STATE OF MICHIGAN

IN THE SUPREME COURT

IN THE MATTER OF:

HON. DAVID MARTIN BRADFIELD
Judge, 36th District Court
Detroit, MI 48226

Docket No.

Formal Complaint No. 79

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RESPONDENT'S PETITION TO REJECT THE JUDICIAL TENURE COMMISSION'S DECISION AND RECOMMENDATION

Respondent, the Honorable David M. Bradfield, petitions this Court under MCR 9.224(A) to reject the Judicial Tenure Commission's recommendation for order of discipline. In support of his petition, Respondent relies on the attached brief, and further states:

1. The one-year suspension recommended by the JTC is disproportionately harsh.
2. The recommended psychotherapy is beyond the authority of this Court to order, violates the physician-patient privilege, and is not warranted on these facts.
3. The Commission accepted the Master's findings without comment about Judge Bradfield's objections to those findings.
4. Judge Bradfield requests oral argument.
5. Filed herewith is a supporting brief.

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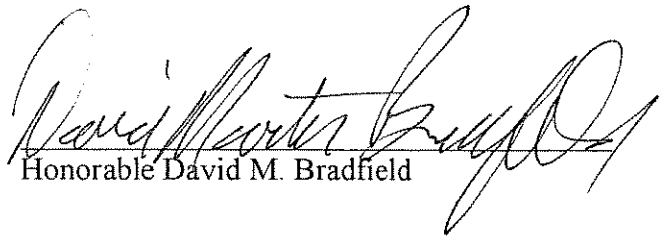
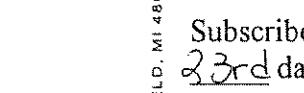
WHEREFORE, Respondent, 36th District Court Judge David M. Bradfield asks this Court to reject the Judicial Tenure Commission's Decision and Recommendation, and impose a fair and proportionate sanction.



Honorable David M. Bradfield

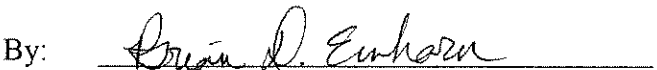
Subscribed and sworn to before me this
23rd day of January, 2006



NOTARY PUBLIC
Oakland County, Michigan
My commission expires: 6-11-07

L. T. AMANIA
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES Jun 11, 2007

COLLINS, EINHORN, FARRELL & ULANOFF, P.C.

By: 

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Dated: January 19, 2006
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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 Bradfield's petition to reject the Judicial Tenure Commission's December 28, 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 Commission recommendation within 28 days after service of the certified record. The Commission served Judge Bradfield with the certified record on December 28, 2005.

REQUEST FOR ORAL ARGUMENT

Judge Bradfield requests the opportunity to present oral argument.

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STATEMENT OF ISSUES

I. The one-year suspension recommendation

> This Court has sanctioned judges to a public reprimand for far more egregious conduct that that involved here, and even in cases involving repeated instances of misconduct that occurred *on the bench*, a six-month suspension has been imposed. *In re Moore*, 464 Mich 98 (2001); *In re Hathaway*, 464 Mich 672 (2001). Judge Bradfield's conduct occurred off the bench, and was motivated by legitimate security concerns. Is the one-year suspension recommended by the Commission disproportionately harsh?

The Commission will presumably answer "No."

Respondent submits that the correct answer is "Yes."

II. The psychotherapy recommendation

> In the only Michigan cases in which judicial discipline involved a judge attending counseling, the counseling was part of an agreement between the Commission and the judge, and was not part of this Court's order. The Commission recommended that this Court order Judge Bradfield to attend psychotherapy, that his choice of psychotherapist be approved by the Commission, and that the Commission oversee his progress through reports from Judge Bradfield's doctor. Does this Court lack authority to impose such discipline, and even if not, does the Commission's recommendation violate Judge Bradfield's privacy, and propose an unworkable solution?

The Commission will presumably answer "No."

Respondent submits that the correct answer is "Yes."

III. Failure to address objections to the Master's report

> MCR 9.215 allows a judge to file objections to the Master's Report. Judge Bradfield filed objections to the Master's report based on the exclusion of relevant evidence, including emails between members of the bench documenting security concerns and Viola Coleman's testimony about Judge Bradfield's customary manner of dealing with unauthorized parkers. Did the Commission err in accepting the Master's findings without comment about Judge Bradfield's objections to those findings?

The Commission will presumably answer "No."

Respondent submits that the correct answer is "Yes."

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SUMMARY OF ARGUMENTS

ARGUMENT I

THE ONE-YEAR SUSPENSION RECOMMENDED BY THE COMMISSION IS DISPROPORTIONATELY HARSH.

The application of the criteria articulated by this Court in *In Re Brown*, 461 Mich 1291; 625 NW2d 744 (1999) does not justify the recommended one-year sanction. Although Judge Bradfield has previously had disciplinary proceedings brought against him, the facts of the present incidents are unique. In this case Judge Bradfield's actions were spontaneous, and were motivated by legitimate security concerns. His conduct occurred off the bench, and the Commission acknowledges that Judge Bradfield's actions were not prejudicial to the actual administration of justice. No criminal proceedings came out of the incident, and Judge Bradfield emphatically dispute the Commission's finding that he committed an assault and battery.

This Court must be mindful of sanctions imposed for similar conduct. In cases involving much more serious conduct than that alleged here, a public reprimand has been imposed. Even in cases of repeated misconduct, much more egregious behavior on the part of judges has been met with far less sanction than a one-year suspension. See, e.g., *In re Moore*, 464 Mich 98, 132-133; 626 NW2d 374 (2001) and *In re Hathaway*, 464 Mich 672 (2001), in which repeated instances of misconduct from the bench warranted six-month suspensions.

Judge Bradfield's misconduct involved an *off-the-bench*, one-on-one confrontation with a person who Judge Bradfield thought might be a threat to court security, a person who refused to identify himself, and tried to enter the court through a private, non-secure door. A three-month suspension is an adequate sanction in this case.

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ARGUMENT II

THE RECOMMENDED PSYCHOTHERAPY IS BEYOND THE AUTHORITY OF THIS COURT TO ORDER, VIOLATES THE PHYSICIAN-PATIENT PRIVILEGE, IS AN UNWORKABLE PROPOSITION, AND IS NOT WARRANTED ON THESE FACTS.

This Court's authority to discipline judges derives from the Michigan Constitution. "The Michigan Constitution created the Judicial Tenure Commission and outlines the power of the Michigan Supreme Court to discipline judges." *In re Noecker*, 472 Mich 1, 14 (2005). There is no authority for this Court to order Judge Bradfield into psychotherapy as a disciplinary measure.

Two cases in Michigan involve judges undergoing counseling or psychological treatment, one of which is a prior proceeding involving Judge Bradfield, and in both cases the judges reached an agreement with the Commission – they were not *ordered* into counseling. Non-Michigan authorities likewise suggest that consideration may be given to a judge's willingness to undergo counseling or psychological treatment, but the courts do not order it.

The Commission's recommended sanction infringes on Judge Bradfield's privacy rights. The Commission would have this Court order Judge Bradfield to attend counseling and that the Commission be regularly apprised of Judge Bradfield's progress. This proposal violates not only of the physician-patient privilege, but also The Health Insurance Portability and Accountability Act (HIPPA), 42 USC 1320d, *et seq.* The Commission's request for "quarterly reports detailing Respondent's attendance at those sessions" clearly falls within the definition of health information subject to protection under HIPPA.

Moreover, the practical concerns implicated show that the Commission's recommendation is unworkable. The Commission asks this Court to require that Judge Bradfield's choice of doctor be approved by the Commission, yet makes no provision for the

possibility of the Commission's failure to approve Judge Bradfield's choice of psychotherapist. Nor does the Commission state what criteria it will use to determine the acceptability of his choice. What is the purpose of requiring the doctor to submit quarterly reports to the Commission *detailing* Judge Bradfield's attendance? Toward what end? And what if the Commission does not approve of the reports that it receives?

Judge Bradfield understands that he must ensure that he not allow a like incident to occur. He knows the consequences if he does not – he agreed to resign if he acts out again. It is not proper, or necessary, for the Commission or the Court to determine that there is a need for Judge Bradfield to enter psychotherapy treatment, over which the Commission will have indefinite oversight.

ARGUMENT III

THE COMMISSION ACCEPTED THE MASTER'S FINDINGS WITHOUT COMMENT ABOUT JUDGE BRADFIELD'S OBJECTIONS TO THOSE FINDINGS.

Judge Bradfield submitted objections to the Masters' findings on several bases. The Commission accepted the Master's findings without addressing the objections.

Judge Bradfield argued that the Master abused his discretion in excluding evidence of emails between members of the bench regarding security concerns. These emails were relevant to show the security concerns that motivated Judge Bradfield and the context in which he acted. The judges' emails to the bench stressing the importance of observing security procedures made Judge Bradfield's explanation of the incident more likely and his anger understandable. The emails were relevant and should have been admitted.

Judge Bradfield also objected to the exclusion of testimony from security person Viola Coleman regarding Judge Bradfield's prior conduct in the parking area toward unauthorized parkers. Ms. Coleman was often observed Judge Bradfield interacting with persons who had

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parked in the restricted area outside the courthouse. She testified that Judge Bradfield was never rude, and never spoke in an offensive manner. Despite the fact that the Master had already heard testimony from several witnesses about Judge Bradfield's character and his prior conduct, and the fact that Ms. Coleman's testimony would tend to contradict Mr. Adams' statement that Judge Bradfield was rude, the Master excluded the testimony as not relevant. Judge Bradfield was entitled to have the Master consider Ms. Coleman's testimony, and the exclusion of this evidence severely prejudiced Judge Bradfield's ability to defend against the allegations.

The Master, and the Commission, erred in concluding that Judge Bradfield committed criminal assault. The basis of the Master's assault and battery finding was Mr. Adams' testimony that Judge Bradfield poked Mr. Adams in the chest. Judge Bradfield acknowledged that he touched Mr. Adams, but explained that the contact was unintentional. Officer Gray testified that Judge Bradfield touched Mr. Adams' chest as part of the conversation Judge Bradfield was having with Mr. Adams, stressing that Mr. Adams was not permitted to enter through the judges' door. Judge Bradfield's and Officer Gray's testimony negates any suggestion that Judge Bradfield had a specific intent to support a finding of an assault.

Judge Bradfield should not have been forced to defend against charges that allegedly occurred years ago and were never pursued or brought to his attention at that time. The incident giving rise to the charge against Judge Bradfield concerning the Gem Theatre parking structure allegedly occurred three years ago, in October 2002. Judge Bradfield was denied a fair opportunity to defend against these charges and the facts occurred so long ago that evidence was either forgotten or manufactured. Judge Bradfield has no recollection of it having occurred. It is unfair to require Judge Bradfield to defend himself against charges of an incident that was clearly so insignificant that it prompted no charges or further discussion at the time. This count should be dismissed.

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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.

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STATEMENT OF FACTS

Background

Judge David Martin Bradfield has been a judge on the 36th District Court for more than nineteen years. *Tr, 253-254.*[1] From 1987 to 1990, he was Director of Security for the court. *Tr, 275.*

The 36th District Court building has two entrances, one main entrance for the public which is equipped with security screening, and a judges' door on the side of the building. The door is directly below Judge Bradfield's and ten other judges' chambers. Only judges, or a person accompanying a judge, are permitted to enter through the judges' door. *Tr, 165.*[2]

Inside the judges' door is a small vestibule area. Only authorized persons may be there. *Tr, 104.* There are no screening devices in the vestibule. *Tr, 104-105.* Inside the vestibule is an elevator that leads to a corridor separating the judges' chambers and the courtrooms, and the cashier's office. *Tr, 101-102, 258.* This is a nonpublic area. *Tr, 103-104.*

On March 17, 2005, just a few weeks before the incident at issue here, Chief Judge Marilyn Atkins sent a memorandum email to the judges expressing concern about security at the judges' door, and implementing steps to be taken to improve security. *Tr, 193.* Among the new policies was the requirement that judges must go downstairs and escort their visitors into the court themselves; they may not send their staff to bring in visitors through the judges' door. *Tr, 193.* If a judge did not personally go and escort his visitor into the building, then the visitor would be directed to the front, public entrance where there is a security check. *Tr, 194-195.*

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[1] Transcript of Judicial Tenure Commission Hearing, August 24, 2005.

[2] This is the only court in Detroit with direct exposure to the judges' chamber from a public street without barricade or prohibited parking.

This was the procedure expected of all judges as of March 17, 2005, without exception. *Tr, 195, 197, 199.*

The April 6, 2005 incident

On April 6, 2005 during the noon hour, Judge Bradfield was returning to the court. *Tr, 261.* No parking spaces were available.[3] Judge Bradfield saw an individual sitting in a parked car on Monroe Street next to the courthouse. *Tr, 25-26, 261.* The man, later identified as Anthony Adams, was waiting for his wife, Judge Deborah Ross Adams, to come down to the car for lunch plans that they had made. *Tr, pp 25-26.* Mr. Adams is also the deputy mayor of the City of Detroit.

Judge Bradfield did not know Mr. Adams. Judge Bradfield looked for a parking pass on the car. The judges have passes that are visible in their cars showing entitlement to park on the street outside the courthouse. *Tr, 55.* Mr. Adams had no such pass. *Tr, 55.* The car also had no other identification that it was a city-owned vehicle, nor any indication that the driver had authority to park next to the court. *Tr, 55, 262, 265.* There was nothing inside Mr. Adams' car that would reflect he was on city business, and in fact at that time he was not at the court on city business. *Tr, 55.*

Judge Bradfield stopped his car next to Mr. Adams' car and requested that Mr. Adams move his car.[4] Judge Bradfield pointed to the sign that prohibited public parking and told Mr. Adams that parking in that area was for judges and court personnel only. *Tr, 265.*

Although Mr. Adams recognized Judge Bradfield, Mr. Adams did not identify himself as the deputy mayor, or as Judge Adams'husband. *Tr, 30.* Mr. Adams had no visible

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[3] Although Officer Gray testified that there were available parking spaces, a security videotape shows Officer Gray with her back to the judges' door and no parking spaces available.

[4] Judge Bradfield and Mr. Adams dispute whether a parking space was available. Mr. Adams says there was. A review of a security tape will support Judge Bradfield's statement that there were no spaces available when he returned to the courthouse.

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identification showing that he was a city employee. *Tr, 59-60.* Per Judge Bradfield, Mr. Adams responded, "Take a pill." *Tr, 266.* Mr. Adams testified that he did not say anything to Judge Bradfield and ignored the request to move his automobile. *Tr, 31.*

Judge Bradfield next told Mr. Adams that he could be ticketed and towed. Still Mr. Adams did not respond. *Tr, 266.* Then Judge Bradfield identified himself, to which Mr. Adams retorted, "We know who you are Mother Fucker." *Tr, 266.* Judge Bradfield then responded, "I can be as street as you are. Move the mother fuckin' car." *Tr, 266.*

Judge Bradfield backed his car away from Mr. Adams' vehicle, and motioned to a nearby police officer who had just come on to the street from the vestibule inside the door. The officer (Officer Gray) came out of the judges' door. *Tr, 31, 267-268.* The officer went over to speak to Mr. Adams and asked him to move his car. *Tr, 31.* Mr. Adams then moved his car three feet forward. *Tr, 32, 269.* Still there was not enough space for Judge Bradfield to park. *Tr, 269.* Judge Bradfield drove his car and stopped it next to Mr. Adams' car and again asked Mr. Adams to move his car or else he would be towed. *Tr, 32.* Mr. Adams "didn't respond. [He] just sat there and looked at [Judge Bradfield]." *Tr, 32.*

At the officer's request, Mr. Adams moved his car into a newly vacant space, and Judge Bradfield parked where Mr. Adams' car had been parked. *Tr, 270.*

Judge Adams' clerk, DiAnn Webb, came out of the judges' door and approached Mr. Adams. *Tr, 32, 80.* She told him that his wife was in the middle of a court proceeding, and Mr. Adams would have to come upstairs. *Tr, 32-33.* What Judge Bradfield saw was Mr. Adams exit his car and walk quickly toward the judges' door. *Tr, 33, 271.*

Because Judge Bradfield did not know Mr. Adams, he was concerned for the safety of the building and the other judges. Therefore, Judge Bradfield attempted to stop Mr. Adams. Judge Bradfield testified:

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> I didn't know who this 6'4" person was, what his intentions were with regard to two 5'4" 5'5" females that were standing there. Ms. Webb is not that tall, and neither is the officer. I didn't know what was going on, since I don't know who this person was. So I got out of my vehicle and went to the door and blocked him and said, you can't come in here; you have to go to the front. [*Tr, 272.*]

According to Mr. Adams, Judge Bradfield poked him in the chest and told him that he (Mr. Adams) was not authorized to use the judges' entrance.[5] *Tr, 34, 145, 272.* Officer Gray testified that Judge Bradfield touched Mr. Adams' chest as part of the conversation Judge Bradfield was having with Mr. Adams, as a gesture to emphasize his point that Mr. Adams was not permitted to enter through the judges' door. *Tr, 161, 172-173.* Judge Bradfield pointed to the front entrance. *Exhibit 10* at hearing, *DVD containing video footage.* Officer Gray instructed Mr. Adams and Ms. Webb to use the public entrance. *Tr, 36.*

Judge Adams learned about the incident from Mr. Adams and/or Ms. Webb. She immediately left the bench and went downstairs to talk to the officer about the incident. *Tr, 41, 109-110.* She used the judges' elevator. *Tr, 41.* When she arrived on the ground floor in the vestibule area, Judge Adams asked Officer Gray what had happened. *Tr, 113.* Per Officer Gray, Judge Adams "was upset about the situation" and she was talking loudly and aggressively. *Tr, 175.* Officer Morris Syfax described Judge Adams as "excited" and "disturbed", and "[i]t wasn't a calm voice she was using." *Tr, 234-235.* Judge Adams demanded to know how Officer Gray "let the incident happen." *Tr, 175-176.*

At that point Judge Bradfield came into the vestibule and Judge Adams angrily confronted Judge Bradfield. She was yelling. *Tr, 42, 116, 275-276.*

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[5] Judge Bradfield acknowledged that he touched Mr. Adams by trying to get Mr. Adams' attention and directing him toward the public door. *Tr, 272, 274.*

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Judge Bradfield tried to explain that he did not know who Mr. Adams was. *Tr, 133, 275-276.* He told her that her husband was not supposed to be coming in through the judges' door, and was not supposed to be parking on the street. *Tr, 275-276.*

At the point of his contact with Judge Adams, Judge Bradfield was speaking in a controlled manner. *Tr, 276.* To Officer Syfax, Judge Bradfield "didn't seem like he was upset. He was just explaining to [Mr. Adams], listen, I didn't know who you were, all right?" *Tr, 237.*

Judge Adams "wanted to continue on with regard to the fact that [he] had no business talking to her husband" and did not "have any authority to say anything to him whatsoever[.]" *Tr, 276.* Judge Adams told Judge Bradfield that her husband "doesn't have to tell you who he is." *Tr, 276.*

Later that day, Chief Judge Marilyn Atkins held a meeting in her chambers with Judge Bradfield, Judge Adams, Mr. Adams, Ms. Webb, and the officers. *Tr, 45.* Judge Bradfield described Judge Adams' demeanor in the meeting as "still hot." *Tr, 280.* He admitted that he also "was hot because this whole thing could have been avoided just on the basis of somebody identifying themselves to begin with." *Tr, 280.* Judge Bradfield admitted having previously called Mr. Adams an expletive, but again emphasized that he did not know who Mr. Adams was and that he was merely responding in kind. *Tr, 135, 140-141.*

Judge Atkins had a similar recall about Judge Bradfield's and Judge Adams' mutually heated exchange during the in-chambers meeting. She remembered that Judge Adams was animated and was loud. *Tr, 200-201.* Judge Adams and Judge Bradfield were on opposite sides of the conference table, and both of them were pointing at each other, making their points. *Tr, 201.* Chief Judge Atkins testified that Judge Bradfield raised his voice in response to Judge Adams raising her voice:

> [A]t first his demeanor was he was trying to explain to – his conversation, his conversing was more so with Judge Deborah Ross Adams, and she took issue at the way he spoke to her

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> husband, and she began to – as she elevated her voice, Judge Bradfield did the same, and it turned out to be finger pointing, and Judge Bradfield raised his voice at her and was shaking his finger in her face – toward her." [*Tr, 190.*]

Chief Judge Atkins further testified:

> *Q. [by Mr. Fischer]* Did he touch her at all?
> *A.* No, he did not.
> *Q.* Did he use profanity at all?
> *A.* No, he did not. [*Tr, 191.*]

If Judge Bradfield had known that Mr. Adams was the deputy mayor, "it would have been probably the same thing as most everybody else does is defer to the fact of his office, but he never told me." *Tr, 283.* Judge Bradfield admitted that his language was inappropriate and not dignified, but it was provoked by Mr. Adams' foul language toward him. *Tr, 204, 284.*

<u>The Gem Theatre parking structure incident</u>

The 36th District Court leased space in the Gem Theatre parking structure for judges to park on the first floor of the parking structure. The lease began on October 7, 2002. *Tr, 186, 207.*

Parking Manager Noah Lee was working at the ticket booth at the entrance to the structure on the Wednesday before the agreement was to take effect. *Tr, 207.* A man driving a Corvette entered the parking structure and identified himself to Mr. Lee as a judge. *Tr, 208, 210.* Mr. Lee explained that the agreement would not begin until the following Wednesday, and showed the man a letter to that effect. *Tr, 209-210.* The man did not read the letter; he "just flung the document down" and left the parking lot. *Tr, 211.* The man did not use profane language. *Tr, 210*.

Mr. Lee told Otis Davis, the court administrator, about the incident. *Tr, 223.* Mr. Davis assumed that the judge was Judge Bradfield because Mr. Lee described the car as a silver

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Corvette, although Mr. Davis was aware that other judges drove Corvettes. *Tr, 229.* Mr. Davis never told anybody about the incident, nor did he follow up in any way. *Tr, 226.*

The first time that Judge Bradfield became aware of the complaint about the alleged incident at the Gem Theatre parking structure was when he received the Judicial Tenure Commission notification in April 2005, two years and six months after this alleged incident. Judge Bradfield knew Mr. Lee from parking in the facility for a period of time, and he remembered speaking to Mr. Lee about his cars. *Tr, 287.* Judge Bradfield never talked to anyone about the alleged incident and has no recollection of it having occurred. *Tr, 288-289.*

STATEMENT OF PROCEEDINGS

Before the hearing before the Master, the Examiner filed a "Hearing Memorandum" on the pretext of providing the Master with background information. In actuality, the Examiner's brief was an attempt to improperly influence the Master with reference to prior allegations against Judge Bradfield. *Examiner's Hearing Memorandum.* In his brief, the Examiner cited case law with gratuitous, parenthetical comments such as "another assault case involving this same judge" and "another loss-of-demeanor case not coincidentally involving this same Respondent."[6] *Id., pp 7, 9.*

At the hearing, Judge Bradfield tried to introduce two emails. One was from Judge Patricia Jefferson to members of the bench concerning security. *Tr, 92.* The email also included a reply written by Judge David Robinson. *Tr, 93.* The second (proposed) email exhibit was the March 17, 2005 email from Chief Judge Atkins to members of the bench about court security. *Tr, 94.* The Examiner objected to the admission of the emails on relevancy grounds. *Tr, 97.* The Master sustained the objections. *Tr, 97.*

[6] In fact, the previous disciplinary proceedings involving Judge Bradfield did not involve an assault.

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Judge Bradfield also sought to introduce the testimony of Viola Coleman. Ms. Coleman was employed by Wackenhut Security Company. Wackenhut provided security services at the court for many years, until just days before the incident which is the subject of these proceedings. *Tr, 243.* Ms. Coleman was stationed at the judges' door. *Tr, 244.* Ms. Coleman often heard Judge Bradfield inform persons who were unwilling to move their vehicles that they were not permitted to park on the street in the area reserved for judges. *Tr, 250.* She testified that Judge Bradfield was never rude, and never spoke in an offensive manner. *Tr, 250.*

The Examiner objected to the admission of Ms. Coleman's testimony on relevancy grounds. *Tr, 248.* Respondent's counsel argued that the Master had already heard testimony from several witnesses about Judge Bradfield's character and his prior conduct, and that therefore Ms. Coleman's testimony should be permitted to refute that evidence. *Tr, 248-249.* Counsel also argued that the evidence was admissible under MRE 405 (Methods of Proving Character), and MRE 406 (Habit, Routine Practice). The Master excluded Ms. Coleman's testimony as not relevant. *Tr, 249.*

During the Examiner's closing argument, he referred repeatedly to Judge Bradfield's prior conduct regarding the parking situation outside the court and Judge Bradfield's concern about security. The Examiner made the following derogatory comment about Judge Bradfield's prior conduct: ". . . [T]here is some issue that the judge has with regard to parking that he sees – takes it upon himself to run around for ten years telling people where they can and cannot park." *Tr, 315.* The Examiner repeated his comment in his reply argument, stating that Judge Bradfield "spent ten years running around checking where people were parking." *Tr, 322.*

Respondent's counsel objected before the Master, and the Master sustained the objection:

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Mr. Einhorn: Your Honor, this is so unfair to prevent us to bring in conduct about it and then have him argue of his prior conduct.
Mr. Fisher: I am not arguing –
Mr. Einhorn: It is unfair.
Mr. Fischer: I'm not arguing the prior conduct. That's what the witness testified.
Mr. Einhorn: Yes, he is. He's arguing the prior offenses.
The Master: Okay. Prior conduct is being argued; I would agree. [*Tr, 323.*]

The Master's Report

The Master subsequently issued an opinion in which he labeled Judge Bradfield an "officious intermeddler." *Findings of Fact and Conclusions of Law, p 28.* The Master found that Judge Bradfield initiated the encounter with Mr. Adams, and he rejected Judge Bradfield's testimony that Mr. Adams' failure to identify himself contributed to the altercation. *Id., p 29.* The Master found that Judge Bradfield "committed both a criminal and a civil assault and battery" upon Mr. Adams when he poked him in the chest. *Id., p 30.* The Master also found that Judge Bradfield was involved in the incident at the Gem Theatre parking structure. *Id., pp 32-33.*

The Master concluded that Judge Bradfield's conduct constituted "irresponsible . . . conduct which erodes the public confidence in the judiciary (CJC Canon 2A), conduct involving impropriety or the appearance of impropriety, (CJC Canon 2A), a failure to respect and observe the law and to conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, (CJC Canon 2B), conduct that exposes the courts to obloquy, contempt, censure, or reproach, (MCR 9.104(A)(2)), and conduct that violates a criminal law, (MCR 9.104(A)(5)). *Id., pp 35-36.*

The Master determined that Canon 3(A)(3) was inapplicable because Judge Bradfield was not acting in an adjudicative capacity. The Master also concluded that Judge Bradfield's conduct did not constitute "conduct which is contrary to justice, ethics, honesty or good

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morals," MCR 9.104(A)(3). Lastly, the Master declined to address the allegations of misconduct in office. *Id., pp 36-37.*

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

A hearing was held before the Judicial Tenure Commission on November 21, 2005. At the hearing, Judge Bradfield acknowledged that his conduct was improper, and that he violated Judicial Canon 1 (observe the high standards of conduct necessary to the preservation of the integrity and independence of the judiciary) and Canon 2A (avoid all impropriety and appearances of impropriety to ensure that public confidence in the judiciary is not eroded by irresponsible or improper conduct by Judges).

Judge Bradfield maintained that a 90-day suspension would be appropriate. Additionally, in an effort to assure the Commission that such conduct would not occur again, Judge Bradfield agreed to resign if he ever acted out again. The following exchange occurred at the hearing:

> *Member Grant:* I have an interesting question. Because of his history, is your client prepared to submit a written documentation that he would automatically resign if he ever acts out again?
>
> * * *
>
> *Respondent:* Yes. [*Commission hearing transcript, p 46.*]

The Commission recommended a one-year suspension, and asked this Court to *require* Judge Bradfield to "complete intensive psychological treatment to control his anger" by a psychotherapist. The Commission's recommendation provides:

> (1) SUSPEND Respondent from the performance of his judicial duties for a period of one year without pay, effective the next business day following entry of the order; and
>
> (2) REQUIRE Respondent to complete intensive psychological treatment to control his anger by a health care professional of Respondent's choosing, **contingent upon approval of Respondent's selected psychotherapist by the Commission.** The counseling will occur on a schedule as determined appropriate by the health care professional, **who shall provide the**

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Commission with quarterly reports detailing Respondent's attendance at those sessions. [*Commission's Decision and Recommendation, p 17.*]

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ARGUMENT I

The one-year suspension recommended by the JTC is disproportionately harsh.

This Court in *In Re Brown*, 461 Mich 1291; 625 NW2d 744 (1999) identified the following criteria to be considered in imposing sanctions for judicial misconduct:

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

(b) misconduct on the bench is usually more serious than the same misconduct off the bench.

(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.

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

(e) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.

(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 delays such discovery.

(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.

Criterion (a) recognizes that misconduct that is part of a pattern of practice is more serious than an isolated incident of misconduct. Although Judge Bradfield has previously had

disciplinary proceedings brought against him, the facts of the present incidents are unique. In this case Judge Bradfield's actions were motivated by legitimate security concerns.

With respect to factor (b), Judge Bradfield's conduct occurred off the bench. This fact militates in favor of a lesser sanction than would be appropriate for conduct occurring on the bench. The Commission did not adequately take this fact into consideration. The Commission merely stated, "Although Respondent's conduct took place off the bench, a Judge must behave as though he is always on the bench." *Commission Decision and Recommendation, p 14.* The Commission apparently gave no weight to this distinction as required by *Brown, supra.*

Brown holds that (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. The Commission acknowledges that Judge Bradfield's actions were not prejudicial to the actual administration of justice. *Commission Decision and Recommendation, p 14.*

Turning to criterion (d), misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does. The Commission found that Judge Bradfield assaulted and battered Mr. Adams on the street in front of onlookers, and also that Judge Bradfield implied that he was acting in his official capacity as a 36th District Court judge.

An example of a judge misusing the prestige of his office can be found in *In re Brown (After Remand)*, 464 Mich 135; 626 NW2d 403 (2001), in which the judge used his status as a judge to direct a police officer's investigation of a car accident between the judge an another driver. The judge knew one of the police officers who arrived at the accident scene. The judge told the officer that the other driver was "doing 85 miles per hour." He also told the officer to run the driver's name on L.E.I.N. [Law Enforcement Information Network] and to ticket her. This Court accepted the Commission's finding that the judge was "attempting to use the prestige of [his] office to gain a personal advantage" and that his conduct was "clearly

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prejudicial to the administration of justice." *Id.* This Court concluded that the judge had "invoked [his] judicial status in an inappropriate manner."

In the present case, Judge Bradfield merely identified himself to Mr. Adams as a judge because the area where Mr. Adams parked was reserved for judges. Judge Bradfield was not using his office to bully Mr. Adams; he was identifying himself as someone who had a right to park in that area. If Mr. Adams had done the same, the incident could have been averted. The second interaction between Judge Bradfield and Mr. Adams occurred just outside the security door to the courthouse. Judge Bradfield did not use the prestige of his office for personal gain; he attempted to prevent an apparently unauthorized person who he thought might create a security problem from using the judges' entrance. Nor was this a case of Judge Bradfield "running around checking where people were parking" as the examiner argued. Given the lack of barricade and set-back of the door with direct access to the judges' chambers, Judge Bradfield's conduct was motivated by self-preservation.

Judge Bradfield emphatically denies that his actions constituted an assault and battery on Mr. Adams. An assault is "an attempt or offer with force and violence to do corporal hurt to another." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). A battery is the consummation of an assault. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). Assault and battery is a specific intent crime. "There must be either an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery." *People v Datema*, 448 Mich 585, 602; 533 NW2d 272 (1995); *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). See also *People v Lardie*, 452 Mich 231, 264 n 55; 551 NW2d 656 (1996) (when the defendant is charged with simple assault, "the jury should be instructed that there must be either an intent to injure or an intent to put the victim in reasonable fear of apprehension of an immediate battery").

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No criminal proceedings came out of this incident. Mr. Adams did not press charges against Judge Bradfield. *Tr, 50.* The basis of the Master's assault and battery finding, which the Commission accepted without addressing Judge Bradfield's objections to this finding (see Argument III) was Mr. Adams' testimony that Judge Bradfield poked Mr. Adams in the chest. Judge Bradfield acknowledged that he touched Mr. Adams, but explained that the contact was unintentional. Officer Gray testified that Judge Bradfield touched Mr. Adams' chest as part of the conversation Judge Bradfield was having with Mr. Adams, stressing that Mr. Adams was not permitted to enter through the judges' door. *Tr, 173.*

Judge Bradfield's and Officer Gray's testimony negates any suggestion that Judge Bradfield had a specific intent to support a finding of an assault. Even Mr. Adams testified that the poking occurred as Judge Bradfield was informing him that he could not use the judges' entrance. *Tr, 34.* Mr. Adams never stated that he was worried about his safety or feared that Judge Bradfield would hurt him. Certainly Judge Bradfield did not intend to injure Mr. Adams or place him in fear of a battery.

The Master ignored the testimony of Judge Bradfield and Officer Gray that the contact with Mr. Adams was unintentional. The Master's finding of assault was seemingly based solely on the fact of the touching, without any finding of specific intent by Judge Bradfield. This finding was erroneous.

Brown factor (e) provides that misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated. The Commission determined that Judge Bradfield's conduct was deliberate, and commented that Judge Bradfield could have "cooled off" at various times during the incidents, and that he "displayed a willful readiness to escalate a confrontational situation." *Commission's Decision and Recommendation, p 15.*

With respect to the lack of forethought involved in Judge Bradfield's conduct and statements, the facts of this matter are similar to those in *Brown, supra*, in which this Court

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agreed with the Commission that the judge's remarks at the site of the accident were made spontaneously. Judge Bradfield's conduct at the 36th District Court, and his alleged conduct at the Gem Theatre parking structure, assuming it happened, was spontaneous. There was nothing premeditated about the encounter with Mr. Adams. Compare with *In re Chrzanowski*, 465 Mich 468, 477 (2001) (judge's appointments to an attorney with whom the judge had a sexual relationship were "deliberate", not "spontaneous", "because she had considered whether the appointments [ ] were improper and had reached the subjective conclusion that they were not.")

The Commission did not address *Brown* factors (f) and (g), and they are clearly not implicated here.

In order to determine the applicable sanction, it is necessary to consider the judge's behavior itself and put that behavior into context. These are really four distinct interactions with Mr. Adams. The first interaction between them occurred at Mr. Adams' car which was parked in the judges' area. Recall that the profane words were exchanged privately between Judge Bradfield and Mr. Adams when they were on the street.

When Mr. Adams attempted to enter the courthouse through the judges' door, legitimate security concerns (or at least perceived security concerns) prompted Judge Bradfield to approach Mr. Adams and direct him toward the public entrance. The "altercation" did not escalate until Mr. Adams attempted to enter the court building through the judges' door, still not having identified himself. Judge Bradfield did not use profanity when he insisted that Mr. Adams not use the court's private entrance.

Later in the vestibule inside the judges' door, Judge Adams is present and witnesses testified that she angrily confronted Judge Bradfield and was yelling at him. *Tr, 42, 116, 275-276.* Officer Syfax testified that Judge Bradfield "didn't seem like he was upset. He was just explaining to [Mr. Adams], listen, I didn't know who you were, all right?" *Tr, 237.*

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The fourth interaction occurred at the meeting in Chief Judge Atkins' chambers. Judge Bradfield described Judge Adams' demeanor as "still hot." *Tr, 280.* Judge Bradfield admitted having previously called Mr. Adams an expletive, but again emphasized that he did not know who Mr. Adams was and that he was merely responding in kind. *Tr, 135, 140-141.* Chief Judge Atkins had a similar recall about Judge Bradfield's and Judge Adams' mutually heated exchange during the in-chambers meeting. She remembered that Judge Adams was animated and was loud. *Tr, 200-201.* Judge Adams and Judge Bradfield were on opposite sides of the conference table, and both of them were pointing at each other, making their points. *Tr, 201.* Chief Judge Atkins testified that Judge Bradfield raised his voice in response to Judge Adams raising her voice, but that Judge Bradfield did not use profanity. *Tr, 191.*

Judge Bradfield acknowledges the impropriety of his words and his actions, but his conduct cannot be divorced from the security concerns that motivated his conduct.

This Court must be mindful of sanctions imposed for similar conduct:

> The most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently . . . it is the burden of the JTC to persuade this Court that it is responding to equivalent cases in an equivalent manner and to unequivalent cases in a proportionate manner. In other words, to demonstrate that there is a consistently enforced system of judicial discipline in Michigan." [*In re Brown*, 461 Mich 1291, 1292; 625 NW2d 744 (2000).]

In cases involving much more serious conduct than that alleged here, a public reprimand has been imposed. In *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). In *In Re Templin*, 432 Mich 1220; 436 NW2d 663 (1989), 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. See also, e.g., *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 Jelsema,* 463 Mich 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).

Earlier this month, this Court decided *In re Fortinberry*, ___ Mich ___ (Docket No. 128666, January 12, 2006). The judge wrote a letter to the Oakland County Deputy Sheriff's Association concerning the association's endorsement of a candidate for the 52nd District Court in the 2004 primary election, Kelley Kostin. Although Judge Fortinberry had no first-hand knowledge of the truth or falsity of the facts, she represented that Kelley had a sexual affair with Robert Kostin while he was married to another woman, that his wife found out about the affair, and that his wife was found dead shortly thereafter. Judge Fortinberry also stated that the circumstances of Mr. Kostin's wife's death "launch a police investigation, which was conducted 'quietly'" because the police chief was a neighbor of the Kostins. Judge Fortinberry stated that the investigation was inconclusive and the case was closed as a suicide, and that Kelley moved into Mr. Kostin's home less than a month after his wife's death. For publishing these unsubstantiated facts to influence the association's endorsement of a judicial candidate, this Court imposed a public censure.

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The Commission's recommendation appears to rest in large part on the fact that Judge Bradfield has been previously involved in disciplinary proceedings. But even in cases of repeated misconduct, much more egregious behavior on the part of judges has been met with far less sanction than a one-year suspension.

In *In re Brown, supra,* 464 Mich 135, involving the traffic accident between the judge and another driver, this Court suspended the judge for fifteen days without pay after finding that the judge misused the prestige of his office. This Court's opinion imposing the fifteen-day suspension expressly states that Judge Brown's conduct was "clearly prejudicial to the administration of justice" and Judge Brown had *four* previous instances of misconduct. *Id.* at 137. This Court imposed the recommended suspension of fifteen days.

The facts of *Brown, supra,* in which the judge used his title to curry favor with a police officer, are far more egregious than the present facts. Even acknowledging Judge Bradfield's prior contacts with the Commission, unlike *Brown, supra,* in the present case the Commission found that Judge Bradfield's conduct was not prejudicial to the actual administration of justice. Measured against Judge Brown's fifteen-day sanction, the recommended one-year suspension for the conduct alleged here is grossly disproportionate.

In *In re Moore*, 464 Mich 98, 132-133; 626 NW2d 374 (2001), the misconduct at issue occurred in eight criminal trials over three years. The judge engaged in a "pattern of persistent interference in and frequent interruption of the trial of cases; impatient, discourteous, critical, and sometimes severe attitudes toward jurors, witnesses, counsel, and others present in the courtroom; and use of a controversial tone and manner in addressing litigants, jurors, witnesses, and counsel." Judge Moore's misconduct occurred while on the bench, and this Court stated that the judge's previous disciplinary encounters with the Commission warranted a "significant sanction." But this Court rejected the Commission's recommendation of a nine-month suspension as too harsh in favor of a six-month suspension. *Id.* at 99.

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In *In re Hathaway*, 464 Mich 672 (2001), the judge's conduct in three separate cases was at issue, as well as her overall "lack of industry". In one case, the judge conducted an arraignment at a police precinct without a prosecutor present. *Id.* at 677. In another case, Judge Hathaway threatened to jail a criminal defendant if he did not waive his constitutional right to a jury trial. *Id.* at 678. In yet another case, the judge repeatedly adjourned proceedings without good cause and had "repeated unnecessary and unexcused absences from judicial responsibilities during normal court hours[.] *Id.* This court noted Judge Hathaway's "overall lack of industry and proper management of her court docket as well as an unwillingness to take corrective action or accept constructive suggestions or assistance to improve case management, constituted a hindrance to the administration of justice and gave the appearance of impropriety[.]" *Id.* at 681. This Court imposed a six-month suspension, identical to that imposed on Judge Moore for his similar pattern of misconduct from the bench. This Court addressed the proportionality of sanctions in the cases:

> Likewise, in *In re Moore*, 464 Mich 98; 626 NW2d 374 (2001), we ordered that Judge Moore be suspended for a period of six months without pay. We recognize that the *Brown* standards, as applied to the conduct of Judges Hathaway and Moore, support proportionate sanctions. A six-month suspension without pay is justified in *Moore* because of Judge Moore's pattern of misconduct extending over a period of twenty years. Though Judge Hathaway's misconduct occurred over a shorter period of time in comparison to that of Judge Moore, we believe a six-month suspension is justified because of the troubling nature of Judge Hathaway's conduct. Accordingly, the misconduct engaged in by both Judges Hathaway and Moore are equally deserving of a six-month sanction. [*Hathaway, supra*, 464 Mich at 692 n 15.]

In stark contrast to Judge Moore's and Judge Hathaway's misconduct *on the bench* and the number of litigants they offended, Judge Bradfield's misconduct involved an *off-the-bench*, one-on-one confrontation with a person who Judge Bradfield thought might be a threat to court security, a person who refused to identify himself, and tried to enter the court through a private, non-secure door. The conduct at issue here warrants a far less severe sanction than that

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imposed in *Moore, supra,* and *Hathaway, supra.* In light of the six-month suspensions given to Judges Moore and Hathaway for their repeated misconduct *from the bench*, a three-month suspension is an adequate sanction in this case. The sanction for the present conduct itself – without Judge Bradfield's prior contacts with the Commission – would be a public reprimand.

"[T]he purpose of judicial discipline is not to punish but to maintain the integrity of the judicial process." *Moore, supra,* 464 Mich at 119. The Commission's recommendation of a one-year suspension is unduly harsh. The incident with Mr. Adams was not unprovoked, and must be viewed in the context in which it occurred. Judge Bradfield has acknowledged that he acted inappropriately, but due consideration must be given to the concerns that motivated his conduct. Also, despite the ongoing security concerns and unauthorized parking problems, there has been no further incident involving Judge Bradfield since April 2005.

A 90-day suspension would be appropriate and adequate under the circumstances. It is a harsher sanction than those previously imposed on Judge Bradfield. As such, it would account for the fact that this is not Judge Bradfield's first experience with the Commission. Further, a 90-day suspension would be proportionate to sanctions imposed in other disciplinary proceedings involving repeat contacts with the Commission. Moreover, Judge Bradfield's agreement to resign if he ever "acts out" again is adequate assurance against this type of situation recurring.

ARGUMENT II

The recommended psychotherapy is beyond the authority of this Court to order, violates the physician-patient privilege, and is not warranted on these facts.

This Court's authority

The Commission recommends that this Court "require Respondent to complete intensive psychological treatment to control his anger by a health care professional of

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Respondent's choosing, contingent upon approval of Respondent's selected psychotherapist by the Commission." *Commission's Decision and Recommendation, p 17.* There is no authority for this Court to order Judge Bradfield into psychotherapy as a disciplinary measure.

This Court's authority to discipline judges derives from the Michigan Constitution. "The Michigan Constitution created the Judicial Tenure Commission and outlines the power of the Michigan Supreme Court to discipline judges." *In re Noecker*, 472 Mich 1, 14 (2005). Our Constitution provides:

> On recommendation of the judicial tenure commission, **the supreme court may censure, suspend with or without salary, retire or remove a judge** for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings. [Const 1963, art 6, § 30(2).]

See *In re Hathaway*, 464 Mich 672, 684 (2001) ("When this Court receives a disciplinary recommendation from the commission, it has authority to 'censure, suspend with or without pay, retire or remove' a judge."). The Constitution makes no provision for ordering psychological treatment as discipline.

Two cases in Michigan involve judges undergoing counseling or psychological treatment, one of which is a prior proceeding involving Judge Bradfield, and in both cases the judges reached an agreement with the Commission – they were not ordered into counseling.

The Commission erroneously states that in an earlier proceeding involving Judge Bradfield, this Court "ordered" him "to complete an anger management counseling program." *Commission Decision and Recommendation, pp 13-14.* This statement is not true. In *In re Bradfield*, this Court's order comprised only a public censure and a 30-day suspension, both of which are permissible discipline under the constitution:

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> For the reasons set forth in this order, we ORDER that the Honorable David M. Bradfield, Judge of the Thirty-Sixth District Court, be publicly censured. This order stands as our censure. We further ORDER that the Honorable David M. Bradfield, Judge of the Thirty-Sixth District Court, be suspended, without pay, from the performance of his judicial duties for a period of thirty days, effective the next business day following entry of the order. [*In re Bradfield, supra.*]

In that proceeding, Judge Bradfield voluntarily agreed to attend (and did attend) an anger management program. *In re Bradfield*, 465 Mich 1308; 638 NW2d 107 (2002). This Court considered Judge Bradfield's willingness to attend the program, which clearly informed this Court's decision:

> Applying those [*Brown*] criteria to the present case, **while mindful** of discipline imposed in *In re Bradfield*, 448 Mich 1229; 531 NW2d 711 (1995) and **of the *agreement between the Commission and the respondent*, we accept the recommendation of the Commission and order the following discipline**:
>
> We publicly censure the respondent judge and suspend him, without pay, from the performance of his judicial duties for a period of thirty days, effective the next business day following entry of the order.

Importantly, this Court did not order Judge Bradfield's participation in an anger management program. This Court went so far as to clarify that the anger management program, although part of the agreement between the judge and the Commission, was not a component of discipline:

> In addition, we observe that the recommendation of the Commission is premised in part on the respondent's agreement to take five additional steps, which have been agreed upon by the Commission and the respondent, as set forth below. **These are not encompassed within our order, *since they are not judicial discipline.***
>
> However, in accordance with rules governing judicial discipline, the Commission may recommend further discipline if the respondent fails to:
>
> 1. Undergo counseling and/or anger management and counseling as determined appropriate by a health care professional of Henry

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> Ford Hospital Fairlane, until he has completed the counseling program, in which case the health care professional will provide a letter to the Commission expressing his/her opinion that the respondent has successfully completed the counseling program. The counseling will occur on a schedule as determined appropriate by the health care professional, who shall provide the Commission with quarterly reports detailing the respondent's attendance at those sessions. The respondent will request the health care professional in writing to convey that information to the Commission and will provide the Commission with a copy of that request; . . .

The only other example of psychological counseling in a judicial discipline matter in Michigan is *In re Trudel*, 465 Mich 1313 (2002). Like Judge Bradfield in *In re Bradfield*, 465 Mich 1308, Judge Trudel "reached an agreement" with the Commission, by which the judge consented to the findings of fact, conclusions of law, and recommendations for discipline. The judge also consented to enter anger management counseling.

In *Trudel*, this Court adopted the agreed-to findings and legal conclusions, which included violations of Canons 1, 2A, and 2B of the Michigan Code of Judicial Conduct. The record contained evidence that the judge also engaged in sexual harassment of court employees and others, misused court time, personnel, facilities, and other resources, failed to treat employees fairly and with courtesy and respect, and failed to discharge administrative duties diligently and professionally, and exhibited hostile and aggressive conduct off the bench. As in *Bradfield, supra*, Judge Trudel's agreement to undergo counseling factored into, but was not part of, this Court's order:

> Applying those criteria to the present case, while mindful of the agreement between the Commission and the respondent, we accept the recommendation of the Commission and order the following discipline:
>
> We publicly censure the respondent judge and suspend him, without pay, from the performance of his judicial duties for a period of ninety days, effective the next business day following entry of the order.

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This Court again clarified that the judge's willingness to enter counseling was not part of the ordered discipline; it would merely be a basis on which the Commission may recommend further discipline if the judge failed to honor the agreement:

> In addition, we observe that the recommendation of the Commission is premised in part on the respondent's acceptance of five additional provisions, which have been agreed upon by the Commission and the respondent, as set forth below. These are not encompassed within our order, since they are not judicial discipline as described in Const 1963, art 6, § 30(2). However, in accordance with rules governing judicial discipline, the Commission may recommend further discipline if the respondent fails to comply with these terms:
>
> * * *
>
> Counseling and/or assistance with anger management, as determined appropriate by a mental health care professional of the respondent's choice, licensed as such by the State of Michigan, for the remainder of his term as judge, i.e., until December 31, 2004, or until he is released by the mental health care professional, in which case the mental health care professional will provide a letter to the Commission expressing his/her opinion that the respondent no longer needs treatment. By agreeing to the imposition of discipline pursuant to this Decision and Recommendation, the respondent also agrees that any such letter opining that the respondent no longer needs treatment shall be included in the public file in this matter. The therapy will occur on a schedule as determined appropriate by the health care professional, who shall provide the Commission with quarterly reports detailing the respondent's attendance at those sessions. The respondent will request the mental health care provider in writing to convey that information to the Commission and will provide the Commission with a copy of that request. . . .

Non-Michigan authorities likewise suggest that consideration may be given to a judge's willingness to undergo counseling or psychological treatment, but the courts do not order it. Significantly, such cases consistently report an agreement by the judge to participate in counseling. See *Inquiry Concerning a Judge*, 2006 Fla LEXIS 2 (Fla, 2006) ("Judge Woodard fully admitted engaging in this improper behavior, and *stipulated* to a sanction of a public reprimand and completion of "suitable anger management counseling."). In *Inquiry Concerning a Judge (Shapiro)*, 845 So2d 170 (Fla, 2003), a term of the judge's sanction was

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his "participation in psychological/behavioral therapy with an emphasis on sensitivity training[.]" In that matter, the Judicial Qualification Commission "considered in mitigation" the fact that the judge had "voluntarily undergone psychological evaluation and treatment and commits to continue such treatment[.]" *Id.* at 1. Similarly, in *In re Jett*, 180 Ariz 103, 109 (Ariz, 1994), the judge had already begun rehabilitative psychological counseling and expressed willingness to continue under conditions the Commission deemed appropriate; in that case, the misconduct was a result of the judge's "impaired state." See also *In re Robertson*, 120 P3d 792 (Kan, 2005), in which the panel received *by stipulation* a psychologist's and a social worker's evaluations of the judge and where the judge participated in ongoing treatment for depression.

Webster's defines "psychotherapy" as the "treatment of mental or emotional disorder or of related bodily ills by psychological means." *Webster's Universal Encyclopedic Dictionary, p 1479.* The Commission purports to diagnose Judge Bradfield as needing psychotherapy on a record devoid of expert testimony, even if the Commission were qualified (it is not) to make such a diagnosis. The Commission further recommends not only that it be empowered to approve Judge Bradfield's choice of a psychotherapist, but also that it oversee Judge Bradfield's psychotherapy through reports from the doctor. The JTC has greatly overstepped its bounds in making this recommendation. Compare with *In re Conduct of Ginsberg*, 690 NW2d 539, 544 (Minn, 2004), in which a judge agreed to submit to a psychiatric interview, and the judge's "proven mental disorders" warranted removal from the bench. Unlike the present matter, in *Ginsberg*, the record contained expert testimony from a psychiatrist and a psychologist who administered tests as part of an independent medical examination, and testimony from the judge's primary treating psychiatrist as well as the psychologist who provides the judge with psychotherapy treatment. *Id.* at 54, n 4.

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Privacy concerns

The Commission's recommended sanction infringes on Judge Bradfield's privacy rights. The Commission would have this Court order Judge Bradfield to attend counseling and that the Commission be regularly apprised of Judge Bradfield's progress.

"[T]he purpose of the physician-patient privilege is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make a full disclose of symptoms and condition." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26 (1999). "The privilege of confidentiality belongs to the patient; it can be waived only by the patient." *Id.*

The Health Insurance Portability and Accountability Act (HIPPA), 42 USC 1320d, *et seq.*, charges the secretary of Health and Human Services with promulgating rules and regulations for the safeguarding of health information. *Bayne v Provost*, 359 F Supp 2d 234, 236 (NY 2005); 42 USC 1320d-2. "Under the HIPPA Privacy Rule, which generally pre-empts state law that is not itself more stringent in the protection of health information, an 'authorization' is required for the disclosure of 'protected health information' before a 'covered entity' may make disclosure." *People v Bercume*, 2004 NY Slip Op 24437, 3-4 (2004). "Health Information" is defined as:

> **any information**, whether oral or recorded in any form or medium, that - (A) is **created or received by a health care provider**, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; **and** (B) **relates to the past, present, or future** physical or mental health or condition of an individual, **the provision of health care to an individual**, or the past, present, or future payment for the provision of health care to an individual. [42 USC 1320d(4).]

The Commission's request for "quarterly reports detailing Respondent's attendance at those sessions" clearly falls within the definition of health information subject to protection under HIPPA. *Commission's Decision and Recommendation, p 17.*

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Practical concerns

The Commission's desire to negotiate a resolution to judicial disciplinary matters with the judge is laudable. The Commission should be encouraged to work with judges toward a mutually agreed resolution. In the previous maters of *Bradfield, supra*, and *Trudel, supra*, the Commission reached agreements with the judges that included anger management counseling as a premise for the recommended sanction, and the agreements were considered by this Court in sanctioning the judges. But in the instant matter, the Commission's unilateral recommendation, made without agreement from Judge Bradfield, creates an unworkable situation.

The Commission asks this Court to require that Judge Bradfield's choice of doctor be approved by the Commission. What if the Commission does not approve of Judge Bradfield's choice of psychotherapist? What criteria will the Commission use to determine the acceptability of his choice? What is the purpose of requiring the doctor to submit quarterly reports to the Commission *detailing* Judge Bradfield's attendance? Toward what end? And what if the Commission does not approve of the reports that it receives?

Judge Bradfield understands that he must ensure that he not allow a like incident to occur. He knows the consequences if he does not – he agreed to resign if he acts out again. It is not proper, or necessary, for the Commission or the Court to determine that there is a need for Judge Bradfield to enter psychotherapy treatment, over which the Commission will have indefinite oversight.

ARGUMENT III

The Commission accepted the Master's findings without comment about Judge Bradfield's objections to those findings.

Judge Bradfield submitted objections to the Masters' findings on several bases. The Commission accepted the Master's findings without addressing the objections.

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The emails between members of the bench were relevant to show the security concerns that motivated Judge Bradfield and the context in which he acted.

Judge Bradfield argued that the Master abused his discretion in excluding evidence of emails between members of the bench regarding security concerns, and testimony from Viola Coleman regarding Judge Bradfield's prior conduct in the parking area toward unauthorized parkers. The incident involving Mr. Adams was preceded by a series of emails between judges of the 36th District Court regarding security at the court, and specifically, the judges' entrance. At the hearing, Judge Bradfield tried to introduce two of these emails. One was from Judge Patricia Jefferson to members of the bench concerning physical security. *Tr, 92.* The email also included Judge David Robinson's reply. *Tr, 93.* The concern was prompted by recent murders of a judge and judge's family that had occurred in Atlanta and Chicago. *Tr, 256-257.* The second proposed email exhibit was the March 17, 2005 email from Chief Judge Atkins to members of the bench about court security. *Tr, 94.* The Examiner objected to the admission of the emails on relevancy grounds, and the Master sustained the objection. *Tr, 97.*

The emails addressing security concerns were relevant to providing a context in which to evaluate Judge Bradfield's conduct. Judge Bradfield had had several discussions with Judge Atkins and other judges about problems with the judges' door and parking, and he shared their concerns about security. *Tr, 257-258.* Judge Bradfield testified:

> Well, we're concerned with people coming out that [judges'] door, not having the authority to be in that elevator to go up the door – through the door up into the areas, that would be open to an individual trying to get in there to possibly rob the cashier, which has open access on the second floor directly. . . [*Tr, 258.*]

The evidence of the ongoing security concerns was relevant to assessing Judge Bradfield's conduct. The Master chose to disregard Judge Bradfield's testimony and instead

found that Judge Bradfield was motivated entirely by irrational anger. The Master labeled him an "officious intermeddler," as if Judge Bradfield's concern about persons entering the courthouse through a non-secure area was unreasonable. The emails between the judges corroborated Judge Bradfield's testimony that security was a major concern at the court. Judge Bradfield's conduct did not happen in a vacuum, and it cannot be examined as if it did.

The Master also chose to disregard Judge Bradfield's testimony that Mr. Adams' failure to identify himself contributed to the altercation. The security concerns that prompted Judge Bradfield to approach this unknown person were only heightened when Mr. Adams failed to identify himself, and then attempted to enter the building through the judges' door. Judge Bradfield had no way of knowing whether Mr. Adams was entitled to park on the street or use the judges' entrances Without knowing who Mr. Adams was, Judge Bradfield could easily assume that Mr. Adams had no business utilizing parking reserved for the court or using the judges' entrance. The Master found that Judge Bradfield's anger was "irrational." The judges' emails to the bench stressing the importance of observing security procedures made Judge Bradfield's explanation of the incident more likely and his anger understandable. The emails were relevant and should have been admitted.

The testimony of Viola Coleman was relevant to establishing Judge Bradfield's manner of dealing with unauthorized parkers, and also to refute the instances of prior conduct that the Examiner injected into the proceedings.

Judge Bradfield sought to introduce the testimony of Wackenhut Security person Viola Coleman. Ms. Coleman was stationed at the judges' door, and she often observed Judge Bradfield interacting with persons who had parked in the restricted area outside the courthouse. Ms. Coleman heard Judge Bradfield inform persons that they were not permitted to park on the street in the area reserved for judges. *Tr, 250.* She testified that Judge Bradfield was never rude, and never spoke in an offensive manner. *Tr, 250.* The Examiner objected to the

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admission of Ms. Coleman's testimony on relevancy grounds. *Tr, 248.* Despite the fact that the Master had already heard testimony from several witnesses about Judge Bradfield's character and his prior conduct, and the fact that Ms. Coleman's testimony would tend to contradict Mr. Adams' statement that Judge Bradfield was rude, the Master excluded the testimony as not relevant. *Tr, 248-249.*

In a separate record, Ms. Coleman testified as follows:

> *Q.* *[by Mr. Einhorn]* Ms. Coleman, you have observed Judge Bradfield talking to people who are parked outside the court?
> *A.* Yes.
> *Q.* Have you ever heard him come up to somebody and say, move your car, MF?
> *A.* No.
> *Q.* Okay. Tell the Court what it is that you observed and heard him do.
> *A.* Well, basically, you know, he may tell the person, say if he drives up and that person is sitting in the vehicle and there's no place to park, he'll just ask them to move the vehicle or say you can't park here, something to that effect.
> *Q.* I mean have you – have you – when he tells somebody you can't park here, does he raise his voice? Does he say it in an authoritative manner? How does he go about doing that?
> *A.* Maybe in an authoritative manner, but not in a rude way, no.
> *Q.* In your – in your dealings with Judge Bradfield – and – how many times did you observe him or listen to him comment to people or talk to people who were parked out there?
> *A.* Observe or listen? Because sometimes it's across the street.
> *Q.* Sure.
> *A.* But I can't hear.
> *Q.* Let's talk about listen.
> *A.* Okay. I can't count the times. You know, I was like over there for six, six and a half years. I have no way of putting number to that, so . . .
> *Q.* But it was certainly more than one and more than ten.
> *A.* Oh, yes.
> *Q.* All right. And on any of those occasions, did you ever hear him when he approached somebody approach them in an offensive manner?
> *A.* No. [*Tr, pp 250-251.*]

Judge Bradfield was entitled to have the Master consider Ms. Coleman's testimony, and the exclusion of this evidence severely prejudiced Judge Bradfield's ability to defend against

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the allegations. During the Examiner's closing argument, he referred repeatedly to Judge Bradfield's prior conduct regarding the parking situation outside the court and Judge Bradfield's concern about security. The Examiner made the following derogatory comment about Judge Bradfield's prior conduct: "[T]here is some issue that the judge has with regard to parking that he sees – takes it upon himself to run around for ten years telling people where they can and cannot park." *Tr, 315.* The Examiner repeated his comment in his reply argument, stating again that Judge Bradfield: "spent ten years running around checking where people were parking." *Tr, 322.* The Examiner's derogatory comments were not only unsupported, but they would have been contradicted by the excluded testimony of Ms. Coleman.

Counsel for Judge Bradfield raised the unfairness of precluding evidence of Judge Bradfield's prior conduct yet allowing the Examiner to argue it. Although the Master sustained the objection, the prejudicial effect of the Examiner's repeated argument about Judge Bradfield's prior conduct is apparent from the Master's findings. Indeed, the Master was improperly influenced at the beginning of these proceedings by the Examiner's hearing memorandum that served no purpose other than to expose the fact finder to instances of prior conduct.

The exclusion of evidence in support of Judge Bradfield's version of events and the Examiner's Hearing Memorandum unfairly influenced the Master's findings. The Master's finding that Judge Bradfield was an "officious intermeddler" shows animus for Judge Bradfield. This finding is an attack against Judge Bradfield's character, not a comment on his conduct. The Master's task is to make findings of fact regarding the alleged conduct as set forth in the complaint. MCR 9.214. Unfounded, stray remarks about Judge Bradfield's personality are improper. The Commission accepted the Master's findings in their entirely without comment on Judge Bradfield's objections.

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The Master's findings that Judge Bradfield continually exhibited bad behavior and displayed anger throughout the incident and the meeting with Judge Atkins is contrary to the evidence. The Master found that in the vestibule, Judge Bradfield was using "vulgar epithets" and "challeng[ing]" Mr. Adams. *Master's Findings of Fact and Conclusions of Law, p 31.* But the Master ignored the testimony of Officer Syfax who testified that at that point, Judge Bradfield "didn't seem like he was upset. He was just explaining to [Mr. Adams], listen, I didn't know who you were, all right?" *Tr, 237.* The Master also found that "Judge Bradfield's irrational anger continued when he was summoned to Judge Atkins' chambers[.]" *Master's Findings of Fact and Conclusions of Law, p 31.* But the Master chose to ignore the testimony of Chief Judge Atkins and DiAnn Webb. To the contrary, Judge Atkins testified that Judge Bradfield raised his voice *in response to* Judge Adams' raised voice.

The Master chose to ignore Judge Bradfield's testimony that although he swore at Mr. Adams, Judge Bradfield was merely responding in kind. *Tr, 135, 140-141.* Judge Bradfield admitted that his language was inappropriate and unjustified, but it was provoked by Mr. Adams' foul language toward him. *Tr, 204, 284.* An observer can easily think that the Master was predisposed to disbelieve Judge Bradfield.

The Master erred in concluding that Judge Bradfield committed criminal assault.

The basis of the Master's assault and battery finding was Mr. Adams' testimony that Judge Bradfield poked Mr. Adams in the chest. Judge Bradfield acknowledged that he touched Mr. Adams, but explained that the contact was unintentional. Officer Gray testified that Judge Bradfield touched Mr. Adams' chest as part of the conversation Judge Bradfield was having with Mr. Adams, stressing that Mr. Adams was not permitted to enter through the judges' door:

> *Q. [by Mr. Einhorn]* Did it appear to you to be part of the conversation of the confrontation that Judge Bradfield was having? In other words, you can't go there and –
> *A.* Yes.

Q. – pressing his finger?
A. It was like that.
Q. Pardon me?
A. Yes.
Q. It was sort of like an explanation point for what he was – the point he was trying to make?
A. Yes. [*Tr, 173.*]

Judge Bradfield's and Officer Gray's testimony negates any suggestion that Judge Bradfield had a specific intent to support a finding of an assault. Even Mr. Adams testified that the poking occurred as Judge Bradfield was informing him that he could not use the judges' entrance. *Tr, 34.* Mr. Adams never stated that he was worried about his safety or feared that Judge Bradfield would hurt him. Judge Bradfield did not intend to injure Mr. Adams or place him in fear of a battery.

The Master ignored the testimony of Judge Bradfield and Officer Gray that the contact with Mr. Adams was unintentional. The Master's finding of assault was seemingly based solely on the fact of the touching, without any finding of specific intent by Judge Bradfield. This finding was erroneous.

Judge Bradfield should not have been forced to defend against charges that allegedly occurred years ago and were never pursued or brought to his attention at that time.

The incident giving rise to the charge against Judge Bradfield concerning the Gem Theatre parking structure allegedly occurred three years ago, in October 2002. Although there is no statute of limitations applicable in this matter, the policy reasons for statutes of limitation are implicated. Statutes of limitation are intended to "compel the exercise of a right of actions within a reasonable time *so that the opposing party has a fair opportunity to defend*" and relieve the court system from stale claims "where *the facts in dispute occurred so long ago that evidence was either forgotten* or manufactured." *Chase v Sabin*, 445 Mich 190, 199; 516 NW2d 60 (1994); *Shields v Shell Oil Co*, 237 Mich App 682, 690; 604 NW2d 719 (1999).

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Judge Bradfield was denied a fair opportunity to defend against these charges and the facts occurred so long ago that evidence was either forgotten or manufactured. Judge Bradfield first became aware of the complaint about the alleged incident at the Gem Theatre parking structure when he received the Judicial Tenure Commission notification in April 2005 – two and a half years after the alleged incident. Judge Bradfield has no recollection of it having occurred. *Tr, 288-289.*

Mr. Lee had difficulty testifying because of the long lapse in time since the incident. He explained more than once, "This has been a long time. I didn't know this incident was going to come back." *Tr, 209-210, 218.* Notably, Mr. Lee testified that he had no further conversations with Judge Bradfield after this incident, yet he somehow knew that Judge Bradfield was subsequently driving a different car because he had had an accident. When asked on cross-examination how he could know this, Mr. Lee had no answer.

It is unfair to require Judge Bradfield to defend himself against charges of an incident that was clearly so insignificant that it prompted no charges or further discussion at the time. Mr. Davis never told anybody about the incident, nor did he follow up in any way. *Tr, 226.* Mr. Lee testified that he never talked to Judge Bradfield about the alleged incident. *Tr, 220.* Yet the Examiner faulted Judge Bradfield for not being able to definitively state that it was not he who was involved in the incident. The Examiner argued that Judge Bradfield "*still* cannot say it was not he who drove in the Gem parking lot[.]" *Tr, 316.* The Examiner's use of the word "still" falsely implies that Judge Bradfield had been asked about the alleged incident previously, or that he is expected to suddenly remember if given enough time. The fact is that Judge Bradfield did not recall any such incident. He is asked to defend against something that happened years ago, an incident so minor that no one even complained to him about it. Indeed, the Examiner conceded in closing argument that "if the Gem Theatre incident were the only incident, we wouldn't be before you." *Tr, 322.*

Mr. Lee testified that the man who demanded to park in the structure identified himself as a judge and drove a Corvette. Mr. Lee conveyed the information to Mr. Davis, the court administrator. Aside from the lack of evidence that the man was in fact a judge, Mr. Davis merely assumed that the man was Judge Bradfield because Mr. Davis knew Judge Bradfield to drive a Corvette. Mr. Davis testified that that was his only basis for connecting these two dots. This despite his awareness that other judges also drove Corvettes.

Even if the Commission accepts the Master's finding that Judge Bradfield was involved in the incident, the lapse of time between the alleged incident and the filing of the formal complaint makes it unfair to require Judge Bradfield to defend against the charges. The passage of time has severely compromised Judge Bradfield's ability to discover whether other persons may have witnessed the alleged exchange between Mr. Lee and Judge Bradfield. This count should be dismissed.

RELIEF REQUESTED

Respondent, 36th District Court Judge David M. Bradfield, asks this Court to reject the Judicial Tenure Commission's Decision and Recommendation. Respondent asks the Court to impose a fair and proportionate sanction.

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Honorable David M. Bradfield

Dated: January 19, 2006

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