STATE OF MICHIGAN

IN THE SUPREME COURT

IN THE MATTER OF:

Docket No. 127453

HON. MICHAEL HALEY
Judge, 86th District Court
38 Washington Street
Traverse City, Michigan 49684

Formal Complaint No. 77

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BRIEF IN SUPPORT OF RESPONDENT'S PETITION TO REJECT THE JUDICIAL TENURE COMMISSION'S DECISION AND RECOMMENDATION

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION AND IDENTIFICATION OF DECISION GIVING RISE TO PETITION

This Court has jurisdiction over Judge Haley's petition to reject the Judicial Tenure Commission's September 12, 2005 Decision and Recommendation for Order of Discipline under MCR 9.224, which permits a respondent to petition the Court to reject or modify a JTC recommendation within 28 days after service of the certified record. The JTC served Judge Haley with the certified record on September 13, 2005.

REQUEST FOR ORAL ARGUMENT

Judge Haley requests the opportunity to present oral argument.

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STATEMENT OF ISSUES

I. "Ordinary social hospitality":

The Michigan Code of Judicial Conduct allows judges to accept gestures of ordinary social hospitality, which, according to the Commission, is dependent in part upon a social relationship between the donor and donee. Mr. Benedict gave his longtime friend, Judge Haley, tickets to a college football game. Did the Commission erroneously find no social relationship between Judge Haley and Mr. Benedict, erroneously find misconduct, and deprive Judge Haley of due process by failing to articulate a standard by which "ordinary social hospitality" is to be determined?

The JTC has asserted that the answer is "No."

Respondent submits that the correct answer is "Yes."

II. No evidence of appearance of impropriety:

The appearance of impropriety is determined by the public, not the Commission. The testimony of several witness demonstrated that the community understood that the incident was a "non-story" that did not lower its regard for Judge Haley or the judicial system. Did the Commission err by finding that the acceptance of the tickets gave the appearance of impropriety?

The JTC has asserted that the answer is "No."

Respondent submits that the correct answer is "Yes."

III. Due Process:

This Court has recognized that where combined investigative and adjudicative functions create an actual risk of bias, a proceeding offends due process guarantees. The Commission refused Judge Haley's attempt to resolve this matter privately, filed a formal complaint, and, when the Master found the evidence insufficient to support the Commission's claim, the Commission ignored the Master's conclusion and recommended a punishment with full knowledge of the private sanction Judge Haley had offered to accept. Was Judge Haley deprived of his right to an impartial decisionmaker?

The JTC will presumably answer "No."

Respondent submits that the correct answer is "Yes."

IV. Proportionality of recommended sanction:

> Cases in which a public censure have been imposed all involved intentional conduct, violent crime, or physical misconduct, and involved much more serious conduct that than attributed to Judge Haley. Judge Haley's acceptance of the football tickets occurred spontaneously and was unanticipated by Judge Haley. Is the Commission's recommendation of public censure inappropriate?

The JTC has asserted that the answer is "No."

Respondent submits that the correct answer is "Yes."

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SUMMARY OF ARGUMENTS

ARGUMENT I

THE COMMISSION ERRONEOUSLY FOUND THAT THERE WAS NO SOCIAL RELATIONSHIP BETWEEN RESPONDENT AND BENEDICT. THE FOOTBALL TICKETS CONSTITUTED PERMITTED "ORDINARY SOCIAL HOSPITALITY."

The Michigan Code of Judicial Conduct allows judges to accept ordinary social hospitality. MCJC Canon 5C(4)(b). The Commission applied the test articulated by the Illinois Supreme Court in *In Re Corboy,* 124 Ill 2d 29; 528 NE2d 694 (1988), which defined ordinary social hospitality as consisting of "those routine amenities, favors, and courtesies which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer." Among the factors to be considered in assessing whether judicial misconduct exists are the relationship, if any, between the judge and the donor/lender lawyer and the particular circumstances surrounding the gifts and loans.

The Examiner/Commission has never asserted that Judge Haley's accepting the tickets was a quid pro quo. This incident involved college football tickets to a single game, given from one longtime friend to another in the hope that the tickets would be used by someone, i.e., that someone would occupy the seats. Several "reasonable, objective" witnesses testified that their perception of the incident was that it was a nonissue. The incident did not cause them to lower their regard for Judge Haley or the judicial system.

The Commission's finding that Judge Haley and Mr. Benedict did not have a social relationship was erroneous, as was its finding of judicial misconduct. In light of the many years that Judge Haley and Mr. Benedict have known each other, their interaction with each other several times a week for more than twenty years, Judge Haley's description of Mr.

Benedict as "a friend," a statement or suggestion that these men are virtual strangers reflects that the Commission gerrymandered to reach a conclusion that the facts do not support.

The Commission's decision violated Respondent's substantive due process rights. This Court has recognized that "ensuring a consistent rule of law" is essential to the maintenance of due process rights for JTC respondents. *In re Brown*, 461 Mich 1291, 1295; 625 NW2d 744 (2000). The Commission notes that the test of "social hospitality" "is very fact-specific." The Commission posits that "one could imagine numerous factual scenarios in which a judge is offered tickets to a sporting event that may or may not constitute a gift of "social hospitality," but conclusorily states that "these football tickets, given under these particular circumstances, were not 'ordinary social hospitality'. Respondent's acceptance of them constitutes judicial misconduct." *Id., pp 10-11.* The Commission's decision is arbitrary, and affords no guidance for judges to inform them of under what circumstances accepting tickets to a sporting event may be impermissible. Due process requires a clarity of proscribed conduct.

ARGUMENT II

THE APPEARANCE OF IMPROPRIETY IS DETERMINED BY THE PUBLIC, NOT THE COMMISSION ; THE COMMISSION ERRONEOUSLY FOUND THAT THERE WAS AN APPEARANCE OF IMPROPRIETY.

The evidence established that the general community thinks that the ticket incident was a non-issue. The Commission cited selected portions of testimony so as to suggest the witnesses disapproved of Judge Haley's conduct when in fact the testimony when viewed as a whole reflects that the witnesses viewed the incident as a nonevent.

Radio broadcaster Ron Jolly, whose job requires him to be in touch with public sentiment on current events, testified that the incident involving Judge Haley's acceptance of the tickets was never raised by any of his listeners. His impression was correct, that Judge

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Haley and Mr. Benedict are "probably friends or know of each other. It's an innocent exchange." *Transcript, p 250.*

Judge Philip Rodgers testified that Judge Haley's reputation in the community for honesty after the event, (and even after it was reported by the Judicial Tenure Commission) has not changed at all; that the community had not expressed any contempt towards Judge Haley or the judiciary by reason of the event; and that public confidence in Judge Haley has not in any way been impacted as a result of the charges being made by the Judicial Tenure Commission nor has any such complaint ever been personally communicated to him.

Brad Niergarth, a CPA and Vice Chairman of the Chamber of Commerce, read articles about the incident as reported by the Traverse City Record Eagle, and believed it was a nonissue. He had discussions with others in the community at the time the newspaper articles were published and testified that there was agreement that the story was "overblown" and "not really an issue." The public's perception, per Mr. Niergarth, was that the integrity of the judiciary had not been damaged in any way by Judge Haley's conduct.

Judge Haley's acceptance of the tickets cannot be reviewed in a vacuum or in the abstract. The testimony of Judge Haley and others present in the courtroom support the Master's conclusion that Judge Haley's acceptance of the tickets did not under the facts and circumstances of this case rise to the level of a violation of the Code of Judicial Conduct.

ARGUMENT III

THE COMMISSION COULD NOT AND DID NOT SEPARATE ITSELF FROM ITS PROSECUTORIAL FUNCTIONS IN THIS CASE, RESULTING IN ACTUAL BIAS AGAINST RESPONDENT AND THE INFRINGEMENT OF HIS DUE PROCESS RIGHTS.

The Commission's decision implicates procedural due process concerns. Due process requires an impartial decisionmaker. "[T]he right to a hearing before an unbiased and impartial

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decisionmaker is a basic requirement of due process." *City of Livonia* v *DSS,* 423 Mich 466, 508; 378 NW2d 402 (1985). In this case the impartiality of the JTC is called into question because it is simultaneously an investigator, prosecutor and adjudicator. As this Court has noted in the past, "the investigative and the adjudicative roles are combined in the Commission." *In the Matter of Del Rio*, 400 Mich 665, 690; 256 NW2d 727 (1977).

Judge Haley attempted to resolve this matter privately. The Commission refused, and filed a formal complaint. The Master found that the Commission did not support its claim. When Judge Haley argued before the Commission that he should not be sanctioned, the Commission was in a position of knowing from prior dealings that Judge Haley was willing to accept a private sanction. After the Commission "lost" in front of the Master, it knew what Judge Haley had previously offered to accept, at the same time they were in the position of recommending his punishment.

ARGUMENT IV

THE RECOMMENDED SANCTION OF PUBLIC CENSURE IS INAPPROPRIATE.

In the event the Court is of the opinion that the Examiner met his burden of proof, per *In Re: Brown* 461 Mich 1291, dismissal of the complaint is required. The Commission recommends a public censure. The case law does not support such a sanction. A review of cases where public censure was imposed will reflect that the theme in all of those cases was a finding that the sanctioned engaged in some form of intentional conduct. In cases where public censure was imposed, there had been a finding of intentional conduct, intentional retaliation against a party and/or a crime of violence, or physical misconduct. All of the cases involved much more serious conduct than that attributed to Judge Haley.

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STANDARD OF REVIEW

De Novo Standard

This Court reviews JTC recommendations *de novo* based on the Court's review of the record. *In the Matter of Del Rio*, 400 Mich 665, 694 (1977); MCR 9.225.

I. INTRODUCTION

The Commission filed a formal complaint against the Honorable Michael J. Haley, 86th District Court Judge. The 86th District Court includes Antrim, Leelanau and Grand Traverse counties. The Michigan Supreme Court, pursuant to a request by the Commission for the appointment of a Master, appointed Judge Casper O. Grathwohl. A formal hearing began on April 6, 2005, continued on April 7th and concluded on April 8th. The Examiner called four witnesses, Deputy Terry Skurnit, Sheriff Terry Johnson, Detective Donald Snyder and Sergeant Dean Pratt. Judge Haley called, in addition to himself, Richard Benedict, Charles Koop, Donna Cottrell, Ronald Jolly, Shirley DeWitt, The Honorable Philip Rogers, Carol Stocking and Brad Niergarth. Judge Grathwohl issued his report on May 9, 2005. Judge Grathwohl concluded that the Examiner did not prove the allegations contained in Count I and Count II of the Complaint by a preponderance of the evidence.

Judge Grathwohl's conclusions are correct. The Examiner established only what Judge Haley had always acknowledged, that (former judge) Richard Benedict, at the conclusion of a hearing involving one of Mr. Benedict's clients, approached the bench and gave Judge Haley two tickets to a University of Michigan/Illinois football game. The Examiner did not prove and offered no evidence that the ticket exchange rose to the level of an impropriety or the appearance of impropriety as defined by the Michigan Constitution or the Code of Judicial Conduct. Judge Haley's witnesses testified that the incident was a "non-event' and that it has not impacted negatively on Judge Haley or the judicial system.

Judge Haley's conduct must be, but was not, viewed in context in which it occurred. The ticket incident was never anticipated and Mr. Benedict's placing the tickets on the bench caught Judge Haley by surprise. The incident also caught the people in the courtroom by surprise. Clearly the tickets were given as "social hospitality" and on a desire by Mr. Benedict that two people sit in his seats. Mr. Benedict took full responsibility for the incident.

Judge Haley petitions this Court to reject the JTC's Decision and Recommendation, and instead adopt the Master's decision in its entirety.

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II. STATEMENT OF FACTS

a. Background

Judge Michael J. Haley was a practicing attorney for twenty-one years before he ascended to the bench. He was elected in 1996 to the 86th District Court bench. Judge Haley replaced retiring Judge Benedict who, after twenty-four years on the bench, had chosen not to seek re-election. *Transcript, pp 144, 147.* Judge Haley was re-elected in 2002. *Id., pp 345-347.*

Judge Haley and Richard Benedict have known each other for "many, many years." *Transcript, p 144.* Mr. Benedict, a former judge, retired from the 86th District Court after having served on the bench for twenty-four years. *Id.* During that time Mr. Benedict "saw a lot" of Judge Haley when Judge Haley was first a prosecutor and then a defense attorney. *Id. at 145.* Haley was "in front of Judge Benedict from day one, and at least two or three times a week, for a period of 17, 18 years." *Id. at 348.* During that period lawyer Haley came to Judge Benedict's home on many occasions to get orders and warrants signed. Since retiring, Mr. Benedict has been practicing law, which has given him occasion to come before Judge Haley. *Id. at 147.*

Between January 1996 and October 2003, Mr. Benedict and Judge Haley have had many social contacts with each other. *Transcript, p 148.* Mr. Benedict, knowing "how isolating it is to be a judge," went out of his way to talk to Judge Haley in his office. *Id.* Mr. Benedict "would stop in and say hello, and [they] would discuss whatever guys discuss and lawyers discuss." *Id.* They both had children attending the University of Michigan, and "on one occasion [they] went down to the game together." *Id.*

Upon his retirement from the bench, Mr. Benedict was given season tickets to the University of Michigan home football games from the court staff. *Transcript, p 149.* After the 1997 season, Mr. Benedict continued to pay for the tickets himself. *Id.* Generally, he attended three or four of the six or seven games each season, and he "would hand the tickets off to my

son, my cousin, my friends; anybody, relative to any other games." *Id. pp 149-150.* The only proviso was that the recipient of the tickets must attend the game. *Id.*

A couple weeks before the incident, Mr. Benedict had been in the Traverse City Courthouse. *Id., pp 372-373.* He approached Judge Haley in the hallway or in chambers and asked Judge Haley if he would be interested in using Mr. Benedict's football tickets to the Illinois game, or if Judge Haley knew "of somebody that can use them in the court." *Id.* "[E]verybody knew he had them and that he got rid of them from time to time[.]" *Id.* Judge Haley told Mr. Benedict that he would "get right back to him" within a day or so if he was interested in the tickets or knew of anyone who could use them. *Id., pp 373-374.* Judge Haley did not contact Mr. Benedict about the tickets, and in Judge Haley's mind, the opportunity had "come and gone." *Id.*

b. The Incident

On October 14, 2004, Judge Haley presided over a plea hearing in Bellaire, Michigan, in the case of *People v Teresa Elizabeth Porter*, Case No. 03-1259-SM-3. Richard J. Benedict, Esq., represented Ms. Porter; Charles H. Koop, Esq., was the prosecuting attorney; and Officer Terry Skurnit was the court officer. *Joint Pre-Trial Statement, Stipulations of Fact.*

The defendant, Ms. Porter, while operating a vehicle (owned by S&S Leasing) lost control of the vehicle striking and damaging a sign. The sign owner (a florist) claimed that it paid or was obligated to pay $4,116.35 to repair the sign. *Id.* Ms. Porter was charged with two counts of operating a vehicle without security or insurance, MCLA 500.3102, and one count of using a vehicle with improper license plates, MCLA 257.2551. The Commission and Judge Haley stipulated to the following facts:

> A plea agreement was reached between Ms. Porter and the Prosecutor whereby defendant Porter would enter a guilty plea to the improper plate charge and agree to make restitution for the damages to the florist's sign. The original two charges against her, as well as similar charges against S&S Leasing Co., would be dismissed. The restitution amount was the only contested issue

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remaining, and that would be determined by the Court. The People were seeking $4,100. The defendant argued that the amount should be $2,700.

Judge Haley accepted the guilty plea, stated on the record that a pre-sentence investigation and report would not be necessary and then indicated that restitution would either be determined at a formal hearing on November 6, 2003 or that the parties "could submit written materials in lieu of an actual hearing."

Thereafter, defense counsel, Richard Benedict, asked, "Approach the bench?" and did so. Mr. Benedict had not indicated the reason he wanted to approach the bench. Upon being given permission to approach the bench, Mr. Benedict placed two University of Michigan football tickets on the bench. The following discussion occurred between Mr. Benedict and Judge Haley:

MR. BENEDICT: You got to promise to go.

THE COURT: It's a week from Saturday?

MR. BENEDICT: No, Saturday,

THE COURT: This Saturday. Hmm, I could go.

MR. BENEDICT: Promise.

THE COURT: I promise to go? I've got to make a phone call. Today's Tuesday, where are you tomorrow?

MR. BENEDICT: The office. No, I'm in Kalkaska. If you want it, take it.

THE COURT: Okay. If there's anybody else that--

MR. BENEDICT: When you said you were interested, I indicated that I still have to ask another. If you can't go, somebody's got to go.

THE COURT: I'll make sure somebody goes and that you get paid.

MR. BENEDICT: I don't need to get paid.

THE COURT: Okay. All right.

MR. BENEDICT: I need to make sure there's [sic] two people sitting in the seats. [*Joint Pre-trial*

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Judge Haley gave the tickets (valued at $92) to a Court employee.

Judge Haley described the incident as follows:

> A. I'm sitting at the bench. I'm reviewing the file. We're having a discussion about the next hearing. The plea has been accepted. He asked to approach the bench. I'm thinking it has something to do with the case. I don't know.
>
> ***
>
> Anyway, I had no clue why he was coming up, but he was coming up. Mr. Koop came around – now, I don't know if he came up directly at the exact moment that Mr. Benedict came up, but Mr. Benedict came up from my left and I remember looking at the file, looking up at him, and seeing – at first I did not know what they were, but two things came down on the bench. [*Transcript, pp 375-376.*]
>
> ***
>
> So that's when I realized, after they came down on the bench, the football tickets came down on the bench, what is going on here? And it threw me. I just – I had no idea that this was going to happen. [*Id., p 376.*]

When asked about his initial impression and whether he was thinking about "how it looked" with an attorney putting tickets on the bench, Judge Haley stated:

> At that moment, I don't know that I did. Because the courtroom was practically empty. ... there was no jury ...
>
> So I really wasn't concerned that much about what people thought. Especially the people that were in that courtroom, because for the most part, they all knew me.
>
> So you know, I wasn't that concerned. I should have been concerned about it, but I wasn't that concerned about it.
>
> I said that I wasn't concerned at that moment about how it looked. And I just wasn't. I was concerned about was a couple of things. This bench conference was going on for longer than a couple of seconds – And plus, it was a total personal matter.

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> There wasn't anybody in the courtroom that could possibly have thought anything, or imputed anything improper about what happened in that courtroom, including Skurnit. And so when Koop told me that, [that Skurnit was saying that Judge Haley "was on the take"] I was furious. Because I knew bloody well that Skurnit knew that there was nothing improper about that. [*Transcript pp 378-380.*]

Having said that, Judge Haley *was* embarrassed about Mr. Benedict's conduct:

> I think I was embarrassed that this personal matter was taking place in the courtroom, and it shouldn't have taken place in the courtroom. I knew that. Thought process about – I thought, well, this is just Benedict, you know. What a dumb head thing to do.
>
> But you know, he started it, it happened on the record. I do everything on the record. I don't know what off the record is. And I finished it on the record.
>
> And frankly in retrospect, there were a lot of other options, and with the benefit of hindsight, I would have done it differently. But this thing happened in an instant; ... this was like an ambush; not malicious, Benedict didn't mean anything malicious or harmful. It was just a dumbhead Benedict move.
>
> If you know him, you'd understand that. I mean, he's a great guy, he's a friend, but it was just a dumbhead thing to do. And you'd never expect that from an experienced attorney, let alone somebody who's been on the bench for 24 years". [*Transcript, pp 381-382.*]

The focus of persons in the courtroom was on Mr. Benedict. Prosecutor Koop was surprised by Mr. Benedict's conduct. He testified:

> "I had known Dick Benedict for 25 years. He had always been a judge who was very conscious about the appearance of impropriety, to the extent, at one point he posted his driving record in the probation office because there was a rumor that he had a drunk driving conviction. And so he was always extremely cautious about the appearance. And for him to take the tickets out, I was surprised that he had done that". [*Transcript, p 190.*]

Magistrate Shirley DeWitt was similarly focused on the conduct of Mr. Benedict:

> Q. [Question by the Master] What was your impression when you saw that taking place, Ms. DeWitt?

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A. My honest impression was, when Judge Benedict approached the bench, I did think that it was kind of odd for him to do it at that time. I did realize that, as far as he was concerned, he was done and he was getting ready to leave.
My personal opinion was that he should not have done it there, but I did believe that it was an exchange between friends. I really did not take it as totally improper. I was a little amazed that Judge Benedict would approach the bench doing that, being as he had served many years on the bench himself. [*Transcript, pp 269-270.*]

Not only was every person in the courtroom surprised by Mr. Benedict's conduct; they also did not think that Judge Haley acted inappropriately. The court reporter, Donna Cottrell, did not perceive that Judge Haley did anything wrong:

Q. Now, when you saw this happen, did you think anything improper was going on?
A. No, I didn't
Q. Did you think that, wow, Judge Haley is doing something wrong?
A. I did not think the judge was doing anything wrong, no.
Q. Did you think Mr. Benedict was doing anything wrong?
A. In looking back, I would have thought that he might have said, may I speak to you in private, rather than in the courtroom. But that's what I –
Q. And that's with the benefit of hindsight?
A. Yes. [*Transcript, p 226.*]

III. STATEMENT OF PROCEEDINGS

a. Procedural Background.

On November 18, 2004, the JTC authorized the filing of a formal complaint. The complaint comprised two counts alleging that: 1) Judge Haley accepted football tickets from an attorney, constituting impropriety and/or the appearance of impropriety; and 2) Judge Haley allegedly made false and misleading statements in the course of his communications with the Commission, by failing to inform the Commission of his October 31, 2003 letter to Sheriff Johnson. (This second allegation was not pursued by the Commission after the hearing, and is not at issue here.)

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This Court appointed the Honorable Casper Grathwohl to serve as Master. On April 6, 7, and 8, 2005, the Master conducted a hearing. At the hearing, the Master heard testimony from thirteen witnesses, including Judge Haley. Eighteen exhibits were admitted.

b. The Master's Report.

On May 3, 2005, the Master issued his report. He concluded that Judge Haley did not commit any act warranting discipline. The Master found that "viewed as a whole, the information conveyed to the officers was accurate." (*Master's Report at p 19*). He found that "Officer Skukrnit's animus toward the judicial system and in particular toward the 86th District Court provided the motive for his complaints." *(Master's Report at p 5.)* The Master also made factual findings that Attorney Benedict' "indiscrete act" "toward Judge Haley at the bench conference . . . was inexcusable." *Id., p 5.* Judge Grathwohl also wrote that Judge Haley's acceptance of the tickets "displayed poor judgment" and "was inappropriate," but found that it did not "rise to the level of an impropriety and/or the appearance of impropriety[.]" *Id., p 6.*

The Master found that Judge Haley forgot that he had written to Sheriff Johnson. The Master also observed that Judge Haley had told the Commission in his first response that he talked with Sheriff Johnson and had instructed that Skurnit could no longer serve as a court officer. Judge Haley's failure to inform the Commission about his letter to Sheriff Johnson was merely an oversight, and Judge Haley did not intend to deceive the commission.

The Master found no violation of the Michigan Constitution or the Code of Judicial Conduct.

c. The JTC's Decision and Recommendation for Order of Discipline.

The Commission accepted the Master's factual findings, but rejected his legal conclusions. The Commission made a supplemental finding of fact that Mr. Benedict and Judge Haley "had no social relationship; theirs was entirely a professional one." *JTC Decision*

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at p 4. In support of this finding, the majority cited portions of the transcript in which Respondent and Benedict testified that they had not been to each other's homes for social reasons. The majority also cited out of context Judge Haley's testimony where he said "Not really"[1], in response to a question whether he and Mr. Benedict did things on a social basis. *Id.*

The Commission concluded that Judge Haley's acceptance of the football tickets constituted judicial misconduct. *Id.* They also determined that Canon 5C(4)(b), which provides an "ordinary social hospitality" exception to the prohibition of accepting gifts, was inapplicable to Judge Haley's conduct. *Id. at 10-11.*[2] The Commission based its decision in part on its conclusion that the relationship between Judge Haley and Benedict was purely professional, and found also that Judge Haley's acceptance of the football tickets created an appearance of impropriety. *Id. at 17-18.*

The Commission concluded that Judge Haley and Mr. Benedict had a strictly professional relationship because, according to the Commission, they had never visited each others' homes. Testimony that Mr. Benedict had not previously given Judge Haley tickets was the basis for the Commission's conclusion that the giving of such gratuities "was ***not*** within their social practices and customs[.]" *Id., p 10 [emphasis in JTC decision.]*

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[1] The Commission at page 11 cites to a portion of Judge Haley's testimony. The full text of the question and answer is as follows:

Q. Did you do things with Judge Benedict on a social basis?

A. Not really. You know, somebody mentioned a softball team. At that time, for some reason, blooperball was a thing that people did up here, and it was a nice social, fun thing to do that was played with a huge softball.

Judge Benedict had his blooperball team and the lawyers got together and put a team together, and of course all of us were trying to take as many cheap shots against the pitcher as we possibly could, because Judge Benedict was always the pitcher. It was just fun. That's what we did. So that was the social life, if that's a social life.

Did we go to the bar afterwards? Occasionally that did happen, but most of the time, you know, we had young families and we went home. *Transcript, pp 348-349.*

[2] But maybe to only some of the Commission's concluding: "Respondent's claim that he was merely accepting a 'social hospitality' or acting as a conduit or agent for Mr. Benedict to be rid of the tickets is not a defense to (d), (e), (f), or (g), above." *JTC Decision, p 7.*

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The Commission made inconsistent findings regarding the effect of Judge Haley's conduct on the administration of justice. On page six of its decision under the heading "Conclusion of Law", the Commission stated: "Respondent's conduct constitutes: . . . (b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205[.]" But in recommending a sanction, the Commission expressly stated that Judge Haley's acceptance of the football tickets "does not seem to have had an actual effect on the administration of justice in this matter." *JTC Decision, p 12.* The majority of the Commission recommended a public censure. *Id. at pp 17-18.*

Two of the commissioners filed a separate opinion, concurring in part and dissenting in part. They recommended a sanction of a thirty-day suspension in addition to a public censure. The concurring/dissenting opinion found it significant that after the tickets were offered, Respondent decided to sentence Mr. Benedict's client at that time instead of at a later time.[3] The dissenting opinion suggests a quid pro quo, despite the fact that neither the Examiner nor the JTC has ever alleged a quid pro quo. In summarizing his complaint to the Master, the Examiner stated "it just describes the impropriety and the appearance of impropriety of taking the tickets. *It does not allege that he gave some benefit to Mr. Benedict's client for having received the tickets*". *Transcript, p 192.* Also absent from the JTC recommendation is any mention that Judge Haley imposed the sentence and the restitution urged by the prosecutor.

[3] The record of the Porter hearing reflects that Judge Haley had continued to look at the file as Mr. Benedict approached the bench and having concluded that the only issue remaining to be decided was the question of the amount of restitution Ms. Porter was going to be assessed stated "I'll just sentence her right now and save you the trip back." Judge Haley proceeded to sentence Ms. Porter to a fine of $100 court costs, $40 state fee, restitution (in an amount to be determined) and six months probation. *Joint Pre-Trial Statement, Stipulation of Facts. Appendix #8.*

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ARGUMENT I

THE COMMISSION ERRONEOUSLY FOUND THAT THERE WAS NO SOCIAL RELATIONSHIP BETWEEN RESPONDENT AND BENEDICT. THE FOOTBALL TICKETS CONSTITUTED PERMITTED "ORDINARY SOCIAL HOSPITALITY.

a. ***The Michigan Code of Judicial Conduct allows judges to accept gestures of ordinary social hospitality.***

The Michigan Code of Judicial Conduct prohibits judges from accepting gifts, subject to certain exceptions, including "ordinary social hospitality":

> A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applications. [MCJC Canon 5C(4)(b).]

The Commission looked beyond Michigan for guidance on interpreting what constitutes "ordinary social hospitality." In *In re D'Angelo*, 126 Ill 2d 45, 54-56; 533 NW2d 861 (1988), the court considered whether a lawyer's provision of rental cars to judges was "ordinary social hospitality" as defined in *In Re Corboy,* 124 Ill 2d 29; 528 NE2d 694 (1988), The *Corboy* test, which the Commission accepted and applied in this case, provides:

> "Ordinary social hospitality" is not a self-defining concept. It is not, however, completely opaque. We believe that *ordinary social hospitality consists of those routine amenities, favors, and courtesies which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer*. [*D'Angelo, supra* at 54, quoting *In re Corboy*, 124 Ill 2d at 42-43.]

The *D'Angelo* Court held that "car rentals worth hundreds or thousands of dollars" did not constitute "ordinary social hospitality."

In stark contrast, college football tickets to a single game, given from one longtime friend to another, are precisely the type of amenity, favor, or courtesy "normally exchanged

between friends and acquaintances." Nor could they be expected to create an appearance of impropriety to a reasonable, objective observer. Query: If Mr. Benedict had given the tickets to Judge Haley in chambers would the Commission still think that Judge Haley violated a canon? If the answer is "no", the fact that Judge Haley received the tickets "on the record" is of no consequence, at least as it relates to the Commission finding that Judge Haley violated Canon 5C(4)(c). Indeed, several "reasonable, objective" witnesses testified at the hearing that their perception of the incident, as reported by a local newspaper, was that it was a nonissue or nonevent. The incident did not cause them to lower their regard for Judge Haley or the judicial system. Indeed, six out of seven letters that were printed in response to the article voiced their support of Judge Haley.

The *Corboy* test is an *objective* one that requires the following factors to be considered in assessing whether judicial misconduct exists:

> (1) the monetary value of the gift, (2) the relationship, if any, between the judge and the donor/lender lawyer, (3) the social practices and customs associated with gifts and loans, and (4) the particular circumstances surrounding the gifts and loans. [*D'Angelo, supra* at 54, quoting *In re Corboy*, 124 Ill 2d at 42-43.]

Judge Haley and Richard Benedict had known each other for "many, many years." *Transcript, p 144.* They saw each other regularly, "at least two or three times a week, for a period of 17, 18 years." *Id.* at 348.

In *Adams v Comm'n on Judicial Performance*, 10 Cal 4th 866, 879-880; 897 P2d 544 (1995), the court employed the following definition of "ordinary social hospitality":

> It is that type of social event or other gift which is so common among people in the judge's community that no reasonable person would believe that (1) the donor was intending to or would obtain any advantage or (2) the donee would believe that the donor intended to obtain any advantage." (Cal. Judges Assn., Jud. Ethics Com., Opn. No. 43 (1994) at p. 4, published in Rothman, Cal. Judicial Conduct Handbook.)

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Mr. Benedict testified that he did not intend to obtain any advantage. Mr. Benedict wanted only to be assured that *somebody* would go to the game, if not Judge Haley, someone. Mr. Benedict did not think that Judge Haley's decision to sentence Mr. Benedict's client was a result of receiving the football tickets. *Id. at 154-155.* Judge Haley knew that Mr. Benedict giving him the tickets was a "personal matter." *Id.* at 381. Items like acceptance of a fishing trip and a condominium stay were deemed "exchanges of social hospitality" and did not constitute misconduct." *Adams, supra* at 901. Yet the JTC apparently thinks that two tickets to a meaningless football game was misconduct. Their recommendation in light of the cases they referenced does not seem to make sense.

In this case, there are no quid pro quo allegations. The Commission has never claimed that Judge Haley's acceptance of the tickets or Mr. Benedict's offer of the tickets was a quid pro quo. Summarizing his complaint to the Master, the Examiner stated "it just describes the impropriety and the appearance of impropriety of taking the tickets. *It does not allege that he gave some benefit to Mr. Benedict's client for having received the tickets*". *Transcript, p 92.*

Based on the *Adams* reasoning, and looking at the facts objectively, there was nothing improper about the acceptance of the football tickets. The evidence demonstrated that it was of paramount importance to Mr. Benedict not that Judge Haley use the tickets, but that the tickets get used by *someone*. Mr. Benedict stated, "It was a matter of pride, and always has been a matter of pride to me, that my seats were occupied." *Transcript, p 151,* i.e., "I need to make sure there's two people sitting in the seats." *Id. at 157.* Mr. Benedict testified that he routinely offered tickets to his son, cousin, friends, "anybody." *Id. at 150.* On the day that he first spoke with Judge Haley about the tickets, Mr. Benedict had been "trying to unload them on some lawyers" without success. *Id. at 151.* Like the condominium use in *Adams* that was available to the general public, the football tickets in this case could have been used by anyone, and were in fact given to a court employee by Judge Haley.

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The *Adams* Court also explained by way of example that although the judge's acceptance of a "rain check" dinner given in celebration of a litigant that appeared before the judge, an attorney's act of "pick[ing] up the tab" for a dinner, in and of itself, "would not have placed in doubt, from the perspective of an objective observer, the independent and impartiality of [the judge], and his acceptance of this favor therefore did not rise to the level of prejudicial conduct." *Id. at 899.*

The *Adams* reasoning is instructive. In the same context that treating a judge to dinner would not suggest misconduct, passing on football tickets to a meaningless game in the hopes that they be utilized by someone is similarly innocuous.

b. The Commission erroneously found that no social relationship existed between Judge Haley and Mr. Benedict.

The Commission implied that there is nothing improper per se about an attorney giving a judge football tickets worth $92. The majority even qualified its decision by explicitly stating that under difference circumstances, the proffer might not constitute "social hospitality":

> The Commission notes that the Illinois Supreme Court's test of whether a gift constitutes "social hospitality" is very fact-specific. Although one could imagine numerous factual scenarios in which a judge is offered tickets to a sporting event that may or may not constitute a gift of "social hospitality," only the instant case is now before us, and we decline to extend our holding beyond the facts present here." [*JTC decision, p 9.*]

If the giving of these tickets under these facts do not constitute a gift of social hospitality, what facts would justify such a finding?

The Commission majority's reliance on the test in *Corboy* is dubious because the *Corboy* Court frames the issue before it as "whether a *gift* constitutes 'social *hospitality*'", suggesting that the two terms are synonymous or that "social hospitality" is a broader term that may encompass a "gift". The language of MCJC Canon 5C(4)(b) clearly establishes that a

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"gift" is separate and distinct from "social hospitality." As discussed previously, the canon provides in pertinent part:

> A judge or a family member residing in the judge's household may accept ***ordinary social hospitality***; a ***gift***, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; ***or*** a scholarship or fellowship awarded on the same terms applied to other applications. [MCJC Canon 5C(4)(b).]

Because the language of the Michigan canon separates these terms, the Illinois Court's blurring of them detracts from the wisdom of relying too heavily upon *Corboy*.

In *Corboy*, at issue was a judge's acceptance of a gift or loan of $1000 from a person with whom the judge "had only a nodding acquaintance." *Id.* Significantly, the *Corboy* Court used terms like "unusual" and "extraordinary" to describe proffers that do not constitute "ordinary social hospitality." By example, the Illinois court described items that may properly be considered social hospitality, such as "social dinners, gratuitous rides, birthday recognitions and gifts of books or flowers[.]" *Id. at 44.* Surely tickets to an Illinois football game should properly be viewed as coming within the same class of gratuities and certainly Judge Haley and Mr. Benedict's relationship was way beyond nodding acquaintances.

Moreover, although the Commission was persuaded that the test in *Corboy* was useful, the Commission applied it incorrectly and contorted the evidence in this case to reach a predetermined conclusion. In light of the many years that Judge Haley and Mr. Benedict have known each other, their interaction with each other several times a week for more than twenty years, Judge Haley's description of Mr. Benedict as "a friend," *p 382*, to suggest that these men are virtual strangers suggests that the Commission retrofitted a result to reach a conclusion the facts do not support.

The Commission's premise is flawed. The majority's reasoning implies that visits to each other's homes is necessary for the existence of a social relationship, when it is but one of

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many indicators of such a relationship. The fact that Judge Haley and Mr. Benedict did not frequent each others' homes cannot be determinative of whether their relationship was both social and professional. There was ample evidence of the social relationship between Judge Haley and Mr. Benedict. Judge Haley testified that when then-Judge Benedict had a blooperball team "the lawyers got together and put a team together" and "[it] was just fun." "That's what we did. So that was the social life[.]" *Transcript, p 349.* Judge Haley also stated that "occasionally" they went to the bar afterward. *Id.* The implication that just because they have not socialized at each other's homes mischaracterizes the relationship, and ignores the reality that relationships commonly exist between judges and attorneys that go beyond the purely professional simply by nature of the practice of law, especially in a small legal community such as Grand Traverse.

Judge Haley and Mr. Benedict are friends who have known each other "many, many years." *Transcript, pp 144, 382.* When Judge Haley began practicing law, he was "in front of Judge Benedict from day one, and at least two or three times a week, for a period of 17, 18 years." *Id. at 348.* Between January 1996 and October 2003, they had many social contacts with each other. *Id. at 148.* Mr. Benedict, knowing "how isolating it is to be a judge," went out of his way to talk to Judge Haley in his office. *Id.* Mr. Benedict "would stop in and say hello, and [they] would discuss whatever guys discuss and lawyers discuss." *Id.* They both had children attending the University of Michigan, and "on one occasion [they] went down to the game together." *Id.* It is not unusual for someone to count among his "friends" those who might not have had occasion to visit him at his home. To disqualify their relationship from being "social" merely because they did not frequent each other's homes shows the Commission's fixation on one criteria to the exclusion of all others, in an attempt to retrofit the facts to support their decision.

In *Moran v Clarke*, 213 F Supp 2d 1067, 1073 (D Mo, 2002), a recusal matter, the court recognized that "it should be common knowledge, especially among attorneys, that a judge knows many of his or her community's attorneys and public figures. . . . This is the reality of

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knows many of his or her community's attorneys and public figures. . . . This is the reality of public life, which in and of itself should not raise questions about the judge's impartiality." Members of this Court surely include as friends lawyers – and others – they have dealt with over the years despite the fact that the person never visited the Court member's home. See *Cheney v United States Dist Court*, 541 US 913, 928; 124 S Ct 1391; 158 L Ed 2d 225 (2004) (Confidence in the integrity of the judicial branch "cannot exist in a system that assumes judges to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find the foot fault".)(Scalia, J., memo denying motion for recusal).

c. The Commission erroneously found that the giving of the football tickets to a single game was not within the social practices and customs associated with gifts.

The *Corboy* test for "ordinary social hospitality" requires consideration of the social practices and customs associated with gifts. *Corboy, supra* at 42-43. The Commission concluded that because Mr. Benedict had never given Judge Haley tickets in the past, that therefore the giving of the tickets in this instance was inconsistent with social practices and customs. The criterion as articulated in *Corboy* is a general one. It is the "social practices and customs associated *with gifts*." *Id.* One apparent basis of the Commission's decision was the fact that Mr. Benedict and Judge Haley had never before exchanged tickets. The Commission concluded that "the giving of such gifts was not within *their* social practices and customs."

This Court must recognize the implication of the Commission's reasoning. The "social practices and customs associated with gifts" cannot be defined only by whether Mr. Benedict had given Judge Haley tickets previously. If Mr. Benedict had customarily given Judge Haley seasons tickets for all Michigan or Big Ten Games, or every Rose Bowl, neither Judge Haley nor any other judge could claim a defense that because this was their custom, what occurred was "ordinary social hospitality." See, e.g., *In re D'Auria*, 67 NJ 22; 334 A2d 332 (1974) (misconduct found where a worker's compensation judge was a regular and public luncheon guest of attorneys and representatives for insurance companies). By the Commission's logic, if

this were not an isolated incident, if Mr. Benedict had regularly given Judge Haley tickets in the past, then the conduct at issue would have been excusable. But because there was only one occasion on which tickets were gifted, the conduct was not excusable. The "logic" is faulty.

d. The Commission's decision violated Respondent's substantive due process rights.

"It is uncontroverted that judges, like all other citizens, have protected due process interests under the Michigan Constitution, Const 1963, art 1, § 17, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *In re Chrzanowski*, 465 Mich 468, 483; 636 NW2d 758 (2001). The fairness concerns implicit in principles of due process are absent here.

In *In re Brown*, 461 Mich 1291, 1295; 625 NW2d 744 (2000) this Court stated that the Commission's application of the "listed factors to judicial misconduct proceedings," by "ensuring a consistent rule of law," would assist in maintaining due process rights for JTC respondents." In this case, the Commission's finding of judicial misconduct is contrary to the goals of ensuring a consistent rule of law.

The Commission acknowledges that "Michigan has not defined the term 'social hospitality' in the context of the Code of Judicial Conduct." *JTC Decision, p 8.* Finding favor with the Illinois Supreme Court's test as articulated in *Corboy*, the Commission ostensibly applied the *Corboy* criteria to these facts. But in doing so, the Commission cherry-picked bits of testimony to suit its predetermined conclusion. The Commission's finding that no social relationship existed between Judge Haley and Mr. Benedict, merely because they did not socialize in either others' homes, was contrary to the considerable evidence of their longstanding friendship. Further, the fact that *tickets* had not been previously exchanged between them was sufficient for the Commission to find that "the giving of such gifts was not within their social practices and customs[.]" *Id., p 10.*

The Commission notes that the test of "social hospitality" "is very fact-specific." The Commission posits that "one could imagine numerous factual scenarios in which a judge is

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offered tickets to a sporting event that may or may not constitute a gift of "social hospitality," but conclusorily states that "these football tickets, given under these particular circumstances, were not 'ordinary social hospitality'. Respondent's acceptance of them constitute judicial misconduct." *Id., pp 10-11.* The Commission's decision is arbitrary, and affords no guidance for judges to inform them of under what circumstances accepting tickets to a sporting event may be impermissible. The Commission's statement that its decision is "fact-driven" does not excuse arbitrary and capricious decisionmaking. If the concept of "ordinary social hospitality" is so amorphous as to defy definition, then what guidance can it provide to others regarding how to model their conduct in such situations? Due process requires a clarity of proscribed conduct.

ARGUMENT II

THE APPEARANCE OF IMPROPRIETY IS DETERMINED BY THE PUBLIC, NOT THE COMMISSION ; THE COMMISSION ERRONEOUSLY FOUND THAT THERE WAS AN APPEARANCE OF IMPROPRIETY.

The Judicial Tenure Commission is required to prove its claims by the same standards of proof applicable in civil proceedings, i.e., a preponderance of evidence. See *In Re: Chrzanowski, supra,* 465 Mich at 482, *In Re: Seitz*, 441 Mich 590, 593; 495 NW2d 559 (1993) and MCR 9.211.

The Master questioned the Examiner about who it is that determines whether there is an appearance of misconduct, and he answered "ultimately the Supreme Court". When questioned about "who determines that on a fact-finding basis", he answered "not the population". *Transcript, p 241.*

If it is not the "population's opinion" that decides whether a judge's conduct or activities creates an appearance of impropriety, then who does? How can the Judicial Tenure Commission conclude, without any evidence, that a judge's conduct brought disrespect upon

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the judiciary? If the general community thinks the conduct was a non-issue, and the general community does not think that a judge created a bad appearance or made the judiciary look improper, how can the Judicial Tenure Commission conclude otherwise?

In *Greig v Macy's Northeast*, 1 F Supp 2d 397, 403 (DNJ, 1998), the court stated that the public must be the judge of what constitutes an appearance of impropriety: "Rather than considering the perceptions of judges and lawyers, the issue of whether there is an appearance of impropriety is assessed by reference to a layman's standard." See *In the Matter of Opinion No. 653*, 132 NJ 124, 130; 623 A2d 241 (1993) ("Significantly, under our law the appearance of impropriety is determined not from the perspective of the attorney involved but from the public's vantage."); *Lyden v Susser*, 1994 US Dist. LEXIS 4048, 1994 WL 117794, *2 (DNJ 1994) ("The appearance of impropriety standard is not defined by the perceptions of judges, lawyers, or other trained professionals."); *Fredonia Broadcasting Corp v RCA Corp*, 569 F2d 251, 256 (CA5, 1978) (The Code of Judicial Conduct for United States Judges expresses concern that the judicial system be protected from the appearance of impropriety in the eyes of both the parties and *the general public*.).

The Commission cited the testimony of witnesses who viewed the incident as a nonevent, but chose to ignore the "essence" of the testimony and instead referenced portions of testimony which, if read in a vacuum, and without benefit of the entire record would cause someone to think that the witnesses were critical of Judge Haley when the opposite is true.[4]

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[4] The transcript evidences that Mr. Jolly approved of Judge Haley's conduct. Mr. Jolly testified in the following manner:

> A. I questioned, like when I first heard of it or read of it, I wondered why Judge Benedict would do it in that location, but I didn't question it as proper or improper.
>
> Q. Do you think Judge Haley acted properly in accepting those tickets from an attorney who was arguing a case in front of him at that time on the bench in open court?
>
> A. To tell you the truth –

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Ron Jolly is employed as a radio broadcaster and morning show host at a 50,000 watt station that covers the entire Grand Traverse region, roughly from Manistee and Houghton Lake north to the Mackinaw Bridge and into the Upper Peninsula. Mr. Jolly's primary audience is within 7 or 8 counties in the Grand Traverse region including Leelanau, Benzie, Manistee, Wexford, Grand Traverse, Crawford, Kalkaska, Antrim, Charlevoix, Emmet and Otsego. *(Transcript, p 232).* Mr. Jolly's program is designed to cover local stories that affect people's lives, and national local issues. At least once a week he allows an open line where people can call in and discuss whatever subject that they want to discuss. *Id., pp 230-231.*

Mr. Jolly, whose job requires him to be in touch with public sentiment on current events, testified that the incident involving Judge Haley's acceptance of the tickets was never raised by any of his listeners. It was not a matter the people in the community discussed. Mr. Jolly described the incident as "just a non-issue." His impression was that Judge Haley and Mr. Benedict are "probably friends or know of each other. It's an innocent exchange." *Transcript, p 250.* Mr. Jolly testified that the incident involving Judge Haley's acceptance of the tickets was something that was never brought up by any of his listeners. It was not a matter that the people in the community discussed. Mr. Jolly did not consider the incident sufficiently important to merit discussion:

> I guess I didn't see that - - I don't want to compare it to the Gilbert case, [Judge Gilbert admitted to having smoked marijuana at a

---

Q. The question is, so you think that was proper?
A. Define proper, if I may say that.
Q. Do you think it was appropriate?
A. No, I would say it was probably not appropriate.
Q. And is the word proper any different in your mind than appropriate?
A. No.
Q. So would you say it is not proper for Judge Haley to have accepted football tickets?

* * *

A. You know, I want to change, because I have a problem with proper and appropriate. *Transcript, pp 247-248.*

> concert], but I just didn't see that there was a possibility of anything being wrong, that there was any wrongdoings. I guess my initial thought was that if somebody wanted to offer a bribe and if a judge wanted to accept one, they might not do it in front of a courtroom on the record. I just figured it was, you know, just a non-issue. [*Id., pp 242-243.*]

Mr. Jolly had never heard any negative comments about Judge Haley since the incident:

> ... I've never heard anybody, I've never come into contact with anybody, before or after this was reported, that questioned his integrity or honesty. [*Id., p 244.*]

Mr. Jolly testified:

> ... I haven't given a lot of thought to this, when the story came out or since. I mean, because it seemed like an innocent exchange, but maybe not the greatest location for something like that to happen. So I've not really thought about it too closely.
>
> I don't think that, like I said, a couple of Michigan tickets are something that can be offered to somebody to persuade their opinion, and I don't know both men that well, but I believe they're probably friends or know of each other. It's an innocent exchange. It's the whole Michigan thing, you know? [*Id.*, pp 249-250.]

Describing the community reaction to the story, Mr. Jolly commented:

> I can't believe what the newspaper is writing, because this is a nothing kind of a case. [*Id., pp 238-239.*]

Judge Philip Rodgers testified that Judge Haley's reputation in the community for honesty after the event, (and even after it was reported by the Judicial Tenure Commission) has not changed at all; that the community had not expressed any contempt towards Judge Haley or the judiciary by reason of the event; and that public confidence in Judge Haley has not in any way been impacted as a result of the charges being made by the Judicial Tenure Commission nor has any such complaint ever been personally communicated to him. *Transcript, pp 312-314.*

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Brad Niergarth, a CPA and Vice Chairman of the Chamber of Commerce, read articles about the incident as reported by the Traverse City Record Eagle, and believed it was a nonissue:

> When I read it, I looked at the details and based on the facts in the initial part of the article and then those that follow, it looked to me not to be an issue in terms of – it certainly shocked me initially, and I was concerned. But until I read through the rest of it, and then I saw that there was some issues involved beyond the tickets and stuff, and so I didn't see it as a factor in changing my judgment on what I thought of Judge Haley or other parts of the system up here in Antrim County. [*Transcript, p 333.*]

Mr. Niergarth also had discussions with others in the community at the time the newspaper articles were published and testified "it was either overblown or was not really an issue to us, it has not been raised as an issue". *Transcript, p 334.* Mr. Niergarth also testified that the community's (high) opinion of Judge Haley has not changed at all by reason of the incident and that he has heard "no contempt expressed toward Judge Haley or the judicial system because of the incident." *Id., p 335.* The Commission ignored this testimony of community members, and instead extracted portions of their testimony piecemeal to reach the conclusion the Commission had predetermined.

The only evidence the Examiner produced relating to an impropriety was one editorial from the Traverse City Record Eagle. The editorial was followed by six letters to the editor all of which criticized the newspaper and supported Judge Haley. (See Exhibits 16, 17 and 18 which were introduced at the formal hearing). Judge Haley's conduct is to be examined by an objective standard. *In Re: Tschirhart* 422 Mich 1207; 371 NW2d 850 (1985). Objectively the public's perception is that the integrity of the judiciary has not been damaged in any way by Judge Haley's conduct.

The Master's report shows an appreciation for the context in which the incident occurred, a fact which appears to have been lost on the Commission. Judge Haley's acceptance

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of the tickets cannot be reviewed in a vacuum or in the abstract. The transcript is replete with reference to Deputy Skurnit's suggestion that Judge Haley was on the take. Even assuming that Deputy Skurnit could have actually thought Judge Haley accepted the tickets to return a favor, he should have been dissuaded from that belief after he spoke with Prosecutor Koop and Magistrate DeWitt[5], (and probably others including Detective Snyder and his boss, Sheriff Johnson). Deputy Skurnit chose to go to the newspaper with a story suggesting that he was removed from his job because he reported that Judge Haley was doing something wrong. The Master and all other right-thinking persons did not think that a former Judge such as Mr. Benedict who had a long-term relationship with Michael Haley was trying to influence Judge Haley. Indeed, the Examiner did not make that claim. The testimony of Judge Haley; Prosecutor Koop; Donna Cottrell; and Shirley DeWitt support the Master's conclusion that the Judge Haley's acceptance of the tickets did not under the facts and circumstances of this case rise to the level of a violation of the Code of Judicial Conduct.

The Commission's finding that Judge Haley's conduct created the appearance of impropriety was used to support its decision that Canon 5C(4)(c) was inapplicable. Canon 5C(4)(c) prohibits a judge from accepting gifts "from a party or other person whose interest have come or are likely to come before the judge." However, if the tickets fall within the category of exceptions in Canon 5C(4)(b) for gestures of "ordinary social hospitality," then there is no need to consider the exception set forth in 5C(4)(c).

Like the rules applicable to questions of statutory interpretation, judicial canons must be interpreted in a way that does not render any part surplusage and nugatory. *Reed v Yackell*, 473 Mich 520, 537; 703 NW2d 58 (2005). The Michigan Code of Judicial Conduct that sets forth

[5] When Deputy Skurnit approached Ms. Dewitt and asked her whether she thought there was anything improper about what happened, she told him she did not think anything improper had occurred. *Transcript, p 271.* Deputy Skurnit was told the same thing by Prosecutor Koop. *Id. at 192.*

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three separate exceptions to the prohibition against a judge accepting gifts. Canon 5C(4)(b) permits a judge to accept "ordinary social hospitality" without qualification. Because Canon 5C(4)(b) permits a judge to accept ordinary social hospitality, and if the tickets constitute ordinary social hospitality, then it is irrelevant whether the donor appears frequently before the judge. The two exceptions are mutually exclusive. Only one exception need be satisfied.

ARGUMENT III

THE COMMISSION COULD NOT AND DID NOT SEPARATE ITSELF FROM ITS PROSECUTORIAL FUNCTIONS IN THIS CASE, RESULTING IN ACTUAL BIAS AGAINST RESPONDENT AND THE INFRINGEMENT OF HIS DUE PROCESS RIGHTS.

The Commission's decision implicates procedural due process concerns. Due process requires an impartial decisionmaker. "[T]he right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *City of Livonia* v *DSS,* 423 Mich 466, 508; 378 NW2d 402 (1985); *Cain* v *Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Additionally, proceedings must *appear* to be fairly decided. The appearance of even-handed justice "is at the core of due process." *Mayberry* v *Pennsylvania*, 400 US 455, 469; 91 S Ct 499; 27 L Ed 2d 432 (1971). "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias." *Commonwealth Coatings Corp* v *Continental Casualty Co*, 393 US 145, 150; 89 S Ct 337; 21 US 301 (1968).

In this case the impartiality of the JTC is called into question because it is simultaneously an investigator, prosecutor and adjudicator. As this Court has noted in the past, "the investigative and the adjudicative roles are combined in the Commission." *In the Matter of Del Rio, supra* at 690. "Concentrating the powers of judge and prosecutor in the same person or body poses an unreasonably high risk of compromising the protected and cherished

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value of judicial detachment and neutrality." *Tweedy* v *Oklahoma Bar Ass'n*, 1981 OK 12; 624 P2d 1049, 1053 (1981).

This Court has addressed due process challenges to Judicial Tenure Commission proceedings in the past, most notably in *In the Matter of Del Rio, supra*. In that case, the respondent judge argued that the JTC's "combined investigative, adjudicative and disciplinary roles" made it a tribunal of "inherent and incurable bias." *Id.* at 689. The Court opined that the JTC did not, in reality, exercise a disciplinary function, as the Supreme Court alone had the authority to discipline judges. *Id.* The JTC, on the other hand, was limited to submitting recommendations to the Supreme Court. *Id.* Nevertheless, the Court did not deny that in addition to its investigative role, the JTC also assumed an adjudicative role, albeit an adjudication subject to review by the Supreme Court:

> We are in limited agreement with respondent's contention that the investigative and adjudicative roles are combined in the Commission. (By "limited" agreement, we mean that it should not be forgotten that we review *de novo* the Commission's adjudication of the matter before we take disciplinary action). [*Id.* at 690.]

Due process has been held to prohibit a person from taking on the dual positions of complainant-prosecutor and adjudicator. *In Re Murchison*, 349 US 133; 75 S Ct 623; 99 L Ed 2d 942 (1955). That is exactly what the JTC has done here.

Judge Haley attempted to resolve this matter privately.[6] The Commission refused, and thereafter filed a formal complaint. The Master found that the Commission had not proved its assertions. When Judge Haley argued before the Commission that he should not be sanctioned, the Commission was in a position of knowing from prior dealings and before the complaint was filed that Judge Haley was willing to accept a private sanction. After the Commission "lost" in

[6] Judge Haley has always acknowledged that at least by hindsight he should have admonished Mr. Benedict and that his taking of the tickets or not refusing them showed poor judgment. Although he did not think he violated a canon, he wanted to put the matter behind him so as to avoid the attention a JTC complaint would and has generated.

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front of the Master, it knew what Judge Haley had offered to accept while it was in the position of deciding his punishment.

ARGUMENT IV

THE RECOMMENDED SANCTION OF PUBLIC CENSURE IS INAPPROPRIATE.

In the event the Court is of the opinion that the Examiner met his burden of proof, and accepts the Commission's finding that Judge Haley violated a judicial canon, Judge Haley should not be sanctioned. *In Re Brown,* 461 Mich 1291; 625 NW2d 744 (1999). *Brown* identified the following considerations regarding sanctions:

(a) misconduct that is part of a pattern of practice is more serious than an isolated incident or misconduct. Clearly this was an isolated incident.

(b) misconduct on the bench is usually more serious than the same misconduct off the bench. It is true that the ticket exchange occurred on the record, but it was on the record because Judge Haley allowed it to stay on the record.

(c) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety. Judge Haley's conduct did not implicate the actual administration of justice. The conduct occurred spontaneously and did not undermine the ability of the justice system to discover the truth and it did not involve an unequal application of justice. *Id.* at 1293. The Commission acknowledged that Judge Haley's acceptance of the tickets "does not seem to have had an actual effect on the administration of justice in this matter." *JTC Decision, p 12.*

(d) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does. Judge Haley's conduct did not implicate the actual administration of justice, nor its appearance of propriety. The Commission does not claim that Judge Haley's conduct impacted the administration of justice.

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(e) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated. This incident was spontaneous. Mr. Benedict placing the tickets on the bench was entirely unexpected by Judge Haley. The Commission's statement that Mr. Benedict and Judge Haley had discussed the tickets "at least a week before their actual delivery" implies that Judge Haley expected delivery. The Commission ignored Judge Haley's testimony that he told Mr. Benedict "'If I'm going to do something, or use these or whatever, I'll get right back to you,' meaning like in a day or so. And I didn't[.]" *JTC Decision, p 13; Transcript, p 374.* The understanding between Judge Haley and Mr. Benedict was that Judge Haley was to contact Mr. Benedict *if* he could use the tickets or knew of someone who could use them. Judge Haley never contacted Mr. Benedict.

(f) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delay such discovery. The conduct at issue did not undermine the ability of the justice system to discover the truth or to reach the most just result in a case. The Commission does not address this factor. A fine and restitution in an amount requested by the prosecution was the proper result.

(g) misconduct that involves the unequal application of justice on the basis of such considerations of race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship. Judge Haley's conduct did not involve the unequal application of justice, and the Commission did not claim that it did.

The Commission recommended a public censure. The Commission relied on *In re Daghir*, 657 A2d 1032 (Pa, 1995). In *Daghir*, the judge essentially accepted bribes from a litigant and accepted them while the cases were being contested, and also delayed his decision

in the case.[7] *These are not the facts in the subject case.* The only issue remaining after Judge Haley "accepted" the tickets was the amount Ms. Porter was to pay in restitution. Judge Haley decided the issue timely and favorably for the prosecutor.

That Judge Haley's conduct does not warrant a public reprimand is well illustrated from reviewing *In Re Templin*, 432 Mich 1220; 436 NW2d 663 (1989). In that case, the judge made substantive decisions in a high-profile criminal case while he was secretly dating the defendant, and failed to disclose that information or disqualify himself until it was discovered. Judge Templin received a public censure.

The lesson from *In Re Templin* is that public censure is warranted where the judge's conduct was not only improper, but was kept from interested parties under circumstances where a reasonable person would clearly know that the other party would object (i.e., there was "stealth" of some sort).

The common theme that emerges from other cases involving public censure, is that in all of those cases the Judge engaged in some form of intentional conduct. See for example *In Re Ford*, 469 Mich 1252; 674 NW2d 147 (2004) (sexual harassment against a court employee, including unwelcome sexual contact and comments; judge accessed pornography on court computers; and pled guilty to aggravated assault); *In Re Justin*, 456 Mich 1220; 577 NW2d 71 (1998) (judge asked city to increase pension benefits for former district court employees; city denied the increased pension benefits; judge began assessing a persistence fee of $100 or more payable to the county, instead of the usual fines and costs payable to the city); *In Re Cooley*, 454 Mich 1215; 563 NW2d 645 (1997) (judge produced radio and TV shows using court time, personnel, equipment and materials; personally incorporated the show as a for-profit corporation, and failed to report any of its funds with the SCAO); *In Re Jelselma*, 463 Mich

[7] The Pennsylvania court also commented, "The mere giving of a gift from a lawyer to a judge . . . implies that there is some string or thread attached to the gift, unless of course the gift arises out of a long-standing personal friendship between the lawyer and judge." *Id.*, p 1036.

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1229; 625 NW2d 751 (2001) (judge was publicly censured because he: (1) persistently failed to timely decide motions or promptly enter orders after matters were decided by the court; and (2) neither submitted replies nor requested additional time to respond to grievance letters); *In Re Bradfield*, 448 Mich 1229; 531 NW2d 711 (1995) (judge had a dispute with another motorist over a parking space; security officer determined that a third motorist was entitled to it; second motorist withdrew, but the judge drove into the space and struck and injured the security officer). Similarly, *In Re O'Brien*, 441 Mich 1204; 494 NW2d 459 (1992), (the judge grabbed an airline supervisor's braided hair at the neck, causing her head to jerk backwards, and verbally abused and insulted her at an airport). *In Re Thomas*, 441 Mich 1206; 494 NW2d 458 (1992), (the judge made seven harassing and obscene phone calls to another person. Misdemeanor charges were issued against the judge arising out of both the telephone calls and a related altercation).

A review of the cases where a public censure was imposed all involved either intentional conduct, intentional retaliation against a party and/or a crime of violence, or physical misconduct. All of the cases involved much more serious conduct than that attributed to Judge Haley.

In order to determine the applicable sanction, it is necessary to consider the behavior itself and put that behavior into context. It is notable that the prosecutor was present during the discussion between Judge Haley and the defense attorney; that a plea bargain had already been reached; that Judge Haley's later ruling on the amount of restitution was consistent with the prosecutor's requested figure and not the defense attorney's and that at no time has the prosecutor objected to or questioned Mr. Benedict's conduct.

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CONCLUSION

Judge Haley has been required to defend himself because of an incident that was essentially caused by Mr. Benedict's (inexcusable) conduct. The incident was brought to the Commission's attention by a person who was more interested in having the newspapers get a hold of his grudge-based complaint (and knew or should have known that there was no basis to his complaint). Although Judge Haley did not decline the ticket offer and has acknowledged that he should have, this Court will hopefully appreciate the fact that Judge Haley was caught by surprise when Mr. Benedict placed the tickets on the bench. This Court must also appreciate Judge Haley's thought process during the time the incident occurred:

> Because the courtroom was practically empty. ... There was no jury ... So I really wasn't concerned that much about that people thought. Especially the people that were in that courtroom, because for the most part, they all knew me. (transcript p. 378)
>
> There wasn't anybody in the courtroom that could possibly have thought anything, or imputed anything improper about what happened in that courtroom, including Skurnit .... Because I knew bloody well that Skurnit knew that there was nothing improper about that. [*Transcript, pp 378-380.*]

Also important is that the community understood that the incident was a "non-story". Including in the appendix are three letters attesting to Judge Haley's sterling character and reputation. ***Appendix.***

This Court should accept the Master's conclusion and dismiss the complaint.

RELIEF REQUESTED

Respondent, 86th District Court Judge Michael J. Haley, asks the Court to reject the Judicial Tenure Commission's Decision and Recommendation, adopt the Master's Report, and

order that no discipline be imposed. If the Court finds misconduct, Respondent asks the Court to impose a fair and proportionate sanction.

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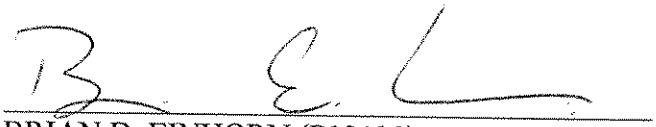
By: 

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