear to apply and are therefore not addressed here.

sanction. The short shrift he provides the *Brown* factors is likely due to the fact that, as discussed, there is no wiggle room as to the undisputed facts of his misconduct. His self-serving application of the *Brown* factors primarily hinges on his requests – both unsupportable – that the Court (a) ignore his past warnings, admonishment and uncharged conduct; and (b) treat his misconduct, while serving in his official capacity as a judge during a homicide trial, as “off the bench conduct.” The Court should reject his unfounded requests. As set forth in the Decision and below, at least *Brown* factors 1, 2, 5, and 7 *Brown* factors, and aspects of *Brown* factor 4, weigh in favor of a more severe sanction, while two factors (3 and 6) are not applicable.

(1) *Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.*

Respondent’s misconduct is more serious because it was part of a pattern and practice, as detailed in the Commission’s Decision (pp. 19-22). Respondent, citing *In re Simpson*, 500 Mich 533; 902 NW2d 383 (2017), incorrectly contends that the Commission improperly considered other acts not charged in the FC *for finding misconduct*. (Pet. pp. 51, 57-58.) That is false. The Commission considered only the charged acts of misconduct directed at APAs Ciaffone and Bickerstaff during the June 2019 homicide trial in finding that Respondent committed the misconduct charged in Counts I, II, and III of the FC.

Respondent selectively ignores (failing to even address the authority cited by the Commission) that his prior warnings and uncharged acts of misconduct are properly considered – not for determining whether he committed misconduct as charged in the FC – but for determining an appropriate *sanction*, which comes only *after* finding that

misconduct as alleged in the FC occurred. As set forth in the Decision, with no acknowledgement or discussion by Respondent in his Petition, “other acts by Respondent are properly considered *in determining an appropriate sanction*” under *In re Moore*, 464 Mich 98; 626 NW2d 374 (2001). (Decision p. 21 (emphasis added).)

In *In re Moore*, the Commission recommended that Judge Moore be suspended for nine months without pay, and explained that this recommendation was based on the collective acts of Judge Moore throughout his judicial career, noting that he had received two admonitions and a public censure. *Id.* at 117. It was proper for the Commission, *while limiting its findings of misconduct to the allegations of the complaint*, to consider “past behavior *in its sanction determination*,” as such “behavior is relevant.” *Id.* n16 (emphasis added). The Commission’s finding with respect to *Brown* factor number 1 was:

“Respondent’s misconduct is not an isolated instance. It represents a pattern of misconduct continuing throughout Respondent’s career and resulting in admonitions, public censure, and repeated criticisms and reversals by reviewing courts. Respondent *was warned repeatedly* that his conduct was improper. *He cannot justifiably assert ignorance of the error of his ways. He has failed to acknowledge the criticisms were valid and has failed to alter conduct.*”

Id. at 119 (emphasis added).

As in *In re Moore*, Respondent’s prior warnings about inappropriate intimate personal communications in his official capacity and his prior treatment of female lawyers demonstrate his propensity, knowledge of the criticisms of his conduct, and his failure to alter his conduct. Such failure warrants a determination under the first *Brown* factor that Respondent’s misconduct is more serious because it “is not an

isolated instance,” rather it “represents a pattern of misconduct continuing throughout Respondent’s career and resulting in admonitions, public censure, and repeated criticisms[.]” *See id.*

Moreover, even if Respondent’s uncharged acts from 2018 and 2019 regarding his unnecessary hypothetical scenario about sex with a man in a bathroom stall and asking a female attorney about her armpit hair were, for the sake of argument only, removed from the sanctions analysis (although there was evidence of these acts at the Hearing), Respondent still cannot escape his SCAO warning in 2004, his formal admonishment by the Commission in 2005, or the discipline he received by this Court in 2014. (*See* Decision pp. 19-22; *see also* Pet. p. 58 (acknowledging his discipline in 2014).) Contrary to Respondent’s incorrect and off base argument, it is not true that “[t]his Court can’t treat these uncharged instance as a ‘pattern’ without presuming that the unpleaded allegations are true.” (Pet. p. 58.) As *In re Moore* makes clear, the *notice* Respondent repeatedly received of how he must conduct himself yet disregarded independently makes his misconduct more serious under the first *Brown* factor. *See* 464 Mich at 119 (respondent “was warned repeatedly that his conduct was improper” so he “cannot justifiably assert ignorance of the error of his ways,” as he “has failed to acknowledge the criticisms were valid and has failed to alter conduct.”).

The *In re Moore* decision makes practical sense and is in keeping with the entire purpose of the first *Brown* factor. When determining an appropriate sanction, this Court wants to know whether the misconduct is isolated. Respondent’s conspicuous approach has been to minimize his misconduct relative to the APAs while asking that

no one look at the 2004 warning, the 2005 admonishment, or other notices or acts (including by motion in limine to the Master). His misconduct is not viewed in a vacuum. Thus, the first *Brown* factor weighs heavily in favor of a more serious sanction.

(2) *Misconduct on the bench is usually more serious than the same misconduct off the bench.*

The evidence showed Respondent engaged in misconduct on the bench. The Commission set forth its finding in this regard on page 22 of the Decision when it recounted Respondent's misconduct in chambers and in the courtroom, and explained: "[This] Court considers conduct that occurs in a judge's capacity as judge, but not literally 'on the bench,' to be 'on the bench conduct.'" (citing *In re Chrzanowski*, 465 Mich at 476; *In re Barglind*, 482 Mich 1202, 1203 (2008); *In re Adams*, 494 Mich 162, 181-182; 833 NW2d 897 (2013)).

Thus, contrary to Respondent's repeated misstatements in his Petition that the Commission considers his misconduct to be off the bench or that his misconduct should be treated as off the bench simply because he was not physically sitting on his bench when he committed it, (Pet. pp. 12, 14, 41, 43, 51, 52), this factor weighs in favor of a more severe sanction.⁴ The Commission's Decision unequivocally set forth the Commission's finding and conclusion that Respondent's misconduct was on the bench for purposes of the second *Brown* factor and determining an appropriate sanction, as

⁴ As discussed later in this brief, that fact that Judge Hocking in *In re Hocking* was literally sitting on his bench when he made the statements at issue in that case does not mean, as Respondent speciously contends, that Respondent's profane language did not occur "on the bench" for purposes of *Brown* and the sanctions analysis, just because it occurred physically off the bench.

supported by the precedent the Commission cited (and which Respondent failed to address in his Petition). Thus, this factor weighs in favor of a more severe sanction.

(4) *Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.*

Respondent's conduct was not prejudicial to the actual administration of justice. However, one aspect of it created an appearance of impropriety. Respondent told Ms. Bickerstaff, in open court, that he had something to say to her, then came off the bench and had an intimate conversation while sitting close to her at the prosecution table. Defense counsel was not present. (Decision p. 22.) He did this during a five-minute break in the proceedings, when there were members of the public present. As this Court noted while suspending Respondent in 2014, a private meeting with one party during the proceedings, in a public place, creates the appearance of impropriety. *In re Morrow*, 496 Mich 291, 299 (2014). Respondent's Petition did not address this.

(5) *Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.*

Respondent summarily concludes, without analysis, that all of his misconduct was "spontaneous." (Pet. p. 52.) But the repeated warnings he received about such conduct, his multiple instances and admitted "continuation" of misconduct in this case over the course of two days during a homicide trial, and his failure to take any of the multiple opportunities to shift course or heed the victims' cues belie his conclusory assertion. As set forth in detail in the Decision, (pp. 22-25), Respondent's misconduct was premeditated and deliberate rather than spontaneous. The fifth *Brown* factor weighs heavily in favor of a more serious sanction.

- (7) ***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 justices that do not disparage the integrity of the system on the basis of a class citizenship.***

Respondent, again in summary fashion, simply denies that any of his misconduct involved gender “discrimination.” (Pet. p. 52.) He also argues that the Commission did not establish gender discrimination because: (a) in the inapposite *Hocking* case he relies so much upon, the lone fact that the victims were women was not enough, without a “discriminatory pattern,” to find gender discrimination; and (b) in some instances where Respondent directed inappropriate and sexual language at females, male attorneys happened to be tangentially present. (Pet. pp. 53-54.)

As to his *Hocking* argument, Respondent ignores that the case actually supports a finding of gender discrimination because, here, Respondent *indeed has a pattern* of such misconduct toward women dating all the way back to 2004, as discussed above. As to the presence of males in some instances, the males’ mere presence is immaterial in light of the undisputed facts that Respondent’s sexual comments were directed specifically at women, not the men, in the couple of instances cited by Respondent. The Commission’s finding that Respondent’s misconduct toward Ms. Bickerstaff and Ms. Ciaffone was unequal treatment on the basis of gender in violation of MCR 9.202(B)(1)(d) and Canon 2(B) was more than adequately supported by a preponderance of the evidence, (Decision pp. 8-9, 13-14, 16, 25-27), and should be adopted by this Court.

B. Other Considerations.

This Court has endorsed the additional factor regarding the Respondent's conduct in response to the Commission's inquiry and disciplinary proceedings, including whether the Respondent showed remorse and was candid and cooperative. In *In re Adams*, 494 Mich at 181, this Court reasoned that a sanction may be less severe where a respondent acknowledges his or her misconduct and is truthful throughout the disciplinary proceeding, but "where a respondent is not repentant," the sanction may be "measurably greater." (Quoting *In re Noecker*, 472 Mich at 18 (Young, J., concurring)). As in *In re Adams*, Respondent's conduct merits the sanctions recommended by the Commission because Respondent "has not demonstrated any apparent remorse for h[is] misconduct and continues to deny responsibility for h[is] actions." See 494 Mich at 186-187. Further, some of his explanations and irrelevant arguments further demonstrate that, at worst, he is being untruthful and, at best, he refuses to accept responsibility. Claiming that he did not mean the word "climax" in a sexual manner when he described the same cause of death testimony as the "sex of the testimony", that the attorneys were free to decline his invitation to chambers, that whether Ms. Bickerstaff reported or corrected a report that she thought he was "hitting on her" is either relevant to his misconduct or worthy of disbelieving all of Ms. Bickerstaff's testimony, among other positions he has taken, are untenable.

Respondent has persistently refused to acknowledge that he committed any misconduct. Respondent's years of experience also weighs in favor of a harsher sanction. Respondent committed his misconduct after many years as a judge and having been warned about similar behavior on multiple prior occasions. Respondent's

length of relevant service only exacerbates his misconduct. Thus, several additional considerations this Court utilizes merit a harsher sanction.

C. The Basis for the Level of Discipline and Proportionality.

As the Commission set forth in its Decision, the primary concern in determining an appropriate sanction is to “restore and maintain the dignity and impartiality of the judiciary and protect the public.” (Decision p. 29, citing *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998).) In recommending a sanction in this matter, the Commission undertook to ensure that the action it is recommending is reasonably proportionate to the conduct of the Respondent and reasonably equivalent to the action that has been taken previously in equivalent cases. The Commission provided an in depth analysis of cases from Michigan and outside of Michigan dealing with judges who committed sexually related misconduct without intertwined aspects of other misconduct. (Decision pp. 30-36.) After consideration of the *Brown* and other factors and the case law, the Commission concluded censure and a twelve-month suspension without pay was the appropriate and proportionate discipline for Respondent, and requests this Court adopt its recommendation.

Respondent asserts he should receive no sanction at all or, alternatively, nothing more than censure for his misconduct. Respondent places nearly wholesale reliance on *In re Hocking*, 451 Mich 1; 546 NW2d 234 (1996), but that case is distinguishable. *Hocking* involved a judge’s statements on the record, at a contentious sentencing hearing of a male lawyer, to explain his reasoning for a sentencing departure. Judge Hocking departed below the sentence recommended by the sentencing guidelines based on blatantly sexist and offensive reasoning. No doubt his words were distasteful. In a

companion case, Judge Hocking was charged with treating another female attorney intemperately and abusively (not in a sexual manner), and he admitted to being rude and discourteous to her.

There is a fundamental difference between what Judge Hocking did and what Respondent did. APAs Bickerstaff and Ciaffone testified as to how Respondent's mistreatment of them affected them professionally and on an ongoing basis. Judge Hocking was not alleged to have sexually harassed anyone. Respondent says neither was he, (Pet. p. 43), but his direction of inappropriate sexual language to the APAs had effects on them similar to those experienced by harassment victims. Bickerstaff had nightmares and avoided Respondent, even changing elevators once. Ciaffone was worried no one would believe her, worried about her case and career, that the incident would follow her professionally and make her the subject of gossip while officers may not want to joke with her and judges may not invite her to chambers, and defense attorneys may treat her differently. (Decision p. 26.) Respondent says the victim of the sexual assault in *Hocking* was present in the courtroom to hear Judge Hocking's remarks, but being offended by the reasons for Judge Hocking's sentence of a criminal defendant is not the same as the hostile work environment and potential for ongoing professional ramifications Respondent thrust upon the APAs.

Although Judge Hocking's stereotypes exposed the judiciary to national ridicule, the Court concluded that the inept effort to explain his decision was not misconduct, as the Court was moved by the need for a judge to have latitude to explain his reaction to

the facts of a case.⁵ 451 Mich at 9-14. And, of course, such reasoning for departure is subject to appellate review. Respondent, on the other hand, directed sexually graphic language off the record but while acting in his official capacity as judge at female attorneys appearing before him, in a close personal setting yet under the authority of his office. He deliberately injected sexual language into conversations that otherwise had nothing to do with sex and improperly questioned the female attorneys about their bodies. Respondent was not in Judge Hocking's situation. He was not explaining his decision from the bench on the record. What Judge Hocking said to fulfill his duty to explain his sentence is not similar to what Respondent said to APA Bickerstaff, privately, or what he said to APAs Bickerstaff and Ciaffone in chambers.

Likewise, Judge Hocking's remarks at the sentencing hearing did not address personal and private facts about the attorneys and did not involve Judge Hocking eyeing or discussing anyone's bodies or sexual experiences. While this Court found no misconduct in Judge Hocking's words (some 25 years ago), the Court made it clear that there are times when things a judge says can be misconduct, even when said in connection with a case: "A judge's comments are not immune from censure simply because they are based on facts adduced at trial or events occurring during trial." 451 Mich at 13. Respondent is not immune or insulated in this case.

⁵ Respondent states: "It beggars belief that the Commission would try to excuse [Judge Hocking's] comments as just old-fashioned views about gender roles." (Pet. p. 44.) Respondent is confused. It was the Commission that recommended discipline for Judge Hocking. The fact remains, and regardless of the Court's reasoning in *Hocking* and whether the Commission, the current Court, or anyone else agrees with *Hocking*, it simply does not apply here because it is factually distinct.

The Commission found this case to be much more similar to *In re Iddings*, 500 Mich 1026; 897 NW2d 169 (2017) and *In re Servaas*, 484 Mich 63; 774 NW2d 46 (2009), as well as the cases from other states dealing with sexual conduct by judges, and so should this Court. (Decision pp. 30-36.) While there may be no perfect match of the facts of a prior case to what Respondent did, that does not mean Respondent should get a pass or a less severe than warranted sanction. Respondent has not apologized to the women, like Judge Servaas tried to do with one of the women he offended, rather Respondent denied misconduct and called APA Bickerstaff a liar. Respondent has not expressed remorse like Judge Iddings did, and, instead, Respondent still believes that he did not do anything inappropriate. Respondent has not tried to correct his behavior nor did he self-report his behavior, like Judge Iddings did. Thus, the pertinent distinguishing features of *Servaas* and *Iddings*, such as those judges' acceptance of responsibility and prior unblemished records, serve only to show why a more severe sanction is warranted here, whereas the underlying thread of sexual misconduct makes *Iddings* and *Servass*, but not *Hocking*, the cases that are similar to what Respondent did.

Respondent also relies on *In re Gorcyca*, 500 Mich 588; 902 NW2d 828 (2017), (Pet. p. 52), but that case is distinguishable, too. Respondent appears to advance *Gorcyca* for nothing more than its ultimate resolution, i.e., censure alone as discipline, and advocate for the same discipline.

Gorcyca is not similar. The alleged misconduct arose in the context of a protracted and highly contentious divorce and custody case where more than 100

pleadings were filed and more than 40 hearings were held. 500 Mich at 595-596. The children's refusal to participate in parenting time with their father took center stage, and the events giving rise to discipline occurred at a June 24, 2015 contempt hearing where respondent held the children in contempt. *Id.* at 603-04. The Commission concluded that the following actions of respondent constituted judicial misconduct: (1) holding one of the children in contempt on June 24, 2015, for refusing to participate in parenting time with his father on that date when the only order applying to him called for him to visit with his father on July 14, 2015; (2) having ordered the three children in this case to be confined to Children's Village for contempt of court, but delegating to a third party (the father) the discretion to determine when they had purged themselves of contempt; and (3) failing to act in a patient, dignified, and judicial manner during the contempt proceedings against the three children, aged 9, 10, and 13, directing to them insulting, demeaning, and humiliating comments and gestures far exceeding the proper bounds of stern language permitted to a judge. *Id.* at 613-14.

This Court agreed with only the third finding of misconduct – that Judge Gorcyca failed to observe high standards of conduct and did not preserve the integrity of the judiciary in her treatment of the children. *Id.* at 614-15. The Commission's other findings regarding abuse of contempt power regarded legal error, not disciplinary issues, the Court held. *Id.* at 616. Under the *Brown* factors, the Commission and the Court noted respondent's "exemplary record" and that the incident was "isolated." *Id.* at 629-631. It was because "this is an isolated instance of misconduct by a judge with an otherwise exemplary record that a measured sanction should deter future

misconduct,” whereas, if respondent repeated such behavior, “the Commission can initiate new proceedings to address that misconduct and a sanction may be imposed for a pattern of misconduct.” *Id.* at 631. Thus, the first *Brown* factor “unequivocally favor[ed] a lesser sanction.” *Id.*

Respondent in this case emphasizes that children were involved to argue that Judge Gorcyca’s conduct was worse than his, (Pet. pp. 14, 52, 53), but this Court expressly rejected that idea in *Gorcyca*. Analyzing *Brown* factor #7, this Court determined it did not warrant a more severe sanction because:

“Assuming *arguendo* that age may be included within ‘such considerations as race, color, ethnic background, gender, or religion,’ we simply see no evidence that respondent treated the children differently from other persons who had previously defied court orders. Indeed, respondent jailed the mother for not complying with a court order. Respondent’s assignment to a family court docket means that her cases often involve the custody of children. In our view, respondent’s conduct during the hearing cannot be described as demonstrating animus toward children. Instead, her conduct demonstrated frustration with these particular children and their persistent refusal to follow the court’s orders.”

Id. at 632. This Court’s “review of the proceedings differ[ed] from the Commission’s view that respondent targeted the children.” *Id.* at 635.

There were also “several mitigating factors [that] compel a lesser sanction.” *Id.* at 635. Besides *Brown* factors 1 and 7 warranting a lesser sanction, the proceedings in the case were extremely contentious and protracted. *Id.* Respondent presided over this difficult matter for several years and heard dozens of motions, but the incident represented a single recorded lapse of good temperament, and her frustration was understandable. *Id.*

None of the mitigating factors present in *Gorcyca* warranting a lesser sanction are present here. *Gorcyca* had no sexual or gender bias aspects or premeditation or pattern or practice elements, or any other redeeming similarity, which explains this Court's decision to impose the less severe sanction of censure without adopting the Commission's recommendation for a 30-day suspension. Respondent's record is not "exemplary," rather it is the basis under *Brown* factor 1 warranting a more severe sanction for his pattern and refusal to heed prior warnings. Applying *Gorcyca* here would be the antithesis of assessing "equivalent misconduct." See *Brown*, 461 Mich at 1292.

V. Respondent's Challenges To The Proceedings Lack Merit.

A. These Proceedings Are Constitutional, And Respondent Received Due Process.

Respondent argues that Michigan's judicial discipline system is unconstitutional, relying on United States Supreme Court's now five-year-old decision in *Williams v Pennsylvania*, 136 S Ct 1899 (2016).⁶ Respondent's argument is based upon a strained reading of *Williams* which attributes watershed, precedent-breaking holdings the

⁶ Respondent says the Commission's Decision has a "glaring problem" and "error," which is the alleged unconstitutionality of Michigan's judicial discipline system. (Pet. p. 13.) But, in the lower proceedings, Respondent said that the Commission cannot resolve the constitutional issue and that Respondent was merely preserving the constitutional issue to raise in this Court. (R's 3/9/21 Objections to Master's Report, p 26; Decision p. 17.) The Commission's Decision does not have a glaring problem or error in following the law. Because the issue was not properly teed up for this Court, the Commission's Decision simply stated its agreement with Respondent that it is for this Court, not the Commission, to decide issues of constitutionality and therefore limited its discussion to noting that *Williams* appears distinguishable. (Decision p. 17.) Thus, contrary to Respondent's statement, the Commission did not take a "nothing-to-see-here approach." (Pet. p. 33.) Now that Respondent has raised his constitutionality argument in his Petition to this Court, the Commission will address it.

Williams Court simply did not make. *Williams* did nothing to overturn, or even alter, controlling precedent that it actually explicitly followed, *id.* at 1903, such as *Withrow v Larkin*, 421 U.S. 35; 95 S Ct 1456 (1975), which this Court has repeatedly applied in finding the Michigan judicial discipline system constitutional. *See, e.g., In re Chrzanowski*, 465 Mich at 483-86; *In re Del Rio*, 400 Mich at 682-84; *In re Mikesell*, 396 Mich at 527-531.

Respondent hinges his constitutional argument on two false premises about *Williams*, neither of which are accurate. First, he contends that *Williams* establishes a “structural” flaw in Michigan’s judicial discipline system. (Pet. pp. 27-28.) Respondent has to argue a structural flaw to achieve an automatic result because he cannot otherwise establish any prejudice or lack of due process in the process he received. There is no structural flaw, as his argument is meritless.

Second, Respondent incorrectly contends that *Williams* introduced the “accuser” notion such that a judge or licensing board or, here, the Michigan Judicial Tenure Commission, could perform only investigatory and adjudication roles but not an “accuser” role. (Pet. p. 28.) Respondent’s interpretation is contrary to what *Williams* and the prior precedent Respondent purports to discuss in his Petition actually held. It is settled law, and *Williams* did nothing to change, that a system that includes an agency’s “investigating facts, ***instituting proceedings***, and then making the necessary adjudication” is not unconstitutional per se. *See Chrzanowski*, 465 Mich at 483-84 (emphasis added), citing *Withrow*, 421 US at 47-55 *see also id.* at 484 (“[D]ue process rights are not violated simply by the combination of the investigatory,

prosecutorial, and adjudicatory functions in one agency, but rather by actual bias or the high probability of bias[.]”), citing *Marshall v Cuomo*, 192 F.3d 473, 484-485 (CA 4, 1999); *State Bar Grievance Administrator v Baun*, 395 Mich 28, 34-35; 232 NW2d 621 (1975) (it was not unconstitutional for the State Bar Grievance Board to request the investigation, investigate it, determine probable cause, charge, prosecute, and find appellant guilty). Finally, even if an objective standard for bias rather than actual bias is applied, Respondent cannot overcome this high hurdle because the Commission was not objectively biased, there were more than adequate separations of duties within the proceedings, and this Court, not the Commission, is the final decision-maker.

All the aspects of Michigan’s judicial discipline system noted by this Court in *Chrzanowski* making it withstand constitutional scrutiny still apply with equal force under *Withrow* after *Williams*. The key procedures of Michigan’s system include:

- The Commission conducts a preliminary investigation to determine whether respondent’s alleged conduct warranted further action.
- After determining that sufficient evidence of misconduct exists, the Commission files a formal complaint.
- A master is appointed, notice is given, and a hearing is afforded respondent, with the Commission’s executive director serving as prosecutor-examiner.
- After the hearing, objections may be lodged against the master’s findings, and a hearing held on the objections.
- The Commission renders its conclusion as to whether a respondent should be disciplined, which is “ultimately just a recommendation to this Court that [it is] charged to review de novo pursuant to deciding what discipline, if any, is appropriate.”

465 Mich at 486. “As in *Withrow*, the JTC’s investigative and adjudicative procedures are functionally separate; additionally, as distinct from *Withrow*, in which the investigation and the decision were undertaken by the same Medical Examining Board, here the master, the examiner, and the JTC panel are separate entities.” *Id.* at 486-487. “Further, a majority of the members of the JTC are judges, and all the members who ultimately recommend discipline are assumed to be fair and impartial.” *Id.* at 487.

Williams did not purport to, as Respondent implies, overturn or change the holdings of long-established precedent like *Withrow* and this Court’s application of *Withrow* in repeatedly finding Michigan’s judicial discipline system constitutional. Respondent clings to the word “accuser,” as if that lone word in *Williams* changed the legal landscape in this area, but it did not. The actual quote in *Williams* was: “Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.” 136 S Ct at 1901, citing *In re Murchison*, 349 US 133, 136-137; 75 S Ct 623 (1955). *Murchison* is a 1955 case that preceded *Withrow* by twenty years. In other words, *Williams* used the word “accuser” in simply noting the holding of a prior case, *Murchison*, which was of “particular relevance” to *Williams*, but which does not apply here. *Williams* did not purport to overturn or even address *Withrow* except to cite *Withrow* approvingly as controlling precedent. 136 S Ct at 1903.

Because *Williams* did nothing to alter this Court’s existing precedent and reliance upon *Withrow*, there is no “structural” infirmity with Michigan’s judicial discipline system. Thus, Respondent would need to, but cannot, show “special facts or

circumstances which would suggest that the risk of unfairness here, if indeed there was any,” and that the risk “was ‘intolerably high.’” *Chrzanowski*, 465 Mich at 487, citing *In re Mikesell*, 396 Mich 517, 531; 243 NW2d 86 (1976). Respondent has not and cannot make such showing.

Finally, in *In re Conduct of Sanai*, 360 Ore. 497; 383 P.3d 821 (2016), the Supreme Court of Oregon, in a reciprocal discipline case involving an attorney who was disciplined in Washington, rejected an argument very similar to the argument Respondent makes here. That court found that *Williams* did not render the disciplinary proceedings of an attorney in Washington state unconstitutional. The *Sanai* court noted that, in *Williams*, the United States Supreme Court concluded that there was an impermissible risk of actual bias when the Chief Justice of the Pennsylvania Supreme Court—a former district attorney who had approved the trial prosecutor’s request to seek the death penalty in the petitioner’s criminal trial—refused to recuse himself in the petitioner’s postconviction relief case. 360 Ore. at 535-536. In *Williams*, the Court held that, “[w]here a judge has had an earlier *significant, personal involvement* as a prosecutor in a critical decision in the defendant’s case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level.” *Williams*, 136 S Ct at 1910 (emphasis added). The *Sanai* court distinguished its own case from *Williams* because, unlike in *Williams*, there was no “evidence in the record demonstrating that any member of the Washington Supreme Court had ‘significant personal involvement’ in prosecuting the disciplinary charges against the accused.” 360 Ore. at 536. Here, no member of this Court has had any involvement in prosecuting Respondent.

Respondent's constitutional argument is a meritless distraction from his admitted conduct that the Commission found to be misconduct by a preponderance of the evidence. This Court should reject Respondent's argument, reaffirm the constitutionality of Michigan's judicial discipline system, and adopt the Commission's recommendation for discipline of censure and a twelve month suspension without pay.

B. Conducting The Hearing Virtually Was Proper.

Respondent objected to the Master's decision to conduct the proceedings virtually rather than in person, and maintains his objection in his Petition. (Pet. pp. 38-40.) Respondent's sole argument is that MCR 9.231(B), which states that "[t]he master shall set a time and a place for the hearing ...," implies that the hearing must be at a physical "place." He states that place "refers to a physical location," but provides no authority for this position. (Pet. p. 38.) His own citation to an online dictionary undercuts his position, defining "place" to include space in general.

This Court has authorized, and even encouraged, courts to conduct virtual proceedings whenever possible, in order to best ensure the safety of all participants during the pandemic. The hearing in this case occurred in November and December 2020. Under this Court's Administrative Order 2020-19, June 26, 2020, the courts were mandated to "continue to expand the use of remote participation technology (video or telephone) as much as possible to reduce any backlog and to dispose of new cases efficiently and safely."

Respondent cannot articulate any legitimate way in which conducting the Hearing virtually prejudiced him, because it did not. He had full, fair, and ample

opportunity to present his evidence, respond to his opponent's evidence, and to question and cross examine witnesses. The virtual Hearing easily satisfied due process.

MCR 9.231(B) is not the only Michigan Court Rule which contains the word "place." MCR 2.403(G) pertains to scheduling case evaluation hearings. It provides that the "ADR clerk *shall* set a time and *place* for the hearing and send notice to the case evaluators and the attorneys at least 42 days before the date set." (emphasis added). Case evaluation hearings have been conducted virtually all over the State, and exclusively since July 28, 2020 in the 16th Circuit Court, for example. See [https://circuitcourt.macombgov.org/CircuitCourt-CaseEvaluations??](https://circuitcourt.macombgov.org/CircuitCourt-CaseEvaluations?)

Similarly, MCR 2.503(A) authorizes a trial court to command, by order or subpoena, a party or witness "to appear for the purpose of testifying *in open court* on a date and time certain," and MCR 2.504(D)(4) mandates that such a subpoena must "state the *place* where the trial or hearing is scheduled." (emphasis added). Subpoenas commanding the attendance of parties or witnesses virtually with a Zoom link have routinely issued, notwithstanding the subpoena is supposed to designate the "place" for the witness to appear under the court rules, and notwithstanding that "open court" is virtual, because "place" is not so narrow as Respondent contends.

Indeed, a series of administrative orders by this Court during the pandemic have authorized precisely such actions to occur remotely without amending the rules because the meaning of "place" is not so rigid as Respondent contends. (See Administrative Order 2020-6 (April 7, 2020), "Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely"; Administrative Order 2020-2 (March 18,

2020), “Order Limiting Activities” (“All other civil and business court matters, including trials, must be conducted remotely using two-way interactive video technology or other remote participation tools”); Administrative Order No. 2020-1 (March 15, 2020), “In Re Emergency Procedures in Court Facilities” (“In civil cases, trial courts should maximize the use of technology to enable and/or require parties to participate remotely.”). Respondent, a circuit court judge, surely knows this very well.

Since the pandemic, there have been scores of depositions, motion hearings, case evaluations, mediations, arbitrations, and even trials conducted remotely notwithstanding that these proceedings have historically occurred at a physical “place.” Respondent offers no good reason why his judicial discipline hearing should be treated any different than these other proceedings, or why this Court should apply an exceptionally narrow, inflexible interpretation to the word “place” in MCR 9.231(B) that has not been applied anywhere else to the same word in different rules within the Michigan Court Rules. *See In re McCarrick/Lamoreaux*, 307 Mich App 436, 446-47; 861 NW2d 303 (2014) (courts “should interpret a court rule to avoid inconsistencies.”). The Commission, comprised mainly of judges, is well equipped to conduct hearings virtually. Respondent’s attack on the virtual Hearing, like his attack on the constitutionality of the Michigan judicial discipline system, is simply a sideshow to detract from his misconduct which he is not able to deny.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Commission’s Decision, the Commission asks this Court to reject Respondent’s Petition, and to instead accept in full the Commission’s recommendations.

DYKEMA GOSSETT PLLC

Dated: August 3, 2021

By: /s/ William B. Murphy

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/s/ William Murphy

Signature

Dykema Gossett PLLC

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