STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
Brighton, MI 48116

Formal Complaint No. 99
Master: Hon. William J. Giovan

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BRIEF IN SUPPORT OF RESPONDENT'S OBJECTIONS TO MASTER'S REPORT

On December 20, 2018, retired Judge William J. Giovan, whom the Supreme Court appointed Master in this matter, filed his report. (The report has twice been corrected, but the parties agree that those corrections do not affect the report's transmission date.) Along herewith, Judge Brennan filed objections to that report, as authorized by MCR 9.215. This is the supporting brief also authorized by that rule. The Commission (hereinafter sometimes "the JTC") granted modest extensions for both filings. (Thank you.)

I. PROLOGUE

Judge Brennan's counsel considered rewriting this brief to temper its blunt criticism of the Master's report. He feared a backlash. Counsel knows from experience how judges tend to react to blunt briefs. He still fears a backlash, but he fears more obscuring how demonstrably wrong is much of the Master's report. Silence would not only deprive Judge Brennan of the vigorous defense to which she is entitled, it would diminish the truth, dishonor the constitutionally-based requirement of meaningful review of the Master, and undermine the integrity and credibility of the discipline process. We should not fear speaking up and should not object to anyone doing so. Preferring silence would prefer obfuscation. How inappropriate that would be in a proceeding which exists to protect the integrity of the judiciary!

II. INTRODUCTION

For the sake of efficiency, Judge Brennan discusses here in one place those principles of law which apply to more than one of her objections to the Master's findings and conclusions. That way, those principles need be elaborated only once to then be cross-referenced later where pertinent rather than repeated. Other principles, of which there are a few, which pertain to only one of Judge Brennan's objection will be stated when that objection is discussed; in those instances, duplication is not risked.

A. Standard of Review

1. A master's findings must be reviewed de novo by the Commission, *In re Chrzanowski*, 465 Mich 468, 482 fn 14; 636 NW2d 758 (2001), which means "'anew; afresh; [and] over again,'" *Department of Civil Rights ex rel Johnson v Silver Dollar Café*, 441 Mich 110, 116; 490 NW2d 337 (1992), "giv[ing] no deference," with just one exception, to the master. *Buchanan v Flint City Council*, 231 Mich App 536, 542 fn 3; 586 NW2d 573 (1998). Each Commissioner must assess the record and come to his or her own findings. *In re Somers*, 384 Mich 320, 373; 182 NW2d 341 (1971). That is demanding, but only such review can "adequately" separate the Commission's combined investigative, prosecutorial and adjudicative functions. *Chrzanowski,* 465 Mich at 487 fn 17.

2. With, as noted, one exception, the requirement of de novo review also applies to credibility assessments. The Commission must "necessarily give considerable weight to credibility determinations," but only to such determinations based on demeanor, *In re Hathaway*, 464 Mich 672, 687; 630 NW2d 850 (2001), quoting *In re Disciplinary Proceeding against Anderson*, 138 Wash 2d 830, 854; 981 P2d 426 (1999), not other such determinations. Except when video-recorded, which was not done in this case, only a master experiences witness demeanor, so review of its assessment is not possible. A transcript does not reveal the look and sound which are demeanor. *Silver Dollar Café*, 441 Mich at 124 (op per *Boyle, J.*). Often, however, other revelations of credibility can be determined from a transcript. When they can, therefore, because they can, it, too, must be assessed on review.

Not only does the inclusion in de novo review of such assessments logically follow, which is enough to be precedentially binding, *Morse Chain Co v Formsprag Co*, 380 Mich 475, 483; 157 NW2d 244 (1968), our Supreme Court has often undertaken such assessments. Since, presumably,

that Court does not do what it does not approve of, what it repeatedly does[1] bespeaks an accepted principle. If, on de novo review, the Supreme Court can reject non-demeanor credibility determinations by the JTC, the Commission necessarily can reject such credibility determinations by a master. No rule or case suggests that de novo review by the Supreme Court differs from the de novo review required of the Commission.

3. Also, since it is what the Supreme Court does, the Commission must examine "the entire record." See, e.g., *In re Noecker*, 472 Mich 1, 10; 691 NW2d 460 (2005); *In re Servaas*, 484 Mich 634, 652; 774 NW2d 46 (2009); *In re Morrow*, 496 Mich 291; 854 NW2d 89 (2014); and *In re Gorcyca*, 500 Mich 588, 595; 902 NW2d 828 (2017). Less would not be the independent look which is de novo review. Hence, each member of this Commission must read all 1900 pages of testimony at the formal hearing[2] and must examine all 180 exhibits submitted at that hearing, including 9 videos, 40 deposition and other transcripts totaling over another thousand pages, and 100-plus documents, some quite lengthy.

4. Because an examiner must prove judicial misconduct to a master, and a master must find misconduct, if he or she finds it, by a preponderance of the evidence, *In re Simpson*, 500 Mich 533; 902 NW2d 383 (2017)[3], the Commission, when undertaking de novo review, must also apply that standard of proof. *Chrzanowski,* 465 Mich at 482 fn 14. While trial lawyers still tell juries

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[1] For example, in *Noecker*, *infra*, 472 Mich at 10, fn 4, an explanation was rejected as too "peculiar" to be true. In *Servaas*, *infra*, 484 Mich at 652-654, the Supreme Court rejected determinations that the respondent judge had lied because, based on telephone records, it concluded that he had been confused. In the case of *In re Adams*, 494 Mich 162; 833 NW2d 897 (2013), the Supreme Court concurred that the respondent judge was "not credible," not out of deference, but based on the illogic of her claims. In the matter of *In re Simpson*, *infra*, 902 NW2d at 395, the Court found, again based on a hearing transcript, that the respondent judge had not lied, but had been imprecise, careless and inaccurate.

[2] The transcripts themselves say that they total 1,927 pages in length. However, 27 of those pages are title pages, indices, and signature pages which contain no testimony.

[3] For some reason, some of the cases available to counsel online do not contain the Michigan Reports page references, but only those of the NW2d parallel citations. When that occurs, only the latter are provided. Hopefully, doing so will not be confusing or annoying.

that that standard is satisfied whenever the evidence in support of a proposition just outweighs, however slightly, the evidence against it, that statement is a misleading oversimplification. To preponderate, evidence in support of a proposition must "qualitatively," not just quantitatively, outweigh the opposing evidence. M Civ JI 8.01, Comments, pp 8-2 and 8-3. See also *In re Morrow*, 854 NW2d at 96.

5. Finally, the Commission must "adequately articulate the bases for its findings." *Simpson*, 902 NW2d at 398. Otherwise, its opinion reporting those findings cannot constitute the meaningful recommendation to it which the Supreme Court has just recently reiterated is required. See the Supreme Court order in this case of January 25, 2019, Docket No. 157930. The Commission need not reinvent the wheel. It can adopt, in whole or in part, a master's findings, MCR 9.220(B)(1), so long as they are adequately revealing.

B. Considerations on Review

6. Because only admissible evidence may be presented at a public hearing, MCR 9.211(A), only such evidence, it necessarily follows, may be considered by the Commission on de novo review. Inadmissible evidence may not be considered, it also necessarily follows, but must be backed out, so to speak. The Master in this case relied heavily on rank hearsay more than once.

7. It also follows that all admissible evidence must be considered. If it is not, review is incomplete. Meaningful review, of whatever kind, "considers the whole record -- that is, both sides of the record -- not just those portions supporting the findings" being reviewed. *MERC v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974). Evidence which is not persuasive for some principled reason may, of course, be rejected, but all evidence must be considered to determine what is and is not persuasive. Multiple times, the Master, following the

lead of the examiners, ignored significant, undisputed testimony by their own witnesses. There is a term for that: cherry-picking.

8. While the Supreme Court and the Commission are obligated to make "individualized determinations," *In re Kapcia*, 389 Mich 306, 311; 205 NW2d 436 (1973), it is also their "overriding duty . . . to treat 'equivalent cases in an equivalent manner . . . , and unequivalent cases in a proportionate manner.'" *In re Morrow*, 496 Mich at 302. Not only is consistency "the most fundamental premise of the rule of law," *In re Brown*, 461 Mich 1291, 1292; 625 NW2d 744 (1999), trust in the process is enhanced by consistency and is undermined by inconsistency. *In re Haley*, 476 Mich 180, 200; 20 NW2d 246 (2006).

9. The rule of law also "requires the *consistent* application of [all] controlling legal principles," not the application of an "evolving sense of conscience." *Haley,* 476 Mich at 200 [emphasis in original]. The rule of law is indispensable.

10. What was elicited in front of a master on cross-examination cannot be ignored, as did the Master in this case, but must be considered, not just because it is part of the record, which is enough reason to require its consideration, *Detroit Symphony Orchestra, Inc,* 393 at 124, but also because cross-examination can be very helpful. It might be hyperbole to claim that cross-examination is "the greatest engine ever invented for the discovery of truth," 5 Wigmore, *Evidence in Trials at Common Law* (Chadbourn ed), § 1368, but cross-examination "is [at least] one of the principal and most efficacious tests . . . for the discovery of truth, . . ." *Aluminum Industries, Inc v Egan,* 61 Ohio App 111; 22 NE2d 459, 462 (1938).

By revealing bias, animosity, etc., and the shortcomings of observation and memory, cross-examination can undermine both credibility and accuracy, *id.*, which are different, although the ultimate conclusion is the same, namely: that the affected testimony is not worthy of consideration

Cross-examination can do more, however. It can also "modify, supplement, or make clearer" what a witness said on direct examination. *Sherrick v State*, 157 Neb 623; 61 NW2d 358, 365 (1953). Cross-examination affords an opportunity "to develop fully a material subject as to which [a] witness had testified [only] partially," perhaps, because not asked. *Branch v United States*, 171 F2d 337, 338 fn 3 (DC Cir 1948). When that happens, cross-examination provides more, not less, to believe. As noted above, the Master repeatedly ignored significant undisputed evidence revealed by cross-examination.

11. Here and now is as good a place and time as any to discuss honesty and dishonesty, which are what credibility means. Until recently, only a few cautioned against too readily inferring deception. *Dennis v United States,* 341 US 494, 539; 71 S Ct 857; 95 L Ed 1137 (1951) (op per Frankfurter, J.). A year ago, however, this Commission led the Supreme Court to appreciate that the assessment of honesty has to be nuanced. In *Gorcyca*, 500 Mich at 637, the Court approvingly quoted the Commission:

> ". . . [A] false statement requires the speaker's knowledge that the statement is false and intended to deceive. The fact that a statement may be incorrect does not, by itself, render the statement 'false' within the context of a legal proceeding. It may be discredited, or deemed unworthy of belief, but given the limits of human memory and perception, as well as the limitations of language, it would be unfair to impute motives of deception or falsehood to everyone who says something that someone else finds incredible, or that prove to be incorrect.
>
> Selective memory does not equal falsehood; incorrect memory does not equal falsehood; imprecision in expression does not equal falsehood; even an answer that one chooses to disbelieve does not equal a falsehood." *In re Gorcyca,* 500 Mich at 637.

12. While the burden of proof in judicial discipline proceedings is by a preponderance, to prove a lie examiners must "clear[ly]" show an intentional misrepresentation, not just an incorrect statement. *Simpson*, 902 NW2d at 394. Put another way, it must be "clear" that a

"misleading statement" is equivalent to a "lie under oath," *id.,* at 405 not just unworthy of belief. *Gorcyca*, 500 Mich at 637. The Supreme Court did not pronounce such a requirement in *Simpson*, but it applied such a requirement, twice using the word "clear."

13. "[C]aution must [also] invariably be exercised" by the Commission to avoid being even "arguably influenced by the media's focus" on a matter. "[T]he attentions of the media . . . [must be] placed in an appropriate perspective." *Chrzanowski*, 465 Mich at 488 fn 18. Because not under oath, not subject to the trustworthiness requirement of the Rules of Evidence, and not tested by cross-examination, the numerous news reports and editorials in this case can have no influence. So, for the same reasons, should political posturing, of which there has been much in this case. Both have their place, but not in judicial review at any level.

14. Another "guiding principle in matters of judicial discipline," used "repeatedly" by the Supreme Court, is that judges' conduct "must [be] measure[d] . . . objectively," which means not from the perspective of the supposed target of the behavior, who might be too sensitive for obvious reasons, *In re Hocking*, 451 Mich 1, 12; 546 NW2d 234 (1996), but how reasonable observers would view it. *Haley*, 476 Mich at 192 fn 17. The Master did not do that in this case. He inappropriately relied heavily on those personally affected.

15. Also, a judge's conduct must be viewed "in the context in which it occurred." *Gorcyca*, 500 Mich at 642. "Meaning is inevitably dependent on context," *Stark v Budwarker, Inc.*, 25 Mich App 305, 312 fn 4; 181 NW2d 298 (1970), which includes "in light of the situation with which he [or she, the judge] is confronted." *Mahlen Land Corp v Kurtz*, 355 Mich 340, 350-351; 94 NW2d 888 (1959). While said about written texts, the former principle applies much more widely. The latter was said about courtroom behavior toward witnesses and counsel. The Master failed multiple times to honor either principle.

16. As Justice Scalia noted in *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994), "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even having been confirmed as federal judges, sometimes display" do not establish bias or partiality. Therefore, "[a] judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune" from discipline. *Id.* Hopefully, state court judges are entitled to a like allowance for the human condition. But tough talk can be more than forgivable misconduct. "[F]orming [and expressing] judgments [including exceeding ill judgments] of the actors [witnesses and counsel] in those court house dramas called trials [and hearings]" are not only inevitable when judging, they can be essential to effective and honest judging. *Liteky*, 510 US at 551.

17. The tenets of statutory construction apply not just in courtrooms to statutes, but also here and also to court rules and to the Code of Judicial Conduct. *Chrzanowski*, 465 Mich at 482; and *Haley*, 476 Mich at 198. One of those tenets, the most fundamental of them, dictates that legal texts "be interpreted in accordance with their plain meaning." *Chrzanowski,* 465 Mich at 482. The Master violated that tenet multiple times.

Another basic tenet of construction is that, where a text "contains a specific . . . provision and a related, but more general, provision, the specific one controls." *Haley*, 476 Mich at 198. As a result, the "appearance of impropriety" standard is not applicable to any unmentioned specific where rules or canons "pertain to a subject, such as judicial disqualification, . . .," *Adair v Michigan,* 474 Mich 1027, 1039; 709 NW2d 567 (2006) (op per Taylor, CJ and Markman, J.),[4]

[4] Because two other justices concurred wholly with their analysis, the statement of Chief Justice Taylor and Justice Markman likely constitutes binding precedent. *Negri v Slotkin,* 397 Mich 105; 244 NW2d 98 (1976). Any concern is plainly resolved by a majority signing the opinion in *Haley* which adopted *Adair*.

and *Haley*, 476 Mich at 198 fn 30. What is not included is presumed to have been omitted, or at least cannot be added by any tribunal other than the rule's or canon's author. The Master also violated that tenet and its consequence multiple times.

18. It is another common-sense principle of law, which has long been recognized and regularly applied here in Michigan, that "*de minimis non curat lex"* (the law is not concerned with small things). See, e.g., *Flax v Mutual Bldg & Loan Assn*, 198 Mich 676, 690; 165 NW 676 (1917). The Master appeared to honor that principle at times, but he also disregarded it at significant times.

19. Finally, although Michigan has a well-developed body of judicial ethics law, the Supreme Court, its individual justices, and this Commission have not hesitated to look to other jurisdictions for guidance on open questions. See, e.g., *Haley*, 476 Mich at 192, 198 fn 30; *Moore*, 464 Mich at 132; *Hocking*, 451 Mich at 11; and *Del Rio*, 400 Mich at 722, 723. This case presents at least one open question. The Master sidestepped a case from elsewhere which had carefully addressed that question.

C. Gender Bias

It is counsel's practice, time permitting, to read briefs and opinions multiple times, days apart. The interval tends to open his mind's eye, so he eventually sees more, which happened in this case. As he worked on this brief, Judge Brennan's counsel came to appreciate how much gender bias affected the allegations against her, her prosecution, and several of the Master's findings. Hence, the inclusion of the following discussion of pertinent gender biases in this introductory collection of principles.

20. What appears as zealous advocacy by male attorneys is regularly seen as abrasive in women attorneys. ABA Commission on Women in the Profession, *Unfinished Agenda* (2001). pp 6, 15, 16. And women judges are criticized for strong and decisive action for which male judges

attract praise. *ABA*, at p 27.[5] Also, female judges' performance is held to higher standards, and their competence is "rated consistently lower than their male counterparts," *ABA*, at pp 15, 27, their credibility "is often discounted," and what they say is ignored or trivialized. *ABA*, at pp 9, 21. Several of the allegations in this case, much of the testimony, and multiples of the Master's findings appear to be manifestations of those particular biases. As such, they must be rejected. What looks like bias must be treated as bias.

21. Also, women justices of the United States Supreme Court are consistently interrupted because of their gender "far more often" by colleagues and advocates alike than are male justices. For years, interruptions of female justices were consistently 2.9 times more frequent. Of late, the rate of interruption has become nearly 4 times (3.9 times). Jacobi, "Justice, Interrupted: The Effect of Gender, Idealogy, and Seniority at Supreme Court Oral Arguments," 103 Va L Rev 1379, 1390, 1462-1463 (Oct 2017). There is no reason to believe that interruptions at the trial level are less frequent.

Interruptions are likely to be more frequent in trial courts. Interruptions are a power dynamic, *id.,* at 1404, which means that, if gender bias is strong enough, as it is, to persist at the highest level of power achieved by women judges, *id.,* at pp 1391, 1405, it likely is more powerful at the lowest level where it manifests in more bias. Interruptions are not just discourteous, the more frequent they are the greater the need for control of a courtroom, which likely is mistaken for poor demeanor and, because annoying, the more irritating, which leads to disapproving responses. *Mahlen Land Corp,* 355 Mich at 12-14.

[5] See also Elsesser, "Female Lawyers Face Widespread Gender Bias, According to New Study," *Forbes* (Oct 1, 2018); and "Female Lawyers Still Face Sexism in the Courtroom," *The Atlantic* (Sept. 2018).

22. Even more offensive is the enduring belief that sexual assaults and sexual advances were either invited or not unwanted if the recipient did not fight back, maintained contact, or stayed on good terms with the transgressor. In *People v Christel*, 449 Mich 578; 537 NW2d 194 (1995); and *People v Peterson*, 450 Mich 349, 373-374; 537 NW2d 857 (1995), we finally came to appreciate that such beliefs are demeaning excuses, not manifestations of fact. The MeToo Movement confirms that those excuses persist. Dewan, "Why Women Can Take Years to Come Forward with Sexual Assault Allegations," *The New York Times* (09/18/2018). The Master expressly relied on that misogynistic excuse.

23. Finally, not accepting that couples can keep their professional and business activities separate imposes significant restraints on women's employment opportunities and professional advancement. *Adair*, 474 Mich at 588-589 (op per Corrigan, J.). The Master ignored as "fatuous," but only to Judge Brennan's detriment, the separation of his business which Judge Brennan and her husband carefully preserved.

24. The Michigan judiciary is "committed to eradicating sexual stereotypes." *Hocking*, 451 Mich at 12. Any manifestations must be rejected. Pronouncements cannot be enough.

III. THE MASTER'S FINDINGS

Eleven days of public hearing began on October 1, 2018, and concluded on November 19, 2018. The Master issued a report on December 20, 2018. Every finding by the Master is demonstrably wrong. Why is detailed below in the order those findings appear in his report.

A. *People v Kowalski*

This case began on January 4, 2013, when three days before trial in *People v Kowalski*, 44th Circuit Court Case No. 08-17643-FC, a double murder case assigned to her, Judge Brennan denied, truthfully, the Commission's examiners would eventually concede, that she was then having or had ever had a sexual relationship with Michigan State Police (MSP) Det. Sgt. Sean

Furlong (since he has retired, hereinafter Mr. Furlong), one of two police detectives to whom Mr. Kowalski had confessed. Such a relationship was insinuated in a letter dropped on the prosecution that day by Thomas Kizer, Jr., Esq. (p 207, lines 16-21).[6] Over the years, Mr. Kizer had filed 30 grievances against Judge Brennan, all of which were dismissed (p 1254, lines 4-24), unsuccessfully sued her twice, and, again unsuccessfully, attempted to block her reappointment as her court's Chief Judge. She acknowledged that Mr. Furlong was a "friends," not more (p 980, lines 8-13). The case proceeded to trial. Mr. Kowalski was convicted and his convictions were affirmed.[7]

In February 2017, the local prosecutor filed a grievance against Judge Brennan. It was based on 2013 Mr. Kizer's letter. In March 2017, Mr. Kizer also filed a grievance, adding contentions. In the Fall of 2013, months after *Kowalski* had ended, Judge Brennan and Mr. Furlong had begun a sexual relationship. Apparently, the prosecutor and Mr. Kizer couldn't believe that that relationship had not started sooner. At last, however, shortly before the formal hearing began, the Commission's chief examiner conceded, "We are not claiming that we will offer evidence of a sexual relationship between Judge Brennan and Mr. Furlong before the time that matters, which is before the end of the *Kowalski* trial" (Tr 9/19/2018, pp 52, lines 22-25; 53, lines 1-5).[8] The

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[6] Unless otherwise indicated, all parenthetical references herein to "p ____, lines ____" or "pp ___, lines ___" are to the transcript of the formal hearing. There are multiple volumes, but because they are paginated sequentially, designating volumes is not necessary.

[7] Recently, the Livingston County Prosecuting Attorney stipulated to vacate Mr. Kowalski's convictions. The reason: Judge Brennan's failure to recuse herself from the case. Vacating the convictions was within the prosecutor's authority, but premature and highly irregular. It has yet to be decided that Judge Brennan should have recused herself. Why didn't the prosecutor wait until this case played out? Is something going on? Is the prosecutor trying to hide something? Or is the prosecutor willing to sacrifice two murder convictions to pressure this body and the Supreme Court into removing Judge Brennan from the bench by making that the only politically correct decision? The facts of this case certainly do not support such an outcome. Judge Brennan has to hope that this Commission and that Court will not be stampeded.

[8] A motion hearing occurred on September 19, 2018. The transcript of that hearing is paginated separately from the transcripts of the formal hearing.

examiners reserved the right to ask leave to add the issue "if we develop that evidence" (*Id.*, pp 55, lines 5-12), but they never did, either.

But, despite the examiners' concession, the Master found that Judge Brennan's failure to recuse herself from *Kowalski* was "egregious" misconduct because, "by time of the disqualification motion [in *Kowalski,* which had been orally submitted on January 4, 2013] and for a significant period before, Judge Brennan had a romance with [then-Det. Sgt.] Furlong. Yes, a romance" (p 5),[9] and that "the hottest part" of that romance fell on January 4, 2013 (p 6)." The Master did not use the word "sexual," but that is plainly what he meant. The common meaning of "romance" is a "love affair," and a celibate love affair, if not an oxymoron, is not what the Master meant by emphasizing a "romance. Yes a romance" at the "hottest part" of a multi-year trajectory. To read those words as anything other than avoiding the word "sexual" to describe just such an affair is disingenuous.

Whatever the Master suspected, his finding is wrong. First, the examiner stipulated to the contrary. Stipulations "are sacrosanct" and may not be disregarded once they have been received and approved. *Dana Corp v Employment Security Commission*, 371 Mich 107, 110; 123 NW2d 277 (1963). In addition, the Master's finding is contrary to testimony by the very witness upon whom he principally relied to make the finding. According to the Master, Judge Brennan had told Shawn Ryan "with pleasant excitement" that she and Mr. Furlong "had shared" in 2007 "what had to be a romantic kiss" (p 5). Ms. Ryan did not say that. More precisely, as demonstrated in the paragraph immediately below she testified without equivocation that that is not remotely what she meant. Yet, the Master found otherwise.

[9] Unless otherwise indicated, all parenthetical references hereinafter to "p ____" are to the Master's Report of December 20, 2018.

Yes, Ms. Ryan[10] testified that Judge Brennan told her about "a romantic kiss" with Mr. Furlong in 2007 (p 494, lines 13-17). But Ms. Ryan never used the words "with pleasant excitement," or anything close, and, just a few lines later, she said that the kiss had been "unexpected," "startled" Judge Brennan, "freaked [her] out" (p 495, lines 11-14), prompted her to consider "not talk[ing] to him [Mr. Furlong] anymore" (p 495, lines 15-20), and that she did not talk to him for a few weeks (pp 495, line 25; 496, line 1). Therefore, concluded Ms. Ryan, the kiss "didn't mean . . . a start of a relationship, or anything of that nature" (p 495, lines 21-25). How, then, can this Commission find "on the whole record" that Judge Brennan told Ms. Ryan "with pleasant excitement" about "a romantic kiss"?

Ms. Francine Zysk, another examiners' witness, also testified that the Judge Brennan told her about "a kiss in the court house" with Mr. Furlong (p 1466, lines 4-7), but Ms. Zysk did not contradict Ms. Ryan's characterization of the kiss as an unwanted advance (pp 1466-1471). Nonetheless, the Master concluded that the kiss "had to be a romantic kiss" and that "there had to be prior romantic sentiments between them [Judge Brennan and Mr. Furlong]" (p 5). A police officer would not have, stated the Master, "walk[ed] up and kiss[ed] a judge in [her] chambers . . . without a calamity in the court house" (p 5). In other words, an unwanted advance would have been vigorously protested - - isn't that what use of "calamity" says? - - so the Judge must have asked for it. That finding is offensive (¶ 22 at p 11, above).[11]

The Master's second basis for finding a romance is prurient and speculative. That the prospect of her relationship with Mr. Furlong ending upset Judge Brennan does not establish that that relationship was romantic, let alone that it had "originated some considerable time earlier"

[10] The Master incorrectly identified Ms. Ryan as Kristi Cox (p 5).

[11] All parenthetical references herein to ¶ ___, at p ____, are to this brief's Introduction.

than April 22, 2013 (p 6), specifically, while Judge Brennan had been handling *Kowalski.* Men and women can be friends without romance. There are many such friendships, and most of them are just friendships, nothing romantic. The Victorian Age is long past. And the end of a male-female friendship can be upsetting, even though it is not romantic. Without supporting evidence, there is simply no basis, other than prurient speculation, to conclude that female-male unhappiness has to have a romantic or sexual basis. Some people react emotionally to many things. Judge Brennan demonstrated at the public hearing that she is such an individual. Furthermore, there was no basis for the Master to conclude that, even if a romance was ending in April, 2013, it had begun some considerable time earlier. Only evidence and reasonable inferences based on evidence, never speculation or conjecture, can satisfy any burden of proof. *Skinner v Square D Co,* 445 Mich 153, 164-165; 516 NW2d 475 (1994).

Alternatively, the Master found that Judge Brennan's other contacts with Mr. Furlong (pp 4-5), her non-romantic contacts, which is all they were, were "more than sufficient to have required . . . disqualification" (p 5). But the specifics stated by the Master do not remotely support his conclusion. Most are exaggerations, and the few which are accurate prove nothing, except, perhaps, to those looking for a certain outcome. For example, Judge Brennan did not review warrant applications in chambers with the door supposedly closed only for Mr. Furlong. She did the same for two other MSP officers, Christopher Corriveau and Scott Singleton (p 585, lines 18-23). Was Judge Brennan romancing those troopers too? And closing the door for them was not consistent. Sometimes, she didn't, and sometimes she did for officers from the departments (pp 721, lines 8-13; 694, lines 18-19). What favoritism, therefore? For all MSP officers, sometimes. And, if so, does that mean that Judge Brennan had to recuse herself from all cases with MSP witnesses? Hardly, so how she handled their warrant requests proved nothing.

Before and during *Kowalski,* Judge Brennan attended all of one sporting event with Mr. Furlong (p 4). What was so special about that that it bespoke a bias in favor of Mr. Furlong? She attended events alone with him only after *Kowalski*. Obviously, doing that then had no bearing on her handling that case. It was over. Judge Brennan went Christmas shopping with Mr. Furlong, but only twice and always along with Shawn Ryan (p 486, lines 16-22), and she did not have him as a dinner guest at her home except with others (p 487, lines 3-23). Hence, those acts of friendliness did not reveal something special toward Mr. Furlong. Special friendships are individualized.

There was no testimony that she went to lunch with just Mr. Furlong. Witnesses claimed to have seen the judge and Mr. Furlong leave together saying they were going to lunch, but those witnesses acknowledged not knowing whether the two met up with anyone else, and no one testified to having ever seen just the two of them having lunch. Since when, by the way, does an occasional lunch with someone, portray a very close social relationship? Contrary to the Master, Judge Brennan did not give football tickets to Mr. Furlong, nor did she allow him use of her cottage one week each summer (p 4). The tickets were her husband's, and he gave them to Mr. Furlong, (p 575, lines 3-9). And he concurred in Mr. Furlong's annual use of the cottage (pp 523, lines 19-25; 574, lines 1-9). Did Mr. Root also have a special friendship with Mr. Furlong?

The Master accepted that the number of calls and texts exchanged by Judge Brennan and Mr. Furlong was unique and thereby proved a unique relationship between them. Over a span of 30 months from July, 2008, until January, 2011, they exchanged 1,500 telephone calls, which are 50 calls per month. The examiners and the Master jumped to the conclusion that was an extraordinary number of calls, but based on what evidence? Perhaps, someone from the cellphone industry could have established if such a frequency of calls is at all unusual, but no such evidence

was presented, and it is facile to conclude that such a frequency must be unusual. In the days before cellphones, 50 calls between two people in a month might have been a lot, although "might have been" connotes some uncertainty. But, cell phone usage is much different than landline usage. The former goes with us all day everywhere. The latter were far less available, precluding calls. Higher numbers of cellphone calls and texts are, therefore, likely, the result of ease of availability, not more intense relationships. Hence, Judge Brennan's and Mr. Furlong's telephone and text traffic proved nothing. Neither did their text traffic. Eleven texts a month on average seems minimal. More than that many in a day is likely common. Hence, the frequency of their cell phone and text traffic cannot be said to prove anything.

The examiners and the Masters also concluded that it must have revealed a close relationship that Judge Brennan talked to Mr. Furlong by far longer than she spoke with others. Except, she didn't. She talked to her sister and Ms. Ryan for virtually longer total times as she talked to Mr. Furlong (Ex 1-24 rev). So he was not singularly special. He was no different than two others, neither of whom anyone would say represented a budding, if not yet culminated, romance. And Judge Brennan talked to her husband more than twice as often as anyone else, although for not as long. Being one of four phone pols is not as likely a singular relationship as being the only one.

Finally, the Master overstated Mr. Furlong's significance to the *Kowalski* case and, therefore, the significance of any relationship he had with Judge Brennan. Mr. Furlong was not "the principal witness before and during the trial" (p 2). The principal witness was Mr. Kowalski. His confession did him in. Mr. Furlong was one of two officers who obtained that confession, but that did not make him a key witness, let alone the principal witness or even a witness whom Judge Brennan had to assess. What Mr. Kowalski was asked by Messrs. Furlong and Paulson, how they

asked it, what Mr. Kowalski said in reply, and how he replied was all on videotape for Judge Brennan, first, and, then, the jury to hear and see exactly what had happened (pp 953, lines 12-25; 954, lines 1-10). Things were different in an earlier era when knowing what a defendant was asked, how, and in what context and what he or she replied, how, and in what context, which were essential to understanding what he or she said and to assessing, depended on the credibility of the officer recounting all that.

In the end, therefore, MCR 2.003(C), which governs disqualifications, did not apply to the situation during *Kowalski* of Judge Brennan and Mr. Furlong. That rule deals with some situations involving a judge's spouse, family members who live with a judge, and persons within a specified relationship to the judge. MCR 2.003(C)(f) and (g). Mr. Furlong did not meet any of those criteria, so that rule was not violated. And the appearance of impropriety standard cannot be used to add other relationships. (¶ B[17] at p 8, above). That standard was used in *Chrzanowski* to add a lover, but Mr. Furlong was not Judge Brennan's lover, and *Chrzanowski* predated *Adair* and *Haley* by several years, so they supersede it. In sum, nothing about their relationship required disclosure, so not disclosing that relationship was not misconduct. Maybe, MCR 2.003(C) needs to be expanded, but that can be done only by the Supreme Court and only prospectively.

B. Tampering with Evidence.

The Master's second finding against Judge Brennan was that she stalled disqualifying herself from her own divorce case in order to sidestep a motion[12] to freeze all data on her cellphone

[12] The Master's report ignores, although it had been argued to him, that the motion was not directed to Judge Brennan and need not have been submitted to her. It asked her Chief Judge for relief and the accompanying proposed order had been prepared for his signature, not hers, and he could have fully dealt with it, ruled on it himself or asked SCAO for a visiting judge. MCR 8.111(C)(1). Had Judge Reader, therefore, carefully read the motion, which he admitted he did not (p 384, lines 1-14), when it was submitted to him by his secretary, it would have been handled as expeditiously as the Master found it should have been. Why should Judge Brennan be chastised for his failure to do his job?

and that, having achieved that objective, she then "obliterate[d] the data on that phone so it would not be available as evidence against her" (p 9). That finding is groundless. The Master rewrote the motion on which he relied, ignored undisputed testimony by the very witness upon whom he relied the most, reneged on a stipulation, and ignored the plain language of the statute upon which he acted.

The motion filed on December 6, 2015, on behalf of her then-husband did not ask that Judge Brennan's cell phone not be replaced, but anticipated that it would be replaced, nor did that motion ask that all data then on that phone be kept on it. The motion asked only that "e-mail messaging, text messages, and other relevant data" be "preserve[d]." That was not a request that her text messages and e-mails be kept only on that phone, only that that data be kept. On another phone fully complied. In other words, even if Judge Brennan was obligated to act as if the motion would be granted, which it never was (p 349 lines 10-13), she was free to get a new phone, to transfer data from her old phone to the new one, and, then, to have, the old phone "returned to factory settings," so long as the transferred data was preserved, which it was.

Nor did Judge Brennan "ask[] her court recorder, Felicia [sic] Milhouse, to try to delete" the contents of the phone she would be relinquishing (p 9). The examiner and the Master very much wanted her to say that, but she did not and would not. Although Ms. Milhouse testified that Judge Brennan had asked her for assistance deleting her Hotmail account, she unequivocally answered, "Yes," when asked, "[D]o [you] specifically recall her saying she wasn't interested in getting rid of the contents? She wanted to remove the account?" (p 554, lines 9-12). Then, Ms. Milhouse unequivocally responded, "I do," when asked if she recalled telling a state trooper that Judge Brennan was "not necessarily [interested in deleting] the contents of the phone . . ., just . . . the account" (p 555, lines 4-11). Then, Ms. Milhouse recounted telling the trooper, when he

asked, "Did she want to get rid of the account or the contents?," "The request of me was [to] remove the account" (p 555, lines 16-20). Finally, when the Master brought the interrogation to an end by asking, "The account from the phone not the entire contents?," Ms. Milhouse answered twice, "That's correct" (pp 555, line 25; 556, lines 1-6).

It is unclear what Ms. Milhouse meant by "the account," but she said repeatedly and clearly that Judge Brennan did not want "the contents" of the phone deleted. By distinguishing the two, it is plain that both Judge Brennan and Ms. Milhouse understood "account" and "contents" to be different, and "contents" sure seem to include the "e-mail messages, text messages, phone records, . . . and other relevant data" sought to be "preserved" by Mr. Kizer's motion. Most likely, "account" meant to them the mechanism for obtaining and being billed for cellphone use. In sum, no evidence presented supports the conclusion that Judge Brennan wanted to delete or obliterate any data.

Actually, the examiners conceded Judge Brennan's version of events or at least are precluded from disputing that version. Rather than inconvenience MSP computer forensic experts to travel from Lansing to the formal hearing to testify, the examiners asked for and obtained from Judge Brennan's counsel a stipulation, which began with the following:

> "When a modern cellphone (a smart phone, an iPhone, an Android device, a Pixel, etc.) is replaced with a new cellphone, it is common practice for the contents (text, e-mails, apps, photos, books, music, etc.) of the phone being replaced (the old phone) to be copied onto the new phone. Copying data from the old phone to the new phone is known in the trade as 'a content transfer.'"

As noted earlier, stipulations are "sacrosanct" and cannot be disregarded. *Dana Corp,* 371 Mich at 110. Hence, the examiners could not contend, and the Master could not properly find, that, back in December 2016 when she got a new cell phone, Judge Brennan did anything other than preserve the contents of her old phone. "Cop[ying]" or "transfer[ring]" contents, which was

routine back then and likely still is routine, is keeping contents, not destroying or obliterating them or even altering them. Even if evidence had been developed supporting the examiners' contention, *Dana Corp* would preclude considering it. But there is no such evidence. In sum, Judge Brennan did not destroy any evidence.

C. Shari Pollesch, Esq.

The Master's next finding of misconduct was Judge Brennan not *sua sponte* recusing herself from the handful of cases in which appeared Shari Pollesch, Esq., or either other attorney with her law firm. The bases of that finding are three: First, Judge Brennan and Ms. Pollesch are long-time friends who have had multiple social contacts. Second, Ms. Pollesch represented two businesses owned and operated by Judge Brennan's then-husband. Although it was undisputed that Judge Brennan had no involvement at all with them or their operations, let alone any involvement with Ms. Pollesch's representation of them, it is fatuous," said the Master, to even contend that her husband's businesses were separate (p 12). Third, Ms. Pollesch had "represented the Judge['s] sister in [a] divorce case" (p 11).

Social interactions between judges and attorneys, including attorneys who appear before those judges, "should not be discouraged," but encouraged, because "they can enhance a judge's effectiveness." Geyh, *Judicial Conduct and Ethics* (5th ed), §4.07[4], pp 4-25. Especially in smaller communities, judges "cannot avoid being familiar with the lawyers and the parties who appear before them." *Id.* If walking about town, drinks after work, entertaining each other, skiing, being members of the same book club, and the like (pp 10-11), are disqualifying, judges must become recluses, which will weaken skills essential to judging, or unreasonable burdens are imposed on their courts. *Id.*, at pp 4-25, 4-26. Regularly having to obtain visiting judges will "gum up the works." More significantly, communities will be deprived of the judges whom they have elected. *Adair,* 709 NW2d at 580-581.

Neither this Commission nor the Supreme Court has ever disciplined a judge because he or she handled a case in which some party was represented by an attorney whom he or she knew well and regularly interacted with socially. Much more was required. In *Haley*, 476 Mich at 193, a judge was publicly censured for having accepted football tickets in open court from counsel for a litigant in an immediately pending case. Measured objectively, that looked like a *quid pro quo, id.,* which is why it was misconduct. What prompted severe discipline in the case of *In re Leon Jenkins*, 437 Mich 15; 465 NW2d 317 (1991), were interactions at which bribes were solicited and accepted. The contact was not misconduct; how the contact was used was misconduct. This case involves nothing remotely comparable.

Also significant is what happened, or, more precisely, what regularly did not happen, in Livingston County as a result. Not surprisingly, other judges there are "particularly close" with various attorneys who regularly appear before them (pp 1433, lines 7-12; 1434, lines 3-6; 435, lines 9-12). Those friendships "didn't bother anybody" (p 1434, lines 6-7). Disclosures were not made and disqualification was not sought. That silence or inaction says that friendships no different than Ms. Pollesch's with Judge Brennan were not considered troublesome, *Gorcyca*, 500 Mich at 642, which means that, objectively assessed, Judge Brennan not sua sponte disqualifying herself was not misconduct. *Haley*, 476 Mich at 192.

JI-102, the only authority cited by the Master is not helpful. First of all, that opinion is just an informal one which should not be accorded weight. Cf., MCR 7.215(C)(1). Second, the opinion is not the least bit persuasive. It was poorly analyzed and was poorly written; it just blathers on, frankly. Third, JI-102 is rank dictum in this case. It begins by acknowledging that administrative hearing officers, which is what the case involved, are "governed by the Michigan Rules of Professional Conduct[,] not the Michigan Code of Judicial Conduct." In other words, the opinion

did not even purport to address the situation of a judge, so it is not applicable. Finally, not only is JI-102 badly dated, it substantially predates *Adair* and *Haley,* which, because they say otherwise, has been overruled by them.

Finally, MCR 2.003 does not apply. That rule addresses specifically when an attorney may not appear before a judge. See MCR 2.003(C)(1)(e) and (g)(i). Ms. Pollesch's situation with Judge Brennan is not even alluded to. Two conclusions follow: Judge Brennan did not violate MCR 2.003, and the appearance of impropriety standard cannot be used to supplement that rule to add Judge Brennan's situation with Ms. Pollesch (¶ 17 at p 8, above). In addition, Justice Corrigan's concurring opinion in *Adair (*¶ 23 at p 11, above) notes how outdated is the Master's basic premise that it is fatuous to think that a wife's interests can be separated from her husband's. These days, it is fatuous to think that they cannot be.

D. Demeanor Toward Attorneys

It was an exaggeration by the Master to find that it was "the universal opinion" of every witness who testified that Judge Brennan had been "consistently abusive to attorneys, litigants and witnesses …" (p 14). Multiple witnesses actually said otherwise, and the witnesses most critical of Judge Brennan's courtroom demeanor could not, when asked, back up their contentions, plainly exaggerated, or were substantively, not just demeanor-wise, incredible. Furthermore, nothing attributed to Judge Brennan has ever been found by this body or by the Supreme Court to constitute misconduct. Quite the contrary.

The public hearing's first witness had been Judge Brennan's chief judge for several years. He testified that "many" of the criticisms of her behavior in court were "unjustified" (p 373, lines 10-12). Only after her husband filed for divorce in December 2015, which was ten years after taking the bench, did he consider some of those criticisms accurate (p 737, lines 14-15). Kim Morrison, who had appeared often in Judge Brennan's court and watched her often, "never

witnessed anything out of the ordinary" or "remarkable" in the Judge's interactions with attorneys (pp 856, lines 12-13; 860, lines 21-23; 861, lines 8-12). Mr. Kowalski's defense counsel would say only that "off and on" Judge Brennan was "[s]hort with litigants, [and] sometimes with [other] attorneys" (p 920, lines 12-14). He had a good relationship with her (p 368, lines 3-4).Being "short with people" is not demeaning, and "sometimes" and "off and on" is not persistent.

Ms. Pamela Maas, a senior prosecuting attorney in Livingston County, felt that "sometimes" Judge Brennan was "challenging" to witnesses and that sometimes her reactions to attorneys "would be more than the situation warranted" (p 989, lines 12-16, 18-20), hardly claims of a demeaning demeanor. When asked for specifics (p 989, lines 7-17), Ms. Maas complained only that it was "very difficult" to get adjournments (p 989, lines 20-21). Ms. Lisa Bove, another secretary to her, testified that the Judge expected lawyers to be prepared and wasn't happy when they were not (p. 815, lines 3-6). Being parsimonious with adjournments and insisting on preparation is not misconduct. Finally, Ms. Francine Zysk credited Judge Brennan with "work[ing] very well the [P]robation [D]epartment" (p 1455, lines 12-14), which Ms. Zysk lead.

Other witnesses did not hold up. Contrary to the Master's characterization of her (p 14), Ms. Pott was not an experienced litigator in a position to evaluate judges. She had been an administrator (pp 439, lines 19-25; 440; 411, lines 1-3) who "picked up a few cases here and there" "on the side" (p 439, lines 4-12), and none since 2016 (p 451, lines 21-22). By "a few," she meant "a dozen [child protection] cases over . . . six years" (p 438, line 25; p 437, line 1; 442, lines 8-11), five or six of which went to trial (p 459, line 5). The remainder were review hearings (p 459, lines 6-7). Based on those experiences, she professed to have "come to all kinds of conclusions . . . how Judge Brennan was supposed to run her court" (p 443, lines 17-20).

David Caplan, Esq., testified that Judge Brennan "had the worst judicial temperament I ever came across" (pp 765, line 25; 766, lines 1-2). But, when asked what "inappropriate demeanor" had been exhibited in the one case about which the examiner inquired, Mr. Caplan replied, "I can't recall that" (p 769, lines 10-12). When asked for any instance when Judge Brennan had treated him "rudely," his response was, "I cannot give you any" (p 773, lines 11-15). Not remembering any specifics provides no evidence of poor temperament, let alone a singularly bad judicial temperament.

Contrary to the Master's finding (p 15), no transcript of any appearance by her revealed that Judge Brennan had "excoriated" Margaret Kurtzweil, Esq. Judge Brennan merely told Ms. Kurtzweil that she "was appalled" by what she had seen on a video of her behavior at an earlier hearing toward the receiver in the case (Ex 2-36, p 10, lines 20-23). The Judge had been no more specific than, "It was like you were best buds" (*Id.*, line 22). What an overreaction by Kurtzweil. And Ms. Kurtzweil admitted that she had never before worked with a receiver, and did not know Michigan law regarding receiverships, so she had no basis, she further admitted, to what Judge Brennan's criticism of her dealings with a receiver (p 1074, line 18).

Finally, while she did testify that Judge Brennan was in her opinion, "an outlier" by which she meant "a judge outside of the norm" (p 1046, lines 22-25) with respect to "[h]er temperament" (p 1047, lines 1-2), Ms. Kurtzweil offered no support for that conclusion. During the cases which Ms. Kurtzweil had watched, Judge Brennan was "not necessarily rude, but testy" (p 1024, lines 13-19). Less than rude does not seem like misconduct, let alone persistent misconduct. And Ms. Kurtzweil's standard for comparison was the "exceptional judicial temperament" she had seen once in Wayne County Probate Court (pp 1079, lines 4-8; 1083, lines 6-8). Anything less is

"improper," she insisted (pp 1083, lines 16-21; 1084, lines 1-4). If exceptional is the standard, virtually no judge, maybe none, can meet it.

The Master correctly found that Judge Brennan had "threatened to report Ms. [Amy] Krieg [Esq.,] to the [Michigan] Attorney Grievance Commission [AGC]" (p 15), but incorrectly found that that was done "after [Ms. Krieg] d[id] nothing more than acknowledg[e] [in an attempt to narrow the issues in a case she was handling] that her client[s] had money owing to the opposite party . . ." (p 15). Ms. Krieg had acknowledged much more. She had admitted that she and her clients were likely committing a federal crime 42 USC § 1383a(a)(4). Not reporting such a crime would itself have been a crime, 18 USC § 4, and would have been unethical. MRPC 8.3(a). A rebuke was certainly warranted as was an inquiry for the AGC was hardly improper.

One of Ms. Krieg's clients was a representative payee of a relative's Social Security disability benefits. The Social Security Act says unmistakably that such a payee may use monies paid to them for the benefit of another only to meet the current needs of that person and only in their best interests. Using benefits for any other purpose is illegal. 42 USC § 1383a(a)(4). Ms. Krieg announced in open court in so many words that her clients had loaned themselves the beneficiary's benefits and that that loan was "not in his best interests" (pp 902, lines 15-19; 904, lines 19-25; 905, lines 1-2). That certainly appeared to admit illegal conduct.

The Master also ignored that, after being told by Ms. Krieg of the misuse of the Social Security benefits, Judge Brennan adjourned to chambers to deal with the matter (p 906, lines 14-23). Why? Because she did not want to accuse a young inexperienced attorney in public of criminal behavior (p 1369, lines 11-18). That was the antithesis of abusive. And, even in chambers, Judge Brennan "didn't yell," she was just "very, very stern" (p 890, lines 16-19). She took no action other than to advise Ms. Krieg to consult with more experienced colleagues (p 1368,

lines 18-24). That, too, was far from abusive. Apparently, Ms. Krieg "chose [as a result] to leave the litigation practice altogether" (p 15), but her reaction is irrelevant. (¶ 13, at p 7, above). Besides, not all attorneys are temperamentally suited to be a litigator.

That the Master credited Ms. Lathrop-Roberts' testimony at all is troubling. At the public hearing, the Master *sua sponte* rejected out of hand the heart of her testimony (p 1150, lines 4-10), so why, then, rely on it? Not only was Ms. Lathrop-Roberts argumentative and evasive at the public hearing, which drips off the pages of the transcript, she insisted on repeatedly asserting before the Master what was demonstrably false. Specifically, she insisted that Judge Brennan had refused to let her put an appearance on the record or make a record (pp 1129, lines 6-7; 1131, lines 20-25; 1132, lines 18-19; 1135, lines 11-13; 1139, lines 12-13; 1146, lines 15-17). The transcript presented by the examiners plainly proved otherwise.

The hearing which that transcript memorialized began with Ms. Lathrop-Roberts uneventfully stating her appearance (Ex 8-2, p 3, lines 7-11), which she insisted Judge Brennan would not let her do, and it reflected her making, multiple times (*Id.*, pp 4; lines 22-24; 5, lines 13-14; 23-24; 8, lines 4-5, 25; 9, lines 1-4), the very arguments she repeatedly insisted before the Master that she had not been allowed to make (pp 1147, lines 21-23; 1148, lines 6-7; 1149, lines 11-15, 22-25; 1150, lines 1-3). Even according to an observer determined to denigrate Judge Brennan, Ms. Lathrop-Roberts had "refused to stop pushing the issue" (p 453, lines 23-24). No wonder the Master "announce[d] to save time[] I accept . . . that she had made a record" (p 1150, lines 4-7). Ms. Lathrop-Roberts' dishonesty was unmistakable.

The Master's final finding about Judge Brennan's treatment of attorneys is ambiguous, but is unavailing whatever it was. Read literally, his report says that the Court of Appeals agreed with Bruce Sage, Esq., in *Sullivan v Sullivan*, Docket No. 330543 (Exhibit 10-2), that he "felt he had

been mocked, demeaned, and threatened" (p 16). Mr. Sage's feelings are irrelevant (¶ 13 at p ___, above). More likely, the Master found that the Court of Appeals agreed that Mr. Sage had been, not just that he felt, mocked, demeaned and threatened. But if that is what the Master meant to say, he was wrong to rely on that Court.

Relying on the Court of Appeals' opinion violated fundamental due process, to which even judges are entitled. *Haley*, 476 Mich at 197. Judge Brennan had had no opportunity to defend the claim made in *Sullivan* that she had treated Mr. Sage with hostility. True, judges whose decisions are appealed never participate in defending those decisions, but that situation is much different. Reversing on appeal a ruling does not impose any personal consequence on the judge, other than, perhaps, a bruised ego. Using the *Sullivan* opinion as a finding of misconduct would directly and significantly affect Judge Brennan. Judgments may never be used against a nonparty. *Monat v State Farm Ins Co*, 469 Mich 679; 677 NW2d 843 (2004). Instead, the entire *Sullivan* transcript (Exs 10-3 through 10-11) or the full video (Ex 10-12) must be reviewed. They reveal nothing worse than inept non-invidious expressions of opinion and frustration, which are not misconduct. *Hocking*, 451 Mich at 12-14.

Judges have been disciplined for a lack of judicial temperament, but only for a "gross lack." *In re Matter of Del Rio*, 400 Mich 665, 716; 256 NW2d 727 (1997), and *In the Matter of Bennett*, 403 Mich 178, 192; 267 NW2d 914 (1978). See, e.g., *In the Matter of Mikesell*, 396 Mich 517, 537, 540, 541; 243 NW2d 86 (1976) ("Shut your big mouth"); *Del Rio*, 400 Mich at 719, fn 23, 720, 722 fn 27 ("You're pissed off because a black man got a little white pussy." "Mother-fucking white liberal." "This honkie bitch." "He told me to get my ass out of his court"); *Bennett*, 403 Mich at 189-191 ("[B]ullshit." "Son of a bitch," and "bastards"); *In the Matter of Probert*, 411 Mich 210, 236; 411 NW2d 210 (1981) ("Fresh meat" and "little bastard"); *In the Matter of*

Franklel, 414 Mich 1109, 1110; 323 NW2d 911 (1982) ("You're a despicable son of a bitch"); and *Gorcyca*, 902 NW2d at ____ (telling children that they were "crazy" and "brainwashed"). Judge Brennan is accused of nothing remotely comparable, let alone equivalent (See ¶ 8 at p ____, above).

Finally, remember that a judge's conduct "must [be] measure[d] . . . objectively," which means as reasonable observers "would view" it. *Haley*, 476 Mich at 192. Multiple such observers have said multiple times over the years that Judge Brennan's demeanor is not what the examiners claimed or what the Master found. Her then-Chief Judge supported her in 2014 for re-election (p 1558, lines 14-15). He would not have done that if she had "the worst judicial temperament." He would have welcomed her defeat. So would have the local prosecutors, but they, too, endorsed her (p 1558, lines 12-15). Surely, the local newspaper would not have endorsed her (pp 1202, lines 12-16; 1205, lines 22-23), especially again in 2014 against an opponent whose sole issue was that she was a demeaning bully (p 1205, lines 13-15, 20-21). Newspaper endorsements tend to be bestowed only after taking a community's temperature.

More significantly, a solid majority of the voters returned Judge Brennan to office in 2014, as they had in 2006 and 2008. That year she carried all but five precincts in the entire county (p 1206, lines 8-9). Re-election does not forgive or erase misconduct, but that is not what Judge Brennan is contending. Re-election in the face of claims like those by Judge Brennan's 2014 opponent rebuts the claim of outrageous demeanor. Her re-election says that, objectively, observers throughout Livingston County did not consider Judge Brennan to be a demeaning bully. Maybe, the voters accepted a bully because they liked the swag she handed out at parades, but so concluding without proof would demean the voters.

Most significantly, that Judge Brennan was not considered a bully or demeaning is shown by jurors' persistent opinions of her. For her entire tenure, beginning in 2005, jurors in Livingston County have been asked to complete questionnaires, which most do, about their experiences in its courts (pp 1248, lines 21-25; 1249, lines 4-7). Jurors are invariably perceptive and those who sat on cases before Judge Brennan were impressed with, among other things, how efficient she was, how well she controlled the courtroom, and, how "respectful," yes, respectful, she was (p 1253, lines 13-18). The examiners had from December 8, 2018, until November 19, 2018, to rebut that testimony, but never even tried.

E. Treatment of Employees

Nowhere in any of its three 28-day letters to Judge Brennan (Ex, 20, 22, 24) or in the two iterations of the Formal Complaint which were filed prior to the formal hearing did this Commission allege any demeaning or abusive conduct directed by Judge Brennan at court employees. Only in the Second Amended Complaint, which was filed after 10 days of the formal hearing, did the Commission allege that Judge Brennan had persistently been discourteous to court personnel (Count XV, ¶ 391). Although naming only one of them, Ms. Kristi Cox, her secretary/court recorder, the Master found that Judge Brennan had been "continually abusive to her . . . staff" (p 17). Stating no particulars, the Master also stated, "Every employee who worked for [her] complained about the treatment they received" (p 17).

The Master's finding is deficient for multiple reasons. First, "*[b]efore filing a complaint* . . ., the [C]ommission must give written notice to the judge who is the subject of a request for investigation, and . . . [t]he notice shall specify the allegations" against the judge. MCR 9.207(D)(1). Such notices are known as "28-day letters." Unless "must give" and "shall specify" mean only "may," that subrule imposes "a prerequisite condition," which makes a formal complaint filed without the notice "insufficient to commence" proceedings. *Burton v Reed City*

Hospital Corp, 471 Mich 745, 752, 754; 691 NW2d 424 (2005).[13] That condition was not met in this case.

To be sure, the Commission may amend a formal complaint, even after a formal hearing, to conform to the hearing's proofs, MCR 9.213, but nothing in that rule suggests that MCR 9.207(D) can be ignored after a hearing, just not before, to add issues or charges. In *Simpson*, 500 Mich at ____, fn 20, the Supreme Court said that "the JTC can proceed on additional charges *arising after the complaint is filed"* [emphasis added]. Judge Brennan's supposed mistreatment of her employees preceded by years the filing of the original complaint. Therefore, unless the Supreme Court did not mean what it said in *Simpson*, not including mistreatment of employees in the original complaint precludes considering it now. In addition, the Master's very generalized findings of mistreatment provides nothing for the Commission to review (See ¶ 5 at p 4, above). Only specifics can be meaningfully reviewed.

Second, the Master's finding is inaccurate. No witness testified that Judge Brennan "was continually abusive to her own court staff" (p 17). She was stern and sometimes rude, some witnesses said, but that is far from abusive, and it was not continuous. Her most recent court recorder, Ms. Felica Milhouse, "got along just fine" with her (p 559, lines 9-17). Ms. Francine Zysk, who had worked with Judge Brennan for years, first, as a probation officer, and, then, as court administrator, "had a great professional relationship" with her (p 1457, lines 2-4). That changed only in the last month of Ms. Zysk's tenure when she took umbrage at Judge Brennan accusing her of lying in a deposition. Until then, Judge Brennan had been "a great leader" (p 1515,

[13] Granted, *Burton* was a medical malpractice action, not a judicial discipline proceeding, but to be binding precedent, a case need not be identical. *Hoffman v Burkhead*, 353 Mich 47, 54; 90 NW2d 498 (1958). Were that required, the rule of stare decisis would be feckless. It is a case's rationale which "sets a precedent for the future." *Morse Chain Co v Formsprag Co,* 380 Mich 475, 483; 157 NW2d 244 (1968).

lines 21-24) and had "worked very well [for years] with the [Court's] Probation Department" (p 1455, lines 12-14).

In April, 2015, after a two-year stint in the Howell Courthouse, Ms. Lisa Bove opted to return to the Brighton Courthouse, where she had worked from 2008-2013, to become secretary/court recorder for Judge Brennan (pp 782, lines 18-23; 783, line 25; 784, lines 1-5; 784, lines 22-25), hardly suggestive of an employee who had been subjected to longstanding abuse or who had seen fellow employees mistreated. Only in 2016, during her divorce, did Judge Brennan change, according to Mr. Bove. Even then, the Judge could be "very nice," as well as "very difficult" (p 790, lines 7-11; 802, lines 8-13). The stress of the divorce and having three dockets to manage frustrated the Judge (p 801, lines 8-13).

Not even Kristi Cox, the employee who complained the most about Judge Brennan, testified to continuous mistreatment by Judge Brennan. But, first, two considerations are pertinent. First, Ms. Cox had worked for nearly 20 years for Judge Brennan's predecessor before his death (p 627, lines 9-12). Not surprisingly, she thought "very, very highly of him" (p 627, lines 24-25). It is common that a replacement never matches up to a lionized preceding boss. In addition, a replacement's new ways are seldom considered improvements, but tend to be unsettling. Second, Ms. Cox stayed with Judge Brennan for ten years. Things could not have been horrible. Ms. Cox might have put up with that for a while, not for a decade.

And what Ms. Cox said has to be put into context, not cherry-picked. While she said that Judge Brennan was "[d]emeaning, degrading, [and] belittling" (p 600, lines 17-21), when asked for specifics, all Ms. Cox could remember was an incident when Judge Brennan said to her, "What were you thinking? Why did you do that?" (p 601, lines 1-5), and when she slid files to her a bit more firmly. Given the structure of the bench in Brighton, Judge Brennan and Ms. Cox had to

slide files back and forth (pp 605, lines 16-25; 606, lines 1-5). Even if said in the "barking" and "accusatory" tone remembered by Ms. Cox (p 601, lines 11-12), those words were not abusive, nor were those actions. Perhaps, Ms. Cox was correct that Judge Brennan was not a good boss, but that did not make her an abusive boss. Nothing in the record suggests that Ms. Cox was mistreated by Judge Brennan anywhere like Judge Seitz had mistreated his secretary. See *In re Seitz*, 441 Mich 590, 604-610; 495 NW2d 559 (1993). Remember, unequivalent conduct must be treated differently (¶ 8 at p 5, above).

Ms. Cox's testimony was also badly inconsistent. Initially, she testified that Judge Brennan's poor treatment lasted "the entire ten years" she worked for the Judge (p 600, lines 22-24). A few pages later, however, she testified that the poor treatment started a year or two after the Judge took the bench (p 632, lines 9-19). And Ms. Cox was treated well, she said, in 2006, 2008 and 2014 (pp 602, lines 15-17; 697, lines 6-7), supposedly because those were election years, but, whatever the reason, she was not treated badly and, in 2012, after a rapprochement, things hand gone well for six months (p 636, lines 5-14). Also, throughout their working relationship, there were "period[s] of weeks that were fine" (p 36, lines 23-25).

As late as the Spring of 2013, Judge Brennan and Ms. Cox had lunch together and, when at lunch, they exchanged confidences (p 596, lines 5-13). Ms. Cox often asked the Judge if she could bring her anything back for lunch (pp 607, lines 1-4). Finally, on one occasion, Ms. Cox "voluntarily" "recruited a bunch of my friends" to use a day off to campaign for the Judge by walking in a parade for her (p 663, lines 17-25; p 664, lines 1-4). None of the former describe an abusive boss, and none of the latter is the reaction of an abused employee, and there were plenty of other examples of the latter, rebutting any claim of the former.

During her decade with Judge Brennan, Ms. Cox routinely sent the Judge cards with pleasant sentiments and, sometimes, with laudatory handwritten notes (Exs 34-42A, 45, 46, 54, 57, 60). For example, "Congratulations. That'll teach you to worry so much" (p 638, lines 19-21). "Hang in there. Every flower that ever bloomed had to go through a whole lot of dirt to get there" (p 639, lines 11-18). "Don't worry. Everything will pan out. Feel better soon. You'll kick his ass" (p 642, lines 2-7). "Fondly, your friend Kristy" (p 642, lines 20-24). And "The world is a better place because of you" (p 644, lines 7-16). Every year for the Judge's birthday, Ms. Cox decorated the office and brought a dessert. For Boss's Day, Ms. Cox took the Judge out to lunch. Every Christmas, Ms. Cox gave the Judge multiple gifts (p 1264, lines 4-25). Is that the behavior of a persistently abused employee?

Ms. Cox did not deny the complimentary notes. She couldn't. They are all in her handwriting. So, instead, she characterized all but one of them as "B.S." and "insincere" intended to keep a lousy boss content (pp 638, lines 22-24; 639, lines 24-25; 640, lines 1-2, 14-16; 642, line 25; 643, line 1). The exception was the note that the world "is a better place" because of Judge Brennan (p 644, lines 12-13), a really odd compliment to give a persistently abusive boss and to say later was true (p 644, lines 13-16). Nor did Ms. Cox dispute the birthday, Boss's Day and Christmas celebrations. They, too, however, were, she said, insincere gestures. Either, therefore, Ms. Cox lied consistently for years when she professed high regard for Judge Brennan, or she lied to the Master multiple times when she denied high regard for the Judge. It has to be one or the other.

Ms. Cox's testimony that she has been diagnosed with PTSD attributable to Judge Brennan (p 17) does nothing to support the Master's finding. When objected to, it should have been rejected. The examiners did not present expert testimony of such a diagnosis. The only evidence

was testimony by Ms. Cox that she has been told she suffers from PTSD (p 680, line 19). That is inadmissible hearsay. Bizarrely, the Master accepted that testimony as a lay opinion (p 681, line 7). According to the Master, Ms. Cox can give an opinion about the cause of the effects she is suffering (p 681, line 8-17). That is a medical diagnosis, not a lay opinion.

Ms. Zysk and Ms. Jessica Sharpe[14] also spoke glowingly of Judge Brennan (Exs 45, 54-56, 56A, 57-60). Ms. Sharpe sent her the following:

> "You are just awesome. You are always encouraging me, gently pushing me personally and professionally, to better myself. So I knew when you said you were going to push for full-time it would happen. You always keep your word. I am sure you know how much full-time will affect me. What you may not know is that everything you have done to help me has not gone unnoticed. I am so appreciative for a role model, mentor, and friend like you. When I first started, I would tell people, when describing my job, that I won the judge lotto. And today I feel like that more than -- even more so. I hope you don't pull out your red pen." (pp 731, lines 16-25; 732, lines 1-3).

Can the Judge who earned that accolade from one employee after being told by another employee that she made the world "a better place" be the inveterate lout the Master said "every employee" described?

F. Lying Under Oath

Again, contrary to the Master (p 18), Judge Brennan did not exhibit a breathtaking willingness to lie. What is breathtaking is the oversimplification and misconstruction of the record found in the Appendix submitted by the examiners and the Master's wholesale adoption of it. Did he even read? it. If he did, did the Master track down the unidentified, supposedly false statements? How? The Appendix made no references to the record.

[14] Until the very last day of the formal hearing, Ms. Sharpe responded to Ms. Yakel-Sharpe. That day, for the first time, she said she preferred to be addressed as Ms. "Sharpe" (p 1859, lines 12-16). Hence, that is how she will be shown that courtesy throughout this brief.

1. Yes, Judge Brennan testified at her divorce deposition that she first became aware of Mr. Kizer's ex parte motion "[o]nce I spoke with my attorney" (pp 116, lines 17-25; 117, lines 5-13). Yes, Ms. Jeanine Pratt, Judge Reader's secretary had talked to and e-mailed Judge Brennan about it before then (pp 320, lines 8-17; 321, lines 1-8, 25; 322, lines 1-20). The difference was not a lie, however, but a mistake. At her deposition, the Judge had no memory of her phone call with Ms. Pratt, and or of having opened the e-mail from her (p 120, lines 6-9; p 136, lines 15-17; 137, lines 1-10). She still has no memory of either (p 140, lines 22-23). A lack of memory "does not equal falsehood." *Gorcyca*, 500 Mich at 637.

2. Nowhere in her deposition did Judge Brennan testify that she told Ms. Pratt that "she was too busy to sign the disqualification order" (App, p 1). She testified at that deposition that she told Ms. Pratt, first, that "I would take care of it when I had time the next day" (Ex 1-13, p 46, lines 7-8). That didn't say that she didn't have time the day she spoke, just that she would deal with the matter the next day at an available time. Then, the Judge testified, "I said I would sign it [the proposed order] the next day" (*Id.,* p 52, lines 9-10). No reason for waiting was given *(Id.*). Her reason was, "I was busy" (*Id.* p 52, lines 19-20), but that reason was not stated to Ms. Pratt. An unstated thought cannot be a lie. Most significantly, Judge Brennan explained at the deposition, "I don't remember exactly what I said, [to Ms. Pratt]. I remember the circumstances" (*Id.,* p 52, lines 24-25). That was not a lie. *Gorcyca*, 500 Mich at 637-638.

3. At her deposition, Judge Brennan did say, "Jokingly, I did," when asked if she had said to her staff, "I need to know how to delete stuff from this phone" (Ex 1-3, p 59, lines 7-13). The examiners incorrectly claimed, and the Master erroneously found, that she "admitted at the formal hearing that [what she said] was not a joke." Yes, she testified, "I did seriously want to take [sic] off my phone . . ." (p 1705, lines 11-14), but she said more, too. She told her staff that

her husband apparently thought that her old phone would contain "big information," which it would not, and that might find recipes (Ex 1-13, pp 59, lines 23-25; 60, lines 1-6). In other words, because sarcasm is a form of humor, Judge Brennan had been both joking and serious, making her "Yes and no" (p 1704, lines 19-20) truthful.

4. At her deposition, Judge Brennan did deny having "reset" her old phone, the one she had returned to her then-husband (p 151, lines 11-15). She did, however, admit to having "delete[d] messages from that phone" (pp 150, lines 19-24; 151, lines 4-10), so she was not denying that those messages were no longer on that phone. Then, asked by the questioner, "[D]o you know the difference between deleting and resetting the phone?" Judge Brennan answered, "No" (pp 151, lines 12-15). Finally, admitting that, "I wasn't going to make Mr. Kizer's job easy" (p 154, line 16), was not an admission of having lied during her deposition. In context, that was no more than a statement she had not volunteered to Mr. Kizer that he was not asking the correct question.

5. Any discrepancy by Judge Brennan in her "vomit" testimony is insignificant, immaterial, and not a prevarication. Ms. Jessica Sharpe[15] did vomit in a bed the Judge was kind enough to let her use one evening when she did not feel well, ruined expensive sheets (p 745, lines 23-25), and left without cleaning up or telling the Judge (p 709, lines 15-17). Later, Ms. Sharpe sent Judge Brennan an e-mail apologizing and offering to pay for the sheets (Ex 11-1). When asked 18 months later at her deposition about the incident -- of what possible relevance to the divorce was that incident, by the way? – Judge Brennan expressed annoyance that Ms. Sharpe had left without apologizing (pp 263, lines 10-25; 264-266; 267, lines 1-2). When shown Ms. Sharpe's

[15] Until the very last day of the formal hearing, Ms. Sharpe responded to Ms. Yakel-Sharpe. That day, for the first time, she said she preferred to be addressed as Ms. "Sharpe" (p 1859, lines 12-16). Hence, that is how she will be shown that courtesy throughout this brief.

e-mail of later that day, Judge Brennan did not dispute it (pp 262, lines 24-25; 267, line 4-6), but had. She had no memory, however, of Ms. Sharpe's e-mail apology (pp 262, lines 24-25; 267, lines 11-16, 20-21). Failed memory is not a falsehood (¶11 at p 6, above).

6. That Judge Brennan had told Ms. Sharpe to take advantage of favorable weather to stain her deck, as Ms. Sharp had volunteered to do, on a weekday does not establish that the Judge knew that that work had been done on County time. Ms. Sharpe was a part-time employee who then had 2 ½ days/week available off the clock to work for the Judge, which the Judge expected her to use, (pp 1577, lines 5-20). If Ms. Sharpe recorded working for the court those weekdays, she was defrauding the County unbeknownst to Judge Brennan (pp 1577, lines 11-21), who did not have access to her time records (p 1576, lines 15-25). Ms. Sharpe was recalled as a witness a month later (pp 1859-1873) to take issue with some of what Judge Brennan had testified, but not with what she had said about staining the deck (pp 1862-1863). Why not? Could it be because the Judge was correct? Whatever the reason, her testimony stands uncontradicted.

7. Not disclosing on January 4, 2013, in greater detail her contacts with Mr. Furlong was at worst incomplete. It was not false. She did not deny, which would have been false, phone calls, texts and socializing with him. She did deny, correctly the examiners conceded (pp 12-13, above), a sexual relationship with Mr. Furlong. Silence is not untruthful. To say she and Mr. Furlong were friends was not a lie, especially as distinct from not being lovers, which had been alleged and was the topic on the table.

8. And how is it either relevant or material that, when acknowledging accurately that Ms. Pollesch was then representing her husband and his businesses, Judge Brennan may have stated incorrectly when she remembered having learned of that representation? Significant was

her acknowledgment of the representation when asked by counsel in pending cases and when asked by the Commission. She told the truth.

9. Judge Brennan did not mislead, let alone intend to deceive, Bruce Sage, Esq., when she told him, "We don't have a system that would allow" telephonic testimony (¶¶ 236, 311). Judge Brennan's courtroom had two mechanisms for taking testimony by telephone, but neither worked satisfactorily. Putting one of the courtroom phones on speaker, which was tried (pp 651, lines 22-25; 652, lines 1-4), "didn't really work" and "was not terribly effective," acknowledged Ms. Cox (p 652, lines 4-5). There was also a device which was part of the courtroom recording system (p 652, lines 6-8), but, the one time it was tried, its use "was difficult" and "wasn't satisfactory," also per Ms. Cox (pp 652, lines 11-13, 17-19; 689, lines 3-7). Those problems were not fixed until "long after" the statement to Mr. Sage (p 1360, lines 14-20). Therefore, whether the equipment was defective or had not been used properly, what Judge Brennan told Mr. Sage was not a lie; it either was true or was reasonably believed by her to be true.

10. How was "overstat[ing], to a large degree, her friendship with [Shawn] Ryan" (App, p 4) a false statement as *Gorcyca*, 500 Mich at 637, explained what is a falsehood? Isn't an "overstate[ment], to a large degree" partially true? If so, it is not a falsehood. More significantly, it was Ms. Ryan who understated her relationship with Mr. Furlong in order to inflate Judge Brennan's relationship with him. Ms. Ryan testified that she and Mr. Furlong did not have a "relationship," so it was not true that he did not come to social occasions because of her, but to see the Judge, because their sexual encounters were not "a relationship." According to Ms. Ryan, to reflect a relationship, sex has to be publicly known (pp 1761, lines 3-11; 1783, lines 20-25), which theirs was not. Nonsense. A sexual relationship is having sex, secret or broadcast.

11. Of what possible materiality is a false denial, if there was one, by Judge Brennan of different or preferential treatment by her of Det. Furlong's and Corriveau's warrant requests? Treating preferentially threes MSP troopers -- including a Mr. Singleton (p 585, lines 19-21) -- is showing a preference, if any, to the MSP, which does not support the claim of a romance or a close friendship with Mr. Furlong, unless the examiners and the Master concluded, and this Commission concludes, that she was romancing all three or all three were romancing her

Also contrary to what the Master ruled by reference, no witnesses, let alone "a number of witnesses" (App p 5), testified that only those officers' warrant requests were reviewed in chambers behind closed doors. Ms. Bove testified, "I don't know if any other officers went that way [behind closed doors]" (pp 786, lines 22-25; 787, lines 3-7). During the 3-plus years she worked for Judge Brennan (pp 693, lines 24-25; 694, lines 18-19), Ms. Sharpe saw the Judge take officers into chambers only beginning in 2017 (p 721, lines 8-13). Was she oblivious to the practice for 3 years, or was there nothing to be seen until 2017. In sum, the examiners did not prove that Judge Brennan falsely denied preferential treatment.

12. That Judge Brennan had directed Ms. Sharpe, but only after she had volunteered to do so, to stain her deck right away to take advantage of favorable weather, which would have been on a weekday during normal business hours, does not establish that the Judge knew that Ms. Sharpe had done so "while on the County's clock," rendering false her denial of such knowledge. Ms. Sharpe had a flexible part-time work schedule, which she "billed" daily by recording her worked time, and the Judge was right to assume that she would not bill the County for the time. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 530; 529 NW2d 318 (1995). In addition, since she did not have access to Ms. Sharpe's online time records, the Judge had no basis to know that she had fraudulently billed the County.

13. The examiners' Appendix appears correct that neither Ms. Cox or Ms. Sharpe testified at the public hearing that, using those very words, either had "volunteered or insisted" on paying Judge Brennan's bills (not using their money, but using her checks). The Appendix is also likely correct that, although neither witness used that very word, the Judge "directed" them sometimes to pay the bills (App, p 6). Neither can be acknowledged with certainty, however, because the Appendix contains no citations to the record. But what is known is that neither employee was dragooned into helping.

Ms. Cox handling of the Judge's bills began with her "ask[ing] me to pay the bills" (p 611, lines 18-20). Likewise, Ms. Sharpe testified, "Initially[,] I want to say she did ask;" then, she would say "these need to be paid" (p 711, lines 15-18), which Ms. Sharpe did without objection. In addition, Ms. Cox "chided [Judge Brennan] for not keeping a checkbook register" and started one for her (p 673, lines 14-19). That sounds like someone trying to help, not someone being forced to write checks. At a minimum, Judge Brennan had good reason to believe, since neither objected, that her staff was agreeable to help her with her bills, making what she told the Commission not a lie.

14. The final claim in the Appendix contains two glaring omissions. Ms. Cox testified that in 2006 and 2008 Judge Brennan "was indeed" "extremely cautious about intertwining office and campaign work" (p 625, lines 11-18) and that in 2014 she again told her staff to stay off the County computer system, to instead use their personal computers and the publicly-available WiFi (pp 625, lines 21-25; p 626, line 1). Ms. Cox was of the opinion that in 2014 Judge Brennan "was more cautious about not appearing to intertwine them [office and campaign work]" (p 625, lines 18-19). Ms. Cox offered no basis for that opinion, however, so its accuracy cannot be assessed. At a minimum, she never disputed that the Judge repeated her 2006 and 2008 cautions about not

mixing office and campaign work. The Appendix, and, therefore, the Master, also ignored that, when supposedly shown unspecified contrary documents, she acknowledged her error. Having been unquestionably adamant in 2006 and 2008 supports having believed, albeit incorrectly, that she was similarly consistent in 2014. Remember, a mistake must be "clear[ly]" disproven by the examiners (¶ 12 at pp 6-7, above).

15. That brings us to the one instance of a supposedly "facile" misrepresentation by Judge Brennan found by the Master on his own (p 18). Why wasn't it inclu8ded in the Appendix if so obvious? Judge Brennan did not testify that Judge Reader and her SCAO regional representative gave her "explicit permission" to allow her staff to attend to personal matters when not busy with court work (p 18). On October 9, 2018, Judge Brennan testified that Judge Reader knew, because she told him, that she and her staff "wile[d] away" downtime by "online shopping" and that he raised no objections (pp 1600, lines 12-25; 1601, lines 1-4) which she took as acquiescence, which was not unreasonable. On cross-examination, she was consistent (pp 1922, lines 7-19; 1923, lines 12-18; 1923, lines 16-22). Only when pressed by the Master did the Judge say that she had earlier said what she had not said ("Yes. Yes"), but then she clarified, "I don't know that they used the word 'okay.' They acquiesced" by not "object[ing]," "[T]that's what I mean" (p 1425, lines 5-15). At worst, therefore, Judge Brennan was momentarily confused.

G. Personal Assistance

Each iteration of the Formal Complaint alleged that Judge Brennan had "directed" or "instructed" two of her staff, Ms. Cox and Ms. Sharpe, to perform during court hours what the Master characterized as "an array" of personal services (p 19). The Master did not address most of those allegations, which he categorized as "minor courtesies," other than to say they were relatively unimportant and identifying which ones were not acceptable would likely "cause unnecessary consternation to the entire Michigan judiciary, most of whom have been afforded [the

same courtesies] by [their] staff[s]" (p 19). That is not a finding of misconduct, but neither is it a finding no misconduct. But, for lack of a finding, those activities are off the table. The Master did, however, addressed a few of the allegations.

There is remarkably little case law, none here in Michigan, on judges looking to staff for assistance with personal tasks, but there is case law elsewhere. In *Matter of Neely*, 364 SE2d 250 (W Va 1987), a justice was admonished for having required his secretary to care for his son on 11 occasions during a 27-month period, once for 7 days, and then having fired her when she declined to do it again. A judge can ask staff, ruled the Court, to do such things as complete tax forms, type a child's term papers, make travel arrangements, attend rallies and help with speeches, sign personal checks, and do banking, so long as those tasks did not interfere with official duties and so long as declining to do them would not have resulted in dismissal. But making their performance a condition of employment goes too far.

"While 'no two judicial misconduct cases are identical,'" *Gorcyca*, 500 Mich at 634, this case presents much of the very same kind of conduct that *Neeley* found to be acceptable. Justice Neeley had acted improperly because he went further and fired his secretary when she declined to babysit again. Such conduct by other judges had not been considered improper because there had been "no assertion" to their staffs that failure to perform personal duties "would have resulted . . . in being fired." *Neely*, 364 SE2d at 252. Likewise, there was no such assertion in this case. Neither Ms. Cox nor Ms. Sharpe so testified, and Ms. Robbin Pott was not fired when she refused a pair of requests by Judge Brennan to assist with a personal project (p 436, lines 1-8). She quit for unrelated reasons (p 468, lines 21-24). The Master's use of the word "involuntarily" (p 21) was totally unsubstantiated, therefore.

In addition, the personal tasks the Master considered worthy of discussion all satisfied *Neely's* other two criteria: not interfering with court work and not depriving the court of more than de minimis value. Ms. Sharpe never testified that she "was sometimes required to leave the court to pay the [J]udge's bills" (p 20). She testified to voluntarily using the Judge's checkbook to pay bills, doing so online and, once, by phone, all in the courthouse. She never hinted otherwise (pp 710, lines 20-25; 711; 712, line 1). Once, while the Judge was on vacation, Ms. Sharpe did go to her home to collect a water sample and deliver it to a laboratory, but the task took only moments. The Judge's home was just 5 minutes away and the lab was only a quarter mile from there (p 749, lines 12-25). There was no claim that the task took more than minutes or that it interfered with the court functioning; Judge Brennan was on vacation.

The time Ms. Sharpe helped Judge Brennan program Netflix on her home television (p 705, lines 1-5) occurred in the evening after work (pp 1581, lines 19-25; 1582, lines 4-6). Granted, that was the Judge's testimony, but if the Master rejected it, which he did not say he did, rather than ignored it, he also ignored that Ms. Sharpe never disputed the Judge's testimony, even when she returned as a rebuttal witness to take issue with other things the Judge had said. When Ms. Sharpe took the Judge's car to a nearby dealership for repairs and had to wait there, out of the office, obviously, she took work with her (p 1868, lines 1-15), so the task did not interfere with her duties. Besides, the Judge was headed out of town that day, (*Id.*), so Ms. Sharpe's absence did not impair the functioning of the court.

Under other circumstances, Ms. Sharpe staining the deck at Judge Brennan's home might have presented a less egregious version (3 days versus 7 days) of the conduct which garnered Justice Neely an admonition. But findings must be based on what really happened, not something else. Judge Brennan did not insist on her deck being stained on penalty of dismissal. Doing it was

Ms. Sharpe's idea, not a request by the Judge (p 598, lines 17-21). More significantly, Ms. Sharpe working on the deck while being paid by the County was exclusively her own doing. She was, at the time, a part-time employee, working 2 full days and one half-day, in other words, not working 2 1/2 days per week. An honest Ms. Sharpe would not have clocked in the half weekdays she worked on the deck. (The third day was a Saturday). And there is no basis to find that Judge Brennan was aware of Ms. Sharpe's duplicity. The Judge did not have access to her time entries, so she had no reason to know that Ms. Sharpe was defrauding the County. As noted earlier, the examiners recalled multiple witnesses to rebut things about which Judge Brennan had testified earlier (p 1859, lines 20-25), but none of the above (pp 1859-1873).

In sum, the only pertinent case law: *Neely*, says that Judge Brennan did not use her staff improperly to help with personal tasks. The Master's sidestepping *Neely* should be rejected. First of all, the Master was incorrect that the portion of it on which Judge Brennan relies was dictum (p 19). It was a statement of the line Justice Neely had improperly cross, which was, therefore, very much a part of the Court's considered analysis. That is the antithesis of dictum. Nor does the dissent in *Neely*, on which the Master relied, support a different, more stringent standard. The dissenter's only objection was to the penalty. She did not take issue with what is and is not misconduct, just how serious it was. Judge Brennan did not cross the line. Finally, *Neely* should not be disregarded because it is from West Virginia, at least not without an explanation of why Michigan should do things differently. (¶19 at p9, above).

H. Employee Campaign Activities

The Master also found incorrectly that Judge Brennan engaged in misconduct by having two members of her staff (again, Ms. Cox and Ms. Sharpe) occasionally assist her 2014 campaign for re-election. According to him, she violated MCL 169.257(1), which is, he says incorrectly, an

"absolute" "prohibition against campaign activity during court hours, . . . given voluntarily are [sic] not" (p 21). That statute says:

> "*A public body or a person acting for a public body* shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationary, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under section 4(e)(a)" [emphasis added].

It is one of the most fundamental tenets of construction that statutes must "be interpreted in accordance with their plain meeting." *Chrzanowski*, 465 Mich at 482. At no time during her 2014 campaign was Judge Brennan either "[a] public body or a person acting for a public body." Even if she had incorporated herself into an entity, which she never did, she would not have been "a public" entity, and her campaigning for re-election as an individual was not "acting for a public body," but for herself. What the statute proscribes are activities like a school superintendent using public funds or asking teachers to push a millage proposal. Therefore, unless the Commission ignores the plain meaning of the statute, Judge Brennan did not violate it, nor, because she did not violate the statute, did she violate MCJC Canon 2(B).

Nor can MCJC Canons 3(B)(2) or 7(B)(1)(b) be used to transmogrify into applicability the textually inapplicable MCL 169.257(1). First of all, nowhere in Count XI of each iteration of the Formal Complaint, which count dealt in small part with campaign activities (¶¶ 249, 250, 258, 259), or in Count XII, which dealt exclusively with "improper campaign activities," did the Commission rely on any authority other than MCL 169.257. This Commission should not address what are "not formally charged in the Complaint," *Simpson*, 500 Mich at 15 fn 20, and a laundry list of canons and rules are too vague to do. *Gorcyca*, 500 Mich at 645 Fn 1 (conc op per Viviano, J.). Judges should not be put in the untenable position of having to argue against unspecified claims of misconduct.

Furthermore, using generic canons of ethics to punish conduct not prohibited by MCL 169.257(1) is indistinguishable from using the generic appearance-of-impropriety standard to put ethical restrictions on judges accepting legitimate campaign contributions, which *Adair* said would undermine the insistence by "We, the people, of the State of Michigan" on incumbent judges submitting to periodic, popular review. Those canons would, then, become "little more than cleverly devised snares to be exploited by those wishing to undermine individual judges." Not only do judicial campaigns need money, they need effort of a type provided by staff, and a good deal of such effort must occur during the workday. Vendors, such as printers, people organizing or sponsoring events, etc., do not typically work evening. If the Legislature sees value in such restrictions, it may impose them, but this Commission cannot do so on its own.

In addition, only someone anxious to find deception when would find a "deceptive intent" in Judge Brennan having her staff use their personal computers in "a corner of the courthouse" where, and because, there was access to publicly-available Wi-Fi (pp 21-22). Even if the statute's restrictions applied, which they did not, such conduct was not hiding use of a public resource, but was deliberately using a non-governmental, available-to-the-public resource, i.e., not even arguably violating the statute. Hence, confirming how result-oriented was the Master is his finding that Judge Brennan connived to hide what was openly honoring the statute. Given her animosity toward Judge Brennan, Ms. Cox's contention to that effect is explainable. Not so the Master's.

Likewise not understandable is the Master's exaggeration of the amount of campaign-related work which was done in the courthouse during court hours. Ms. Sharpe testified that "[t]here were a few [campaign-related] things" she did in 2014 for Judge Brennan "during the work day" (p 713, lines 3-5). On cross-examination, she clarified that "a few" meant two (p 747, lines 13-16). Once, she helped Judge Brennan draft answers to a media questionnaire, and, once,

she went online "looking for swag" to hand out at a campaign event (pp 247, lines 9-25; 748, line 1). ("Swag" are items such as candy, pens, etc., given by a candidate to attendees of an event, such as a parade, a speech, etc.) Hardly significant expenditures of time, even when combined.

Ms. Cox undertook more campaign-related activities (a total of 31), but virtually all were done on her own time. In preparation for her testimony, Ms. Cox had compiled a summary of what she had done for the campaign, when she did it, and where (Exhibit 44). Of the 31 entries, 14 were projects which Ms. Cox performed at home, during lunch, in the evening, or on Saturdays. Another 15 activities were performed mid-morning or mid-afternoon when employees commonly take breaks. Ms. Cox testified that she never took breaks (p 1844, lines 2-9), but, even if that is true, 30 minutes of personal time were still available to her each day in addition to lunch to work on the campaign off the County clock. In sum, according to Ms. Cox herself, no campaign activities which occurred in the court house were done when personal time was not available.

The Master's final finding with regard to campaign work by employees was that in her testimony Judge Brennan "made the false and insupportable claim that all of it was done 'during breaks'" (p 22). Like his earlier findings on the subject, this one by the Master is incorrect; it is also immaterial, which is dispositively significant. If not done on break, the work was done during available break time. The difference does not render a lie what she said that just it was imprecise. Furthermore, the Supreme Court has "not yet addressed, . . . whether materiality or an intention to deceive are necessary to prove that a judge testified falsely under oath." *Simpson*, 902 NW2d at 405. Since materiality is an issue most places most of the time, it would seem that leaving the issue unaddressed, precludes finding that a judge testified falsely under oath if he or she testified inaccurately. Furthermore, because MCL 169.257(1) does not apply, whether the employees worked on the Judge's campaign during breaks or at other times is immaterial.

I. Misconduct during Depositions

If of judicial misconduct, the Master's final finding should not be taken seriously. The two incidents at issue were described by the Master as "peccadillos" and "unlikely" to belong in a formal complaint (p 22). Peccadillos, whether absolute or just comparative, do not constitute misconduct, *Flax*, 198 Mich at 690, unless the entire discipline process is to be trivialized. Furthermore, the Master cited no authority to support his conclusion that what Judge Brennan did was even minimally improper. To be judicial misconduct, conduct must violate some statute, court rule, or canon of judicial ethics. None was mentioned by the Master. It has long been a staple of advocacy that propositions not supported by authority are not to be considered. Why should masters be able to do less? More should be expected.

At least the Formal Complaint cited one court rule, more precisely, one subrule, in support of its assertion of misconduct, but that subrule says nothing pertinent. MCR 2.306(C) is long, addressing many subjects. The Complaint does not specify which part of the rule is at issue. Presumably, the Complaint relied on MCR 2.306(C)(5) because that is the only place where anything is said about interactions with deponents. The proscribed interactions, all two of them, did not remotely happen in this case, however. Except to assert a privilege or some other legal protection, "a person" may not instruct a deponent to not answer a question, MCR 2.306(C)(5)(a), and a "deponent may not confer with another person while a question is pending." MCR 2.306(C)(5)(b). Neither happened.

MCR 2.306(D)(2), which has never been asserted, authorizes sanctions "on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates this rule." By necessary corollary, what merits sanction is misconduct, but not necessarily ethical misconduct. But there is no claim, nor was there any proof, that the examination of either deponent, Mr. Furlong or Ms. Zysk, was adversely affected, and it is apparent that neither examination was. Neither

witness balked at answering, changed an answer, lost their train of thought, complained, or took or asked for a break before continuing (Exhibit 1-4, p 56; Exhibit 3-2, pp 27-28). In sum, Judge Brennan did not violate MCR 2.306(D)(2).

Apparently, the Master concluded that Judge Brennan had interrupted the two depositions "in order to influence the testimony of [the] witness[es]" (p 22). He did not actually make such a finding, but that is probably how what he did say should be read. Any such conclusion is groundless, however. Even if a possible purpose of the interruptions, it is hardly the only possible objective. Emotions and frustration can build and outbursts occur. The outbursts may be impolite, even rude or indecorous, but are not more than spontaneous, and what is spontaneous cannot be said to be an effort to influence. Without a solid basis, which the Master never even attempted to articulate, the likely explanation of spontaneity cannot be rejected.

Respectfully submitted,

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