STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Complaint No. 102

Hon. Bruce Morrow
Third Circuit Court
Detroit, Michigan

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

LYNN HELLAND (P32192)
Disciplinary Counsel

LORA WEINGARDEN (P37970)
Disciplinary Co-Counsel

3034 W. Grand Blvd. St. 8-450
Detroit, Michigan 48202
(313) 875-5110

INTRODUCTION AND SUMMARY

The Amended Complaint (complaint) charges Hon. Bruce Morrow (respondent) with three counts of misconduct based on multiple violations of the Michigan Code of Judicial Conduct (canons) and the Michigan Court Rules (MCR). His misconduct falls into two categories: inappropriate use of sexually graphic language (Counts 1 and 2), and inappropriately questioning female attorneys who appeared before him about their physical appearance (Count 3).

The evidence clearly proved the facts and violations alleged in the complaint.

JURISDICTION

Respondent has been a judge of the Recorder's Court and the Third Circuit Court since 1993. (DC Exh. 4, ¶3)[1] As a judge, respondent is subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.202.

STANDARD OF PROOF

Judicial discipline is a civil proceeding, the purpose of which is not to punish but to maintain the integrity of the judicial process. *Matter of Mikesell*, 396 Mich 517, 527 (1976); *In re Seitz*, 441 Mich 590, 624 (1993); *In re Haley*, 476 Mich 180, 195 (2006). The standard of proof is preponderance of the evidence. *Id.* at 189; MCR 9.233(A).

[1] The abbreviations used in the citations are as follows: "[name] [date] [p #/#]" - refers to the page and line numbers of the hearing transcript; "DC Exh…" refers to Disciplinary Counsel's exhibit.

THE MASTER'S ROLE

The Master's report must contain a brief statement of the proceedings, plus findings of fact and conclusions of law with respect to the issues presented by the complaint and the answer. MCR 2.236. The Master does not address sanctions.

The standards of judicial conduct are established by MCR 9.202 and the canons. *In re Ferrara,* 458 Mich 350, 359-60 (1998). The Master must evaluate respondent's conduct objectively, not from respondent's subjective perspective or that of the attorneys with whom he interacted:

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

In re Tschirhart, 422 Mich. 1207, 1209-10 (1985).

STATEMENT OF PROCEEDINGS

On August 11, 2020, the Judicial Tenure Commission (JTC) filed a three-count complaint against respondent. On August 25 respondent filed his answer to the complaint, together with affirmative defenses. On September 17 the Supreme Court appointed Hon. Betty Widgeon as Master. On October 21 the JTC filed an amended complaint that corrected some dates but did not change the essence of the charges.

Pretrial meetings were conducted on September 28 and November 4, 2020. A scheduling order was entered on September 28, 2020. Motions were decided on October 21, October 31, November 2, and November 12, 2020. On November 12, the Master allowed into evidence Exhibit

10, a 2005 letter to respondent from the JTC, and Exhibit 11, a letter to him from the State Court Administrator's Office (SCAO), "for the limited purposes of demonstrating guidance regarding inappropriate sexual language that respondent had previously received." The Master also denied respondent's motion to find subchapter 9.200 of the Michigan Court Rules unconstitutional; denied respondent's motion to hold the hearing in person, rather than by Zoom; granted respondent's motion to accept a late filing, and denied disciplinary counsel's motion in limine to exclude character evidence testimony.

An amended sequestration order was entered November 5, 2020. The public hearing commenced remotely on Zoom on November 13, made available to the public on You Tube. The hearing continued on November 23, November 24, December 7, and December 15. Sixteen witnesses testified and 20 exhibits were admitted. Closing arguments were heard on December 15, 2020.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In 2004, following an investigation, SCAO instructed respondent: "It is inappropriate to discuss matters of a personal nature with staff unless that individual is an acquaintance or friend." SCAO further instructed respondent to "refrain from initiating or participating in inappropriate conversations with staff regarding topics of a personal nature." (DC Exh. 11) The next year, after completing its own investigation, the JTC cautioned respondent "against engaging in conversations with court staff which are of a personal or intimate nature and which may be regarded as offensive or embarrassing." (DC Exh. 10)

Between June 10 and June 13, 2019 respondent presided over *People v James Matthews*, case number 18-7023-01. Mr. Matthews was charged with a murder that had taken place in 2003. The two female assistant prosecutors trying the case were Ashley Ciaffone and Anna Bickerstaff. At the time of the trial, Ms. Ciaffone was 33 years old and had been a prosecutor for about eight years. (Ciaffone, 11-13-20, p 30/5-6, 8) Ms. Bickerstaff was 27 years old and had been a prosecutor for a year and a half. (Bickerstaff, 11-23-20, p 375/18-22) Neither of the prosecutors knew respondent very well. Ms. Ciaffone had tried a case before him as an intern and had one other case pending before him. (Ciaffone, 11-13-20, p 30/19-20) Ms. Bickerstaff had never met respondent until her involvement in *Matthews*. (Bickerstaff, 11-23-20, p 375/23-25)

On the first day of trial, and in response to Ms. Bickerstaff's request for feedback, respondent publicly explained to her that she should try to avoid using the word "and" to begin her questions. (Bickerstaff, 11-23-20, pp 379/22-380/12, 15-21) Respondent also publicly corrected Ms. Ciaffone on multiple occasions. On one occasion, during a break in proceedings, respondent publicly stated to Ms. Bickerstaff that she should have a mentor other than Ms. Ciaffone, because Ms. Ciaffone was not very good. (*Id*. at p 434/7-16)

COUNT I
INAPPROPRIATE USE OF SEXUALLY GRAPHIC LANGUAGE

On June 11, 2019, Ms. Bickerstaff questioned a medical examiner who testified for the prosecution. A short time later, respondent stopped the proceedings for five minutes, at the request of defense attorney William Noakes, so Mr. Noakes could talk to his client about whether he wanted to testify. (Noakes, 11-24-20, p 902/2-14) The break took place from 2:52 p.m. to 2:57 p.m. (*Id*. at pp 903/23-904/4) During the break, Ms. Bickerstaff asked respondent whether she had done better with the medical examiner than she had done with a previous witness, referring to her beginning questions with the word "and." (Bickerstaff, 11-23-20, p 384/7-19) From the bench, respondent replied that she did, and added words to the effect of "I'm going to come down there to talk to you because what I have to say could make you blush." (*Id*. at p 385/4-7; Kurily, 11-24-20, p 700/22-24; DC Exh. 2, ¶6; DC Exh. 4, ¶9) Although Mr. Noakes does not remember respondent making that comment, (Noakes, 11-24-20, p 903/5-10), the preponderance of the evidence shows that respondent made it.

As noted above, respondent had not been concerned that criticizing Ms. Ciaffone or Ms. Bickerstaff, publicly and even harshly, would make them blush. His belief that he might make Ms. Bickerstaff blush on this occasion was based on something about the content of what he intended to say, not the fact that it was going to be critical.

There were three chairs on one side of the rectangular prosecution table, so close together that each chair touched the one next to it. (Bickerstaff, 11-23-20, p 383/8-12) In the chair closest to the podium sat the officer in charge of the case, Lt. Derrick Griffin.[2] (*Id*. at p 383/18-20) Ms. Bickerstaff sat in the middle seat. (*Id*. at p 383/13-14) Respondent took the end seat that had been

[2] Lt. Griffin was a sergeant at the time of the *Matthews* trial.

vacated by Ms. Ciaffone, who momentarily left the courtroom. (*Id*. at pp 382/14-16, 385/16-19; DC Exh. 2 ¶ 7) Respondent sat next to Ms. Bickerstaff, with the arms of their chairs touching and their heads a foot to a foot and a half apart. (*Id*. at p 387/8-2l; Kurily, 11-24-20, p 702, l17-25) He kept his voice low. (Bickerstaff, 11-23-20, p 390/11-25; Ciaffone, 11-13-20, p 44/3-7) He looked directly at Ms. Bickerstaff and did not break eye contact during their conversation. (Bickerstaff, 11-23-20, p 387/22-25; Ciaffone, 11-13-20, p 44/21-22). He did not include defense counsel. (Bickerstaff, 11-23-20, p 390/3-5; Noakes, 11-24-20, pp 902/2-903/5)

Respondent then analogized questioning the medical examiner to a sexual encounter. He told Ms. Bickerstaff:

- "When a man and a woman start to get close, what does that lead to?" (Bickerstaff, 11-23-20, p 386/9-10; DC Exh. 2, ¶7c; DC Exh. 4, ¶ 13)
- When Ms. Bickerstaff did not reply, respondent said, "You start with holding hands, rubbing elbows, kissing, foreplay, and then that leads to sex." (Bickerstaff, 11-23-20, p 386/14-15; DC Exh. 2, ¶7d; DC Exh. 4, ¶14)
- "Would you want foreplay before or after sex?" (Bickerstaff, 11-23-20, p 386/16-17)
- "You want to tease the jury with the details of the report, and that leads to the climax, which is the cause and manner of death." (*Id*. at p 389/4-6; DC Exh. 2, ¶7i; DC Exh. 4, 19; DC Exh. 2, ¶7g, DC Exh. 4, ¶17)
- "The testimony crescendos into the cause and manner of death and that's all that really matters with the medical examiner's testimony." (Bickerstaff, 11-23-20, p 389/8-10; DC Exh. 2, ¶7h; DC Exh. 4, ¶18)

Lt. Griffin overheard part of the conversation. He became aware that it was of a sexual nature, and believed it was inappropriate and unprofessional for respondent to talk that way in a courtroom. (Griffin, 11-24-20, pp 751/12-19, 753/7-13) He overheard respondent make sexual analogies, and overheard him describe a sex act as leading to a "crescendo." (*Id*. at p 751/9-11) He believed the discussion may have embarrassed Ms. Bickerstaff. (*Id*. at pp 751/20-21, 752/16) He

did not interrupt respondent because he did not believe it was his place to do so; he did not feel he has authority over a judge in the judge's courtroom. (*Id*. at p 753/16-22)

When Ms. Ciaffone returned to the courtroom, respondent was still speaking to Ms. Bickerstaff. Ms. Ciaffone sat at the bench behind the prosecution table. Though she could not hear much of what respondent said, she overheard him tell Ms. Bickerstaff that the "cause and manner of death are like the climax." (Ciaffone, 11-13-20, p 45/13-15)

At the end of the day, as Ms. Bickerstaff and Ms. Ciaffone were in the elevator on the way back to their offices, Ms. Bickerstaff told Ms. Ciaffone what respondent had said to her at the prosecution table. (Ciaffone, 11-13-20, at pp 48/20-49/13; Bickerstaff, 11-23-20, p 392/7-16) When Ms. Bickerstaff returned to her office, she told her officemate, Patrina Bergamo, that respondent

> said he was going to make some—he was going to say something that would make her blush. So he came down and sat next to her at the prosecutor's table where he then basically said that the cause and manner of death is equal to the climax and everything before is considered foreplay.

(Bickerstaff, 11-23-20, pp 392/17-393/3; Bergamo, 12-27-20, p 1124/16-21)

Ms. Bickerstaff did not react verbally or physically to respondent's statements and conduct, though she did not want to be part of the conversation and wanted it to end. (Bickerstaff, 11-23-20, pp 388/17-19, 409/17-25; Noakes, 11-24-20, pp 875/23-25, 876/1) She

> felt very uncomfortable. It's not a conversation I, you know, would feel comfortable having with a judge or really anyone I work with. I felt like very frozen, like I couldn't leave because he's a judge. I couldn't just get up and walk away from him. It's not—I mean none of this was very professional, but I was always taught not to disrespect a judge, not to, you know, walk away or be rude, that if they're going to give you criticism or something like that or if they're going to, you know, I guess give a critique, like, even if its harsh you just sit and take it and then say thank you, Judge, at the end. So I didn't feel like I was in a position to do anything. I felt just kind of trapped there and frozen and very uncomfortable and embarrassed by the conversation.

(*Id*. at p 388/1-16) In fact, Ms. Bickerstaff later had nightmares due to respondent's conversation with her, and felt compelled to avoid being near him in an elevator or the courthouse. (*Id*. at pp 429/22-430/8, 430/18-431/7, 433/7-18)

Assistant Prosecutor Joseph Kurily was assigned to respondent's courtroom for approximately 18 months, from August 2018 until March of 2020. (Kurily, 11-24-20, p 698/7-9, 12-13) Respondent never said to Mr. Kurily words to the effect of "I'm going to tell you something that may make you blush," and he never heard respondent say that to any other defense attorney or prosecutor. (*Id*. at p 703/19-25.) Mr. Kurily testified that respondent would sometimes sit with him at the prosecutor's table, but did not sit close to him, with the arms of the chairs touching, their eyes locked into each other's, or their heads close together. (*Id*. at pp 705/4-9, 707/10-16, 735/15-20) Mr. Kurily has had more than 15 conversations with respondent in which respondent gave him instructions or critiques on how to try cases, but respondent never used sexual analogies and he never used the sexually connoted words "tease," "climax," "crescendo" or "foreplay." (*Id*. at pp 736/3-737/3.) Further, respondent never discussed sleeping with someone on a first date with him, and he did use swear words in conversation. (*Id*. at p 737/4-16)

Paragraph 17 of the complaint charges that respondent's conduct violated:

Canon 1, which requires that a judge personally observe high standards of conduct;

Canons 2(B) and 3(A)(14), which require that a judge treat every person with courtesy and respect;

Canon 3(A)(3), which requires that a judge be dignified and courteous to lawyers.

Respondent's statements to Ms. Bickerstaff, especially in the context of how intimately they were seated, how close their heads were, and the eye contact they had, violated each of these canons. His statements were completely unnecessary to make the point he wanted to make. There

was no reason for him to explain his theory of direct examination in this particular way other than to inject explicit sex into his conversation with this young woman. He should have realized that analogizing to foreplay, sexual teasing, climax, crescendos and sex could well be inappropriate, offensive, and embarrassing to a young attorney of the opposite gender.

Exhibits 10 and 11 demonstrate that respondent had been instructed about the inappropriateness of his prior overly intimate language. He was aware enough of the JTC to believe that it was concerned with something as innocuous as his use of the word "asshole." (Ciaffone, 11-13-20 pp 131/21-132/7) In the face of this knowledge and history, the preponderance of the evidence shows that he intentionally chose his words and conduct to satisfy some unstated personal desire, whether to shock or show his power or for some other purpose. Whatever his motive, respondent failed to demonstrate a high standard of conduct; he was very discourteous and disrespectful; and his actions were very undignified, in violation of each of the canons charged in paragraph 17 of the complaint.

COUNT II
INAPPROPRIATE USE OF SEXUALLY GRAPHIC LANGUAGE

Respondent invited all the lawyers into his chambers while the jury was deliberating. (Ciaffone, 11-13-20, p 50/21-23; Bickerstaff, 11-23-20, p 397/11-1; Noakes, 11-24-20, p 882/3-6; DC Exh. 4, ¶ 23) His invitation was demeaning to the young and diminutive prosecutors: "Come along, little ones." (Ciaffone, 11-13-20, p 51/5-8)

Before going into chambers, respondent had reserved his ruling on Mr. Noakes's motion for directed verdict. (*Id* p 53/5-7; Noakes, 11-24-20, p 904/5-12; DC Exh. 5; ¶ 24; DC Exh. 5, 6-12-19, p 30/11-13) The first thing he did in chambers was provide Ms. Ciaffone and Mr. Noakes books that discussed the standard for arguing against a defense motion for a directed verdict. (Ciaffone, 11-13-20, p 52/4-5; DC Exh. 4, ¶ 24) The rule to which respondent directed them

provided that, a judge could grant a defense motion for directed verdict even after a jury rendered its verdict. (Ciaffone, 11-13-20, p 54/5-9) Respondent inquired of Ms. Ciaffone whether she understood what the rule meant, then told her "That means I can dismiss your case at any time." (*Id*. at p 54/18) Respondent's comment made Ms. Ciaffone feel concerned about her case. (*Id*. at p 54/l9-21) She considered the *Matthews* case to be very serious, because it involved a defendant who was believed to be a serial murderer and sexual assailant. (*Id*. at pp 54/25-55/13) She felt as though she had to convince respondent of the strength of the prosecution's case. (*Id*. at p 54/22-24)

During the in-chambers discussion, Ms. Bickerstaff and Mr. Noakes said very little. (*Id*. at pp 51/24-52/2; Noakes, 11-24-20, p 887/2-7) The conversation was mostly between respondent and Ms. Ciaffone. (Ciaffone, 11-13-20, p 51/22-23; Bickerstaff, 11-23-20, p 398/16-25)

Respondent critiqued how Ms. Ciaffone tried the case, using several sexual examples and references. As Ms. Ciaffone testified, "it felt like every example that he gave always kept going back to sex or the way someone looked. It felt like they all kept—every example or teaching moment he maybe tried to have about anything always went back to a sexual explanation." (Ciaffone, 11-13-20, p 62/9-13)

One of the things respondent took issue with is why Ms. Ciaffone introduced evidence that the deceased victim's rape kit contained vaginal and oral swabs that had the defendant's DNA on them. (Ciaffone, 11-13-20, pp 55/18-56/25) When Ms. Ciaffone did not agree with respondent's position that that evidence was not helpful to the prosecution of the case, respondent became frustrated, raised his voice and said, "all it shows is that they fucked! Like that's all it shows, that they fucked!" (*Id*. at p 57/1-18; Bickerstaff, 11-23-20, p 400/2-8; *cf*. DC Exh. 2 ¶12b, 12c [respondent "probably did use that word"])

Another thing respondent discussed with Ms. Ciaffone during the in-chambers discussion was how she defined "non-traditional sex." When Ms. Ciaffone answered his question, he told her that her interpretation of non-traditional sex was shaped or formed by her own bias and inexperience. (Ciaffone, 11-13-20, p 59/20-25; Bickerstaff, 11-23-20, p 403/8-12; Noakes, 11-24-20, p 919/6-22) He then explained to Ms. Ciaffone what he thought the defendant meant, using the term "doggy-style." (Ciaffone, 11-13-20, p 60/1-6; Bickerstaff, 11-23-20, p 403/6-7; Noakes, 11-24-20, p 907/6-8)

Respondent laughed about the defendant's testimony that he had not had sex with the victim in the normal way because she was pregnant, and he did not want to hurt the baby. (Ciaffone, 11-13-20 pp 64/24-65/10, 65/24-66/1) Ms. Ciaffone heard respondent laughingly say, "oh, so what—like, he saying that, like, what he's working with," or something along those lines, was "so big that it would cause a miscarriage?" (*Id*. at pp 62/24-63/3) Ms. Bickerstaff laughingly heard respondent say, "that guy must feel so good about himself," or something along those lines, "that his dick was big enough to, like, hurt her or hurt the baby. Like, he must feel so good about himself that he has such a big dick, like, yeah, right, my guy, or something like that." (Bickerstaff, 11-23-20, pp 401/18-402/2) As Ms. Ciaffone stated, whatever respondent's exact words, he was laughingly referring to the defendant's penis. (Ciaffone, 11-13-20, pp 65/6-11, 63/8-10; *cf*. Noakes, 11-24-20, pp 889/18-21, 906/13-17, 920/4-22)

Respondent also took issue with Ms. Ciaffone's voir dire. He gave an example of how he would phrase questions to get the answers he was looking for. Again using an explicitly sexual example, respondent said words to the effect: "If I want to have sex with someone on a first date, what do I ask them?" None of the lawyers in chambers responded. Respondent then said, "I would ask them, 'Have you ever had sex on a first date?' He then said, "What's the second question I

would ask them?" Again, none of the lawyers spoke. Respondent answered his own question: "I'd ask, 'Would you have sex with me on a first date?'" Respondent then concluded: "You don't ask questions like, 'Do you want to get married' or "Do you want to have kids?" Like, those things would come later. Right?" (Ciaffone, 11-13-20, pp 66/22-67/11; Bickerstaff, 11-23-20, pp 400/23-401/5; Noakes, 11-24-20, p 922/1-11; *cf*. DC Exh. 2, ¶ 15; DC Exh. 4, ¶35)

Neither of the women verbally or physically expressed their desires not to engage with respondent in chambers. Ms. Ciaffone was concerned that if she did not play along with respondent, he would dismiss her case. (Ciaffone, 11-13-20, p 72/18-24) Although she would have walked away from a man at a bar or at her office who talked to her the way respondent did, she did not feel she could walk away from respondent because "There's a different level of . . . respect and formality that you show to . . . a judge." (*Id*. at p 74 /2-4, 15-16) Ms. Bickerstaff similarly found parts of the conversation in chambers very inappropriate, but she did not speak up because "he's a judge and we were back in chambers. We were, you know, in his office. I didn't want to step out of line or anything." (Bickerstaff, 11-23-20, p 410/3-11) Although she wanted to leave the conversation, she did not walk out because "I thought it would have been unprofessional to just walk away from a judge while he was speaking to us, just get up and leave in the middle of the conversation." (*Id*. at p 410/15-17)

Ms. Ciaffone did not want anyone to know about what took place in chambers and told Ms. Bickerstaff not to tell anyone. (Ciaffone, p 77/23-24) She did not want to report respondent's conduct because she was very worried about the impact reporting would have on the *Matthews* case, since the jury was still deliberating. She was also concerned that no one would believe her and Ms. Bickerstaff. She was concerned that reporting the matter would have a negative impact

on her career. Ms. Ciaffone cried as she described her concerns. (*Id*. at pp 78/3-14, 78/20-79/6) She explained compellingly:

> I was worried what – I was worried what people at Frank Murphy would think of me. I was worried that it was going to become gossip because it's a very small place to work. I was worried that defense attorneys would look at me differently, that officers on my cases—excuse me—wouldn't want to joke around with me because they would think that I couldn't take a joke. I – excuse me—was worried that no judges would ever want to take me into chambers again to give me feedback. I had a million things that I was worried about. I just didn't want her to ever tell anyone. (*Id*.)

Mr. Noakes has a slightly different recollection of what occurred in chambers. He testified he did not hear respondent use sexually graphic language inappropriately, and does not believe respondent used the word "fucked." (Noakes, 11-24-10, pp 889/14-16, 907/17-19) However, respondent himself admitted that he "probably" did use that word. (DC Exh. 2 ¶12b, 12c) Also, the record does not reflect what sort of sexually graphic language Mr. Noakes would have considered "appropriate." Assuming his memory is accurate, his subjective sense of what is appropriate carries little weight. What matters are the words spoken. Whether or not those words were "appropriate" is for the Master to decide.

Mr. Noakes described Ms. Ciaffone as "a fighter," "prickly," and "feisty," and he testified that Ms. Ciaffone was not "cowed." In that context, he testified that "some people" take offense to things they should not. (Noakes, 11-24-10, pp 885/19-25, 878/24-880/3, 890/13-16) His description of Ms. Ciaffone's demeanor has absolutely nothing to do with whether respondent's words were misconduct, and does not even have any bearing on whether Ms. Ciaffone felt able to end the in-chambers discussion.

Paragraph 28 of the complaint alleges that respondent's statements in chambers violated:

Canon 1, which requires that a judge personally observe high standards of conduct;

Canons 2(B) and 3(A)(14), which require that a judge treat every person with courtesy and respect;

Canon 3(A)(3), which requires that a judge be dignified and courteous to lawyers.

Repeatedly using the word "fucked" to describe the evidence concerning the defendant's interactions with the victim in a murder case; discussing a young female lawyer's personal biases about, and inexperience with sex; mocking a murder defendant's testimony about the size of his penis; and using sexually-based language to illustrate a model voir dire question, were all failures to observe high standards of personal conduct.

As with the conduct charged in Count I, respondent knew the things he said to the two prosecutors in chambers were inappropriate, offensive, and embarrassing. He treated Ms. Ciaffone and Ms. Bickerkstaff discourteously, disrespectfully, and without dignity. He demeaned the seriousness of the charges in this case. He thereby violated Canons 1, 2(B), 3(A)(3) and 3(A)(14), as charged in paragraph 28 of the complaint.

COUNT 3

VIOLATION OF CANONS 2(A), 2(B), 3(A)(3) and 3(A)(14) BY QUESTIONING FEMALE ATTORNEYS WHO APPEARED BEFORE HIM ABOUT THEIR PHYSICAL APPEARANCE

Immediately after leaving respondent's chambers following the conversation described in Count 2, Ms. Ciaffone and Ms. Bickerstaff entered the courtroom and went to the prosecution's table because the jury was going to be dismissed for the day. (Bickerstaff, 11-23-20, p 406/1-12) Respondent approached them and asked Ms. Ciaffone how tall she was and how much she weighed. As he assessed Ms. Ciaffone's height and weight, he looked her up and down. (Ciaffone, 11-13-20, p 71/11-14; Bickerstaff, 11-23-20, p 407/8-11) Ms. Ciaffone informed respondent that it was not polite to ask a woman her weight. (Ciaffone, 11-13-20, pp 70/25-71/1; Bickerstaff, 11-

24-20, p 407/14) Respondent ignored her caution, and asked Ms. Bickerstaff whether she weighed 115 pounds as he looked *her* up and down. (Bickerstaff, p 407/12-13; Ciaffone, 11-13-20, p 71/l, 11-14) When she disputed the estimate, he told her words to the effect of, "Well, I haven't assessed your muscle mass yet." (Ciaffone, 11-13-20, pp 70/14-24, 71/2-25); Bickerstaff, 11-23-20, pp 406/18-20, 407/4-20; DC Exh. 2 ¶¶17a, 17b, 17c; DC Exh. 4 ¶¶37, 38, 39) As demonstrated by both Ms. Ciaffone and Ms. Bickerstaff, respondent overtly eyed their bodies as he spoke with them. (Ciaffone, 11-13-20, p 71/11-24; Bickerstaff, 11-24-20, pp 407/25-408/22)[3]

Paragraph 34 of the complaint alleges that respondent violated MCR 9.202(B)(1)(D),[4] which forbids treating a person discourteously because of the person's gender. Paragraph 34 also alleges that respondent violated Canon 2(A), which states a judge must avoid all impropriety or appearance of impropriety; Canons 2(B) and 3(A)(14), which require a judge to treat every person with courtesy and respect; and Canon 3(A)(3), which requires a judge to be dignified and courteous to lawyers.

Respondent's conversation with Ms. Bickerstaff and Ms. Ciaffone was directly contrary to the caution he had received to avoid overly personal or intimate conversations with people to whom he was not close. (DC Exh. 10; DC Exh. 11) Even after Ms. Ciaffone tried to warn respondent that it is not polite to ask a woman about her weight, he ignored her sound advice and asked Ms. Bickerstaff about *her* weight. It is clear respondent treated Ms. Ciaffone and Ms. Bickerstaff discourteously because of their gender, in violation of MCR 9.202(B)(1)(d). Indeed, it

[3] Mr. Noakes remembers seeing respondent converse with Ms. Bickerstaff and Ms. Ciaffone in the courtroom, but does not know what they discussed. He does not recall either Ms. Bickerstaff's or Ms. Ciaffone's demeanor changing. (Noakes, 11-24-20, p 888/10-25) His observation is not significant, for at least three reasons: 1) Since he did not know what the conversation was about, he had no reason to be sensitive to subtle changes in their demeanor; 2) whether or not the women's demeanor changed has no bearing on whether respondent's words, which are not in dispute, were misconduct; 3) the women are trial attorneys, and masking their demeanor in uncomfortable situations should be a routine part of their arsenal.

[4] This was a typographical error. The correct citation to the court rule is MCR 9.202(B)(1)(d).

is impossible to imagine him having a similar conversation with a male attorney. Respondent's words and conduct were discourteous, disrespectful and undignified, in violation of Canons 2(A), 2(B), 3(A)(3) and 3(A)(14).

Finally, Paragraph 35 of the complaint charges that respondent's conduct as described in Counts One through Three was a persistent failure to treat Ms. Bickerstaff and Ms. Ciaffone fairly and courteously, in violation of MCR 9.202(B)(1)(c). A "judge's activities when evaluated in *toto* create a pattern of conduct and temperament totally unbecoming a member of the judiciary." *In The Matter of Del Rio*, 400 Mich 665 (1977) In a little more than 24 hours, between 2:52 p.m. on June 11 and whenever respondent released the jury at the end of the day on June 12, respondent treated Ms. Bickerstaff discourteously on three occasions, and treated Ms. Ciaffone discourteously on two occasions. His doing so was persistent discourteous treatment, in violation of MCR 9.202(B)(1)(c). Respondent's actions during those 24 hours or more showed a pattern of disrespectful treatment unbecoming a member of the judiciary. *Cf. In Re Moore*, 464 Mich 98 (1977)

Character Evidence

Respondent called several character witnesses. Insofar as their testimony was relevant to the charges in the complaint, the testimony was to the effect that respondent is dignified; treats all attorneys, male and female, with respect; and does not swear or use inappropriate sexually graphic language. (Edison, 11-24-20, pp 670/20-23, 671/16-19, 672/13-15 & 20-22, 675/1-9 & 24, 676/1-9; Fishman, 11-24-20 pp 800/9-24, 811/6-11, 811/16-812/3, 812/15-18, 813/6-18; James, 12-7-20, pp 1007/22-25, 1008/1-2, 1015/21-24, 1016/4-9)

Attorney Jeffrey Edison's character testimony was undercut by the facts that he had never heard respondent inject sex or personal, intimate things into his trials or discussions with lawyers,

while the evidence at the hearing showed clearly that respondent has done that. (Edison, 11-24-20, p 680/3-19) Further, he did not understand that for a judge to ask two young, female prosecutors about their height and weight is discourteous and disrespectful. (*Id*. at pp 680/20-23, 681/9-18, 682/1-6) He was unaware that respondent asked a hypothetical question in a non-sex case about whether he would have an expectation of privacy if he were to have sex in a restroom with another male. (*Id*. at p 684/14-19). He was also not aware that respondent had asked a female prosecutor the color of her armpit hair, or that he shared with that female prosecutor and a male prosecutor that he shaved his own armpits. (*Id*. at pp 684/2-15, 685/1) Mr. Edison's opinion was further undercut when he claimed that even had he been aware of these things, he still would believe that respondent never used sexually graphic language or that he says discourteous and disrespectful things to people. (*Id*. at pp 686/9-13, 17-687/2)

Similarly, Mr. Fishman's character testimony was undercut because he was not aware that respondent asked a hypothetical question in a non-sex case about whether he would have an expectation of privacy if he were to have sex in a restroom with another male. (Fishman, 11-24-20 pp 820/18-821/5). Nor was he aware that respondent shared with a male and female prosecutor that he shaved his own armpits or that he asked a female prosecutor, whose hair was covered by a hijab, the color of her armpit hair. (*Id*. at p 821/7-10, 11-14) Like Mr. Edison, even in the face of this new information Mr. Fishman maintained that it would not change his opinion that respondent is courteous and respectful to women. (*Id*. at p 821/15-19)

No matter the sincerity of the opinions of respondent's friends with respect to his character for treating women respectfully and avoiding inappropriate sexually graphic language, the evidence in this case clearly shows that respondent lacks those characteristics. He did unnecessarily inject graphic sex between males into a case that had nothing to do with sex. (DC

Exh. 16, p 27/13-19) He did ask a female APA, who was wearing a hijab and whose hair was therefore covered in religious modesty, the color of her armpit hair, and did share the highly personal information that he shaves his own armpit hair. (Kurily, 12-7-20 pp 1056/3-1058/15, 1060/22-1061/2, 1061/25-1062/6) Finally, the evidence showed that he did engage in the conversations that are charged in the complaint, which of themselves were inconsistent with a character for treating women respectfully, and for avoiding inappropriate sexual language.

The Context in Which Respondent Acted

Respondent was aware that his past inappropriately intimate comments to a woman resulted in two investigations, done by two agencies which govern the conduct of judges: the JTC and SCAO. Both agencies wrote respondent letters that informed him that his behavior was inappropriate, and educated him on how to behave in the future. (DC Exh. 10; DC Exh. 11) In spite of these warnings and instructions, respondent made the choice to speak with Ms. Bickerstaff and Ms. Ciaffone in the sexually graphic and vulgar ways demonstrated by the evidence. He did so even though the national climate has very publicly become *much* less tolerant of such conduct by men in power since 2005. He did so even though he was aware enough of the JTC that he told the jurors in the *Matthews* case that the JTC did not approve of his use of the much less problematic word "asshole." Because respondent acted as he did in the face of his prior knowledge, and in the face of the change in the extent to which sexually explicit behavior is acceptable, and despite his continuing awareness of the JTC's concern for his words and conduct, the clear conclusion is that he intentionally ignored the prior instruction, and intentionally chose the words and analogies he used with the women. Whatever feeling of pleasure or power or control this gave him, respondent must have felt it was worth the risk that he would again be on the wrong side of the judicial discipline process.

The Michigan Supreme Court has found a judge's sexually charged comments to be misconduct in several cases. In *Matter of Del Rio*, 400 Mich 665 (1977), the Court ruled that a judge committed misconduct when he boasted to a female attorney about his sex life, and when at the bench, asked that same attorney if she would go out on a date with him, then treated her with disdain after she declined. In *In re Trudel*, 465 Mich 1314 (2002), the Court ruled that a judge committed misconduct when he altered a subordinate's screensaver message to say something sexual. In *In re Ford*, 674 N.W. 2d 147 (2004), the Court ruled that a judge committed misconduct by kissing an employee on the lips without her consent and viewing pornography on a court computer. In *In re Servaas*, 484 Mich 634 (2009), the Court ruled that a judge committed misconduct when he drew two lewd pictures on notes attached to two court files, and commented on the small chest size of a female employee. In *In re Iddings*, 500 Mich 1026 (2017), the Court ruled that the judge committed misconduct when, over a three year period, he sexually harassed his judicial secretary by actions that included sexually suggestive language. What respondent did in this case is as troubling as what the judges did in those prior cases.

CONCLUSION

The evidence clearly shows, by much more than a preponderance, that respondent violated the Michigan Court Rules and Code of Judicial Conduct, as described in more detail in the discussion pertaining to each count, above.

Respectfully submitted,

/s/ Lynn Helland
Lynn Helland (P32192)
Disciplinary Counsel

/s/ Lora Weingarden
Lora Weingarden (P37970)
Disciplinary Co-Counsel

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