STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

Complaint against
Hon. Byron J. Konschuh
40th Circuit Court
255 Clay Street
Lapeer, Michigan 48446

Docket No. 159088
Formal Complaint No. 100

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Hon. Byron J. Konschuh's Response to Disciplinary Counsel's Objections to Master's Report

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I. INTRODUCTION

This case is rooted in political disputes in Lapeer County that are well over a decade old. Before his appointment to the bench, Judge Byron Konschuh was the Lapeer County prosecutor. He understood that certain funds belonged to the prosecutor's office. Although his predecessor as prosecutor kept those funds for himself, Konschuh used those funds to benefit his staff. He bought them lunches, refreshments, and other benefits. Some, like county controller John Biscoe, believed that the funds at issue belonged to the county board rather than the prosecutor's office. But even Biscoe acknowledged that this issue was a difficult and "fuzzy" one.

After Konschuh's appointment to the bench, one of his political rivals raised a concern about his handling of this "fuzzy" issue. The Attorney General appointed a special prosecutor, who charged Konschuh with felonies related to his use of these funds. Konschuh maintained his innocence, and still does. But he worked out a plea agreement in which the court eventually dismissed *all* of the charges against him. He would have preferred to try the case and vindicate himself, but that agreement was the fast route to getting back on the bench and serving the people of Lapeer County.

Now, disciplinary counsel is trying to turn this difference of opinion about a "fuzzy" legal issue from many years ago into career-ending discipline. Most of the Amended Formal Complaint re-litigates Konschuh's criminal case and his use of funds from the prosecutor's office. The complaint also addresses Konschuh's conversation with Bonnie and Samuel Oyster and his recusal practices. The remainder of the complaint largely concerns supposed misrepresentations that

Konschuh made when the Michigan State Police and disciplinary counsel investigated his use of funds.

The master, Judge William Caprathe, concluded that disciplinary counsel failed to prove all but one count of their allegations against Konschuh. He found that disciplinary counsel did not prove by a preponderance of the evidence that Konschuh knowingly misused funds, behaved improperly in his conversation with the Oysters, or made intentional misrepresentations. Konschuh's only mistake, the master held, was failing to adequately address conflicts in non-substantive matters involving Mike Sharkey (Konschuh's former lawyer), Tim Turkelson (a political adversary), and David Richardson (Konschuh's friend). Konschuh accepts the master's conclusions and will disclose his potential conflicts in future cases.

As one might expect, disciplinary counsel disagree with the master's conclusions. What one might not expect, however, is the degree to which disciplinary counsel's arguments depend on personal attacks against the master. They accuse the master of writing a "misleading[ ]" report, of accepting Konschuh's arguments "with no analysis[,]" and of being "uncritical." (*Disciplinary Counsel's Objections to Master's Report* ("Objections") at 2, 30, 47). They assert that the master "ignored" evidence and "relied on implausible evidence and inferences[.]" *Id.* at 6. See also *id.* at 55 (accusing the master of "mischaracterizing and excluding important facts"). They even call the master's reasoning "ridiculous[.]" *Id.* at 9. And they take the same approach to Konschuh's arguments. (Objections at 33 n 27) (accusing Konschuh of "slipperiness"); *id.* at 34 (calling Konschuh's view "preposterous").

That, apparently, is disciplinary counsel's view: every perspective that differs from their own must be the product of maliciousness or dishonesty or both. But reasonable minds can disagree, laws can be complicated, and honest people can make mistakes. Our entire justice system depends on these principles; that's why we have an adversarial system for determining the truth, why we have multiple levels of judicial review, and why judges at the highest courts will dissent from their colleagues. Yet, throughout these proceedings, disciplinary counsel portrayed everyone who disagrees with their views as dishonest—first Konschuh, then his witnesses, and now the master.

In fact, the master rejected almost all of disciplinary counsel's theories because he properly applied the law—including the rule that disciplinary counsel must prove "wrongful intent" behind apparent misstatements. *In re Gorcyca,* 500 Mich 588, 639; 902 NW2d 828 (2017). He correctly held that disciplinary counsel failed to prove the majority of their claims by a preponderance of the evidence. The Commission should affirm the master's conclusions and recommend discipline that fits the only misconduct that the master found: Konschuh's failure to adequately address conflicts in all cases. The appropriate discipline is censure.

II. FACTS AND PROCEDURAL HISTORY

A. As prosecutor, Konschuh often bought refreshments for the office.

Konschuh joined the Lapeer Prosecutor's Office as an assistant prosecuting attorney in 1988. (77). He became Lapeer County's prosecutor in 2000. (78). After he served as prosecutor for thirteen years, Konschuh was appointed to the bench. (76, 79). He now sits on Michigan's 40th Circuit Court in Lapeer County. (*Id.*) As for his

legal assistants, Cathy Strong was Konschuh's office manager until 2010. (254). She was familiar with how other prosecutors ran the office, having served 7 prosecutors during her 40 years of service to Lapeer County. (2291). Leigh Hauxwell became Konschuh's office manager after Strong retired. (*Id.*) The office had around 15 people on staff. (3291).

Konschuh had a practice of buying refreshments for his office. He regularly spent his own money to buy snacks, meals, and coffee for his staff. (277). These refreshments benefitted his staff and others involved with the prosecutor's office. He kept receipts but didn't create a formal accounting. (262, 277).

For example, Konschuh took members of his staff to a local restaurant on various occasions. (522-24). He bought cookies for the office, and ice and refreshments for office events. (524, 529-30). He bought drinks and appetizers at post-trial celebrations. (699-70; 3087). Strong recalled Konschuh buying lunches and snacks for crime victims who were working with the prosecutor's office. (2321-2322). Konschuh's wife, Lorraine Konschuh, corroborated Konschuh's testimony about buying coffee for the office. (2280). And Strong testified that she gave Lorraine Konschuh coupons to use for coffee purchases. (2307-8).

Konschuh also purchased appliances for the office, such as a dishwasher (2304) and a coffeemaker (3062-63). He bought another coffeemaker in 2011 and received $26.37 as reimbursement. (375). Controller John Biscoe approved the second coffeemaker. (1018-19). He testified that it was appropriate for the prosecutor's office

to provide refreshments for crime victims. (*Id.)* He added that this public purpose would remain intact even if employees used the machine. (*Id.* at 1021).

Others within the prosecutor's office would contribute toward coffee and water. But those contributions were irregular and a source of controversy in the office. (2304). Strong testified, "To the best of my recollection, I think that people were complaining because they didn't feel they should have to give money to pay for the coffee and the water and were upset about it, and some people were paying and some weren't. And the ones that weren't paying were using the coffee and the water, so it was just a mess." (2304).

Konschuh's expenditures for the prosecutor's office exceeded $7,700, as Judge Neithercut concluded. (714; 3318). Konschuh estimated that he paid over $16,000 in office-related expenses, although he lacks receipts for some of these expenses. (3318-19). Konschuh's $16,000 estimate includes close to $1,800 that he spent on water. (709; 3102). He either spent office funds directly or reimbursed himself with BounceBack funds (discussed below). (717).

B. The prosecutor's office used Transmodus to collect on bad checks.

The first source of funds at issue in disciplinary counsel's complaint is Transmodus. In 2008, while acting as prosecutor, Konschuh contracted with Transmodus to collect from individuals who passed bad checks. (157-58). He hoped that Transmodus could minimize the drain on the prosecutor's resources from pursuing bad-check cases. (164-65). Transmodus charged a $35 collection fee for each check. (163). The Transmodus contract was not with the county. (3124).

Through this program, the prosecutor's office obtained a money order from Sherri O'Henley for $60.28, consisting of $25.28 for the underlying check and a $35 fee. (181-82, Exhibit 6e). The money order was payable to Byron J. Konschuh. (*Id.*) It sat on the desk of then Chief Assistant Prosecuting Attorney Michael Hodges for several months. (1689-91). Konschuh understood that he could not sign the money order over the county. (188-89; 2986). So, in May 2009, Konschuh decided to cash the money order and give the money to the appropriate parties. (2986). Having cashed the money order into his own account, Konschuh gave cash to Patricia Redlin to forward to the county. (191; Exhibit 6h). The county distributed that amount to the victim of the bad check at issue. (192; Exhibit 6i).

Konschuh recalled giving the full amount—$60.28—to Redlin. (195). He did not take the missing $15 and does not know what happened to it. (2987). Redlin doesn't know either. (2074).

C. The prosecutor's office switched from Transmodus to BounceBack.

The prosecutor's office felt that there were problems with Transmodus. So it looked for a new bad-check-collections company. (161). In 2008, Konschuh entered into an agreement with BounceBack, Inc. that was similar to the agreement with Transmodus. (220). BounceBack is a popular program with prosecutors in Michigan and other states. (1757).

Before entering into this agreement, Konschuh spoke to Norm Early, a Colorado district attorney who used BounceBack. (702; 1681-83; 1756-57). Early told Konschuh that he used BounceBack funds for his office's benefit. (*Id.*) Konschuh recalled speaking to other prosecutors about the BounceBack program but could not

remember their names. (703). These discussions took place at conferences between 2005 and 2008. (704). Mike Hodges corroborated Konschuh's testimony. (1681-83).

BounceBack and the prosecutor's office entered into agreements in October 2008, December 2008, and January 2009. (221). These contracts were with the prosecutor's office, not with Lapeer County. (226). Biscoe confirmed that the BounceBack contracts were with the prosecutor's office—though, "in [his] opinion," they should have been with the county. (1112-13). Konschuh believed that the funds generated under the contract were his to use for the benefit of his office. (3245).

At some point, Lapeer County had a policy requiring county departments and county elected officials to submit contracts to the county board of commissioners for review. (167). But Konschuh did not receive a book of county policies when he joined the prosecutor's office. (209; 2984). Strong confirmed that the office did not receive a binder. (2296). The policies were available only via computer:

> Q. … Are you familiar [with] any binders of policies in the county, while you were serving as the office manager, being kept in the office?
>
> A. No, sir.
>
> Q. If somebody wanted to know a policy of the county, who would they go to in the office?
>
> A. Well, they would normally come to me. There was a J drive we also had that was somewhat a facilitation that you could go to. And also if I didn't know, we would check with administration. [2296]

Its proofs leave considerable doubt about whether that the contracts policy was even in effect in 2008. Biscoe testified that he did not believe the policy existed in written form in 2008, when Konschuh entered into the BounceBack agreement. (982-

83). The contracts policy was uploaded to the county server in 2009, after the BounceBack agreement. (*Id.* at 983).

Biscoe also testified that a "Request for New Accounts" form (Exhibit 5C) was in effect when Konschuh was a prosecutor. (900). That form does not address whether the BounceBack funds were county funds. (Exhibit 5C). He testified that a deposit advice form (Exhibit 5B) was in effect "at least for part of the time … that Konschuh was the prosecuting attorney for Lapeer County." (903). But this blank form does not address Konschuh's obligations concerning BounceBack funds. Similarly, neither the county's cash receipts policy (Exhibit 5K) nor its claims-processing procedure (Exhibit 5M) identifies which funds belonged to the county and which did not. (902). So the contract-approval policy was not in effect when Konschuh implemented the BounceBack program and none of the other policies specified who owned the BounceBack funds. (982-83).

The BounceBack program was public knowledge. Merchants had to sign up with BounceBack for restitution services. (2989-90). So Konschuh's office sent a notice to Lapeer County merchants to notify them about the new program. (240). The program also received publicity in a local newspaper. (241). Given this degree of publicity, Konschuh believed that the Board of Commissioners knew about the BounceBack program. (238).

Offenders paid a $40 processing fee per check, a $25 payment plan fee, a $25 victim fee, and a $95 educational fee. (227). The prosecutor's office received $5 from

each processing fee paid. (228). BounceBack sent checks payable to the prosecutor's office. (229).

Konschuh treated the checks from BounceBack as reimbursements for expenses he already incurred for the prosecutor's office. (273; 2981). Accordingly, he deposited them into his own accounts. (*Id.*) He also used one check to fund a post-work celebration for his staff at Abruzzo's restaurant. (266). He received around 40 checks, totaling just over a thousand dollars over five years. (248).

Konschuh did not view these funds as county monies subject to MCL 129.11. (250; 2959, 2989). And he was not alone. His chief assistant prosecuting attorney, Mike Hodges, testified that he couldn't recall thinking that the county commissioners had to review and approve the contract. (1743).

District Court Judge Dignan disagreed with Konschuh's position and concluded that the definition of "public money" was irrelevant to whether Konschuh was guilty of embezzlement under MCL 750.175 (Exhibit 1d). On review, Judge Neithercut ruled that the definition of "public money" was a question for the jury and that it was "not a legal term relevant to the statute with which Defendant is charged." (Exhibit 1z, page 4). But Konschuh's case did not reach a jury, and neither of Michigan's appellate courts has ruled on whether the funds at issue were public money. (2960; Exhibit 4a; Exhibit 4b; Exhibit 4d). Because these appellate courts denied leave, they did not rule on the merits. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 313 n 3; 901 NW2d 577 (2017) ("[D]enials of leave to appeal do not establish a precedent."). (Disregarding this well-established rule of Michigan law,

disciplinary counsel argued below that Konschuh "lost" in the Court of Appeals and the Michigan Supreme Court "because they refused to address the issue." (3417)).

D. The prosecutor's office received fees from the City of Lapeer.

The Amended Formal Complaint also addresses Konschuh's handling of funds from the City of Lapeer. From the early 1990s until 2008, attorneys from the Lapeer County Prosecutor's Office would assist the City of Lapeer with matters in the district court. (331). City attorneys Ron Shamblin or Bruce Lawrence delivered checks for these services to the prosecutor's office. (337). Konschuh estimated that his office received between $300 and $500 per year for this work while he was the prosecutor. (337). He also appeared at pretrials on behalf of the City of Lapeer. (3097).

Mike Hodges confirmed that Konschuh personally covered cases for the City of Lapeer. (1736) ("Konschuh did numerous Lapeer City pretrials."). Tom Sparrow confirmed Konschuh's work as a prosecutor as well. (2173) ("…Byron Konschuh would routinely come down and do pretrials."). Konschuh deposited these checks into his checking account as reimbursement for expenses he incurred to benefit the prosecutor's office. (338-339). He understood that his predecessor, Justus Scott, did the same thing. (338; 351). Unlike Scott, however, Konschuh shared these funds with the prosecutor's office. (338).

E. The prosecutor's office established a budget line item corresponding to the Corelogic settlement fund.

In 2011 and 2012, the prosecutor's office represented the Lapeer County treasurer in litigation with a company called Corelogic. (413). Steve Beatty, an assistant prosecuting attorney, handled the file. (*Id.*) The Corelogic litigation resulted

in a settlement. (414). Corelogic issued two checks. (414). One check, issued to "Lapeer, County of," was for $100,000. (*Id.* at 416; Exhibit 93A). Steve Beatty added "Treasurer" to this check. (2595). Corelogic issued a second check to "Lapeer, County of" for $5,000. (416, 419; Exhibit 93E). Beatty added "prosecutor" to that check. (2596). Beatty did not tell Konschuh that he was altering these checks. (2666). He made these alterations based on his discussions with county treasurer Dana Miller. (2596-2598). The $5,000 check represented fees for Beatty's legal services. (419). The prosecutor's office forwarded both checks to the county. (420, 423).

Beatty discussed how to use the $5,000 with John Biscoe, the Lapeer County controller. (424-25; 470). Konschuh was not involved in this discussion with Biscoe. (471). Although Biscoe believes that Konschuh was at his meeting with Beatty (964), Beatty confirmed that Biscoe and Beatty were the only ones present. (2668, 2684).

After talking to Biscoe, Beatty told Konschuh that he could use the $5,000 fund for the benefit of the prosecutor's office. (474-75). Konschuh understood that the $5,000 fund would become a special line item for discretionary use in the prosecutor's office budget. (423-25). Biscoe later testified that he believed the $5,000 fund was public but he stressed that was just "in [his] opinion." (975).

F. The prosecutor's office provided trainings and updates for the Corrections Academy and local police.

In addition to the BounceBack and City of Lapeer funds, the prosecutor's office received compensation for training sessions. The prosecutor's office conducted training sessions for the Law Enforcement Officers Regional Training Commission

(the "Corrections Academy"). (286). The Corrections Academy did not pay the prosecutor's office for its training sessions until 2011. (508-09).

The prosecutor's office also conducted training sessions for local law enforcement. (1318). It received payment for these training sessions, both while Konschuh was prosecutor and while his predecessor, now-Judge Justus Scott, was prosecutor. (*Id.*) Scott kept all of the fees earned through these training sessions—in contrast with Konschuh, who used the fees to benefit the prosecutor's office. (3304).

Although he was present through each session, Konschuh did not train the entire time. (739). When he was not training, Konschuh would attend each session so he could answer questions and know what his staff was teaching. (310-11). He also set up the room and cleaned afterwards. (329). Beatty testified that Konschuh opened and closed 911 dispatch training and brought donuts. (2654).

In September 2011 and September 2012, Cailin Wilson of the prosecutor's office conducted trainings at the Corrections Academy. (83; 285). Konschuh had a flex-time approach to working hours in the prosecutor's office. (353). He allowed staff to leave early when necessary because they often worked evenings and weekends without overtime pay. (353; 2630). With this flextime approach, Wilson did not need to use vacation time when she presented to the Corrections Academy. (283).

During Konschuh's tenure as prosecutor, the Corrections Academy issued a check for $300 and a check for $480. (288). Both checks were payable to the Lapeer County Prosecutor's Office. (*Id.*) Konschuh gave $80 to Wilson as extra compensation for her work at the Corrections Academy. (298; 1433). Wilson testified that she gave

the remaining funds to Konschuh to be applied to office expenditures, such as coffee, water, and meals. (1515-18).

Konschuh did not keep a record of funds he received through the Corrections Academy and the law-enforcement training programs. (326). He shared some of the funds from the Corrections Academy with his staff by taking them to a local restaurant. (324-25). He used remaining funds as reimbursement for office expenses. He later received 1099s for some of the Corrections Academy checks. (324, 2292).

G. Konschuh organized staff lunches that had the dual purpose of training and social bonding.

Disciplinary counsel also object to Konschuh's reimbursement for office luncheons. The prosecutor's office has a longstanding tradition of hosting a holiday luncheon in December and an Administrative Professionals Day luncheon in April. (388). These luncheons had two functions: they were both social events and opportunities to discuss and improve office operation. (390; 3048). Konschuh often implemented changes at the office based on discussions at these luncheons. (391). Biscoe acknowledged that this dual-purpose approach was arguably permissible:

> Q. …[I]f there is office banter along with those things, that's okay, that's the dual purpose…?
>
> A. One might argue that. [1058]

These luncheons improved office morale and efficiency. (430; 757-58). Konschuh could get information from his staff in a relaxed atmosphere and use that information to improve the office's functioning. (*Id.*)

Cathy Strong corroborated Konschuh's testimony about those luncheons. She testified that staff discussed office-related issues, caseloads, scheduling, and

upcoming events at these lunches. (2323). They also discussed ways to improve public service—and that was one of the reasons for the luncheons:

> Q. True or false, the staff discussed office-related issues at those events?
>
> [objection interposed]
>
> A. True.
>
> Q. True or false, there were—there was attention to staffing morale at those luncheons?
>
> A. True.
>
> Q. True or false, there were discussions about caseloads?
>
> A. True.
>
> Q. True or false, there was scheduling discussed at those luncheons?
>
> A. There could have been.
>
> Q. True or false, upcoming events in the office that related to cases were also discussed at those events?
>
> A. True.
>
> Q. True or false, ways to improve delivery of legal services to the public as a general concept were discussed and one of the reasons for those luncheons?
>
> A. True. [2323]

Beatty corroborated Konschuh's testimony as well, explaining that the lunches included discussion of cases and scheduling. (2589).

From 2001 through 2012, Konschuh continued the tradition of taking the office staff to lunch in April and December. (437-443). Until December 2011, Konschuh did

not submit reimbursement requests for these lunches. (443-44; 3085-86). He began seeking reimbursement nine months before the prosecutor's office established a $5,000 line item with funds from the Corelogic settlement. Biscoe approved all of those reimbursement requests.

Based on conversations with Steve Beatty, Konschuh understood that he should label any request for reimbursement as "training." (495). (Disciplinary counsel never interviewed Beatty). (2632). Biscoe testified that "training" includes staff development. (1065). Subsequently, Konschuh submitted the following reimbursement requests:

- In December 2011, Konschuh submitted a $125.25 receipt from a holiday lunch for reimbursement. (389). He characterized the luncheon as a "legal update training luncheon." (389-90).

- Konschuh also submitted an April 25, 2012 receipt for $184.61 for reimbursement. (394-97). When seeking reimbursement for $174.61 for this luncheon, Konschuh characterized it as a "staff development luncheon." (395). He believes he omitted $10 from his reimbursement request because he purchased a gift certificate for someone who was unable to attend. (398).

- The prosecutor's office attended a holiday lunch in December 2012. (427). Konschuh requested reimbursement for $180.66. (429). That figure represented a $146.66 receipt plus a $40 tip. (*Id.*) His reimbursement request characterized the lunch as "training." (*Id.*) He testified that the lunch included "general discussion regarding the operation of the office." (487).

Biscoe spoke to Konschuh about the December 14, 2012 luncheon. (494; 968). Konschuh explained to Biscoe what transpired at the luncheon. (496). He "explained … that we discussed the operation of the office, that there were lots of issues that [he] could discuss with [his] staff in a relaxed atmosphere that they would not bring up at a formal staff meeting, and [he] found them to be even more productive than [his]

regular staff meetings because people would open up and tell [him] what was bothering them." (496). According to Konschuh's recollection, Biscoe told him that he may have to provide that explanation to the board of commissioners. (761). Biscoe never told Konschuh that he had a problem with Konschuh's requests for reimbursement. (1099).

H. Konschuh and his staff bought donuts for the office.

The Amended Formal Complaint also challenges Konschuh's reimbursements for donuts. Attorneys in the prosecutor's office took turns being on-call for the week. (488). An on-call attorney would be available at all hours to answer legal questions from police agencies. (*Id.*) The on-call attorney received extra compensation for that week. (*Id.*) The prosecutor's office had a custom in which the on-call attorney for that week would buy donuts for the office on Fridays. (488; 1250). Konschuh continued that practice. (489).

From 2001 to 2012, Konschuh did not submit reimbursement requests when he bought donuts. (489). Beginning in 2012—after Biscoe approved the $5,000 line item for the prosecutor's office—Konschuh submitted reimbursement requests for donuts. (490). He labeled the expense as "training" when he sought reimbursement. (491). His reimbursement requests included donuts that he purchased as well as donuts that other attorneys purchased. (492). Those attorneys would receive reimbursements as well. (Exhibit 103a-103o; 2613).

Konschuh's staff would place the donuts on a table near Konschuh's office, toward the back of the suite. (1251). Witnesses, victims, and police officers would often visit the office and a have a cup of coffee from the machine at the back of the

suite. (2306). They would also be free to help themselves to any donuts or snacks in that area. (2571). That happened frequently, as Beatty testified:

> Q. In your time there, can you tell the judge whether or not you ever witnessed anybody partaking or using or eating or consuming items that were brought in either by you or by others who were not members of the paid staff of the Lapeer County Prosecutor's Office?
>
> A. Absolutely.
>
> Q. Was that a rare occasion or was that frequent?
>
> A. Frequent. [2572]

Biscoe did not object to Konschuh's office using "training" funds to pay for publicly available donuts. (1013).

I. Konschuh spent funds on trophies and plaques.

The prosecutor's office had a tradition of buying plaques and trophies for law-enforcement officials and Konschuh decided to continue that tradition. (467; 3088). For example, in 2004, he purchased plaques for two deputy sheriffs. (450). Apart from a plaque for Strong, all of the plaques were for law-enforcement officials. (451). Konschuh also used the BounceBack, the Corrections Academy, and City of Lapeer funds to reimburse himself for buying trophies and plaques. (449-51). Members of Konschuh's office occasionally contributed to plaques and trophies. (452).

J. Konschuh visited the Oysters' residence.

Disciplinary counsels' allegations also include an incident that has nothing to do with funds or reimbursement. In 2016, David Richardson was running for the 40th Circuit Court in Lapeer County. (532). Richardson is a friend and law-school

classmate of Konschuh's. (532). Konschuh supported Richardson throughout his campaign. (551-52). Konschuh posted a campaign sign for Richardson in an easement near the Oysters' home, a popular location for campaign signs. (536; 1135).

Samuel Oyster lives with his parents, Ed and Bonnie Oyster. (1132). Ed Oyster is involved in Lapeer County politics. (530-31). On October 5, 2016, Konschuh drove by the Oysters' home and saw that the Richardson sign was gone. (537). He stopped and rang the bell at the Oysters' home. (538). Bonnie Oyster answered the door. (538). Konschuh introduced himself and asked about the Richardson sign. (539-40). He may have asked for Ed Oyster first. (1134). Bonnie Oyster knew nothing about it. (540).

Samuel Oyster was listening to the conversation from the Oysters' kitchen. (1164). He appeared at the door after Konschuh's initial exchange with his mother. (540-41). He told Konschuh that he had no information about the sign. (541). He also mentioned that he knew who Konschuh was and understood that he was involved with Families Against Narcotics. (542). He mentioned that he had a history of substance-abuse struggles. (*Id.*) Konschuh replied that he was supporting Richardson in part because he favors a drug court. (542). He also said that Judge Holowka had blocked efforts to establish a drug court. (542-43).

Bonnie Oyster believed that Konschuh said that Judge Holowka "had been a pain in his—a thorn in his ass for 30 years." (1138). Konschuh did not remember saying that Judge Holowka was a "pain in the ass." (544). Nor does he recall telling the Oysters that Judge Holowka "had to go." (552).

Bonnie Oyster described Konschuh's demeanor as "very insistent that I should know" and "[q]uite belligerent, like I should know." (1136). Later, she testified that she felt like she was "[in] a court, I guess, in front of him." (1139). She felt that Konschuh did not believe her. (1141).

Konschuh maintained that he spoke appropriately to the Oysters. (544). Loud, belligerent behavior would have been out of character for him. Strong testified that she saw him under pressure daily and he "was always pretty much even-keel." (2312). She could not recall him getting angry. (*Id.*) Similarly, Julie Richardson testified that she could not recall Konschuh ever raising his voice. (2520). James Lee Smith, who has known Konschuh for years, testified that he has never seen him use profanity. (2730). He added that Konschuh tends to get calmer when he gets mad and that he never gets "rattled" or "upset." (*Id.*)

Bonnie Oyster did not recall Konschuh using the word "fuck" (1139) and Konschuh adamantly denied using that term. (545-46). Indeed, the Oysters' report to the Judicial Tenure Commission did not state that Konschuh used profanity—another sign that the Oysters did not hear cursing from Konschuh. (1184). At the hearing, however, Samuel Oyster testified that Konschuh said, "Who the fuck took my sign down?" (1164). According to Samuel Oyster, he was "around the corner" in the kitchen and had difficulty hearing at the time: "It was very weak and shaky, so I couldn't—*at that point I couldn't hear*. I was around the corner, but I could hear the voices talking, being loud." (1165) (emphasis added).

K. Konschuh was prosecuted after his appointment to the bench.

The remainder of disciplinary counsel's allegations concern Konschuh's criminal proceeding and its aftermath. In July 2014, the Shiawassee County Prosecuting Attorney, acting as special prosecutor through the Michigan Office of the Attorney General, charged Konschuh with five counts of embezzlement by a public official over $50 in violation of MCL 750.175. See *People v Konschuh,* Case No. 14-1779-FY 71-A District Court. (548-49; Exhibit 1a). Deana Finnegan was the special prosecutor. (81, 85; Exhibit 1b). Mike Sharkey and Tom Pabst represented Konschuh in the criminal matter. (83).

Konschuh's preliminary examination was in September and October 2014. (86). Sharkey argued that the funds at issue were not public funds. (87). The district court disagreed and bound Konschuh for trial. (86, 88-89; Exhibit 1c). The parties mediated the charges against Konschuh on March 8, 2016. (2355). At the end of the mediation, the parties signed a stipulation that set forth their agreement:

> In order to prevent further taxpayer expense of a trial in this matter, the parties have agreed that Konschuh will plead 'no contest' that there may be an interpretation of MCL 21.44 that supports the argument that he should have reported the collection of these funds to the State or other appropriate entity for accounting purposes. After a delay of sentence as determined by the Court, the matter will be dismissed with prejudice. …" [101-102; Exhibit 1i].

The parties' agreement did not involve a plea to MCL 750.485. (2368; 2963; 2772).

Disciplinary counsel assert that this stipulation "was not focused on the charge to which respondent would plead, but only on the obstacle to the factual basis for the plea." (Objection at 7). They cite no evidence to support this claim. In fact, the written

agreement refers to the very substance of Konschuh's plea: "Konschuh will plead 'no contest' that there may be an interpretation of MCL 21.44 that supports the argument …." (Exhibit 1i).

After mediation, Finnegan arrived at court with an amended complaint. (2368, Exhibit 1e). The amendment surprised Konschuh. (3218). It also surprised Tom Pabst, who believed that Finnegan "pulled a fast one" by adding the misdemeanor count. (2858). The parties had neither agreed to nor discussed adding a count under MCL 750.485. (2368). The amended complaint produced at the hearing was the first time anyone raised that issue. (*Id.*)[1]

Finnegan described the plea agreement in court, stating that Konschuh would plead to Count 6, a misdemeanor, and that the charge would be dismissed if he successfully completed the delayed sentence. (105-6; Exhibit 1L; Exhibit 1cc). Konschuh signed a sentence agreement stating that he was pleading no contest to "failure to account contrary to MCL 750.485." (98-100; Exhibit 1f). Judge Neithercut accepted Konschuh's plea but indicated that he would keep the count open, pending Konschuh's completion of probation:

> … [T]he Court accepts the plea and finds Mr. Konschuh guilty of count six, failure to account for county money, and dismisses without prejudice counts—well, no, wait a

[1] Contrary to the record, disciplinary counsel assert that "[t]he only plausible version of these events is that prosecutor Finnegan added the misdemeanor charge exactly as agreed by the parties just moments before she did so." (Objection at 12-13). There was no evidence that the parties agreed to a misdemeanor charge during mediation. Tom Pabst expressly testified that they did *not* agree to a misdemeanor. (2276). Disciplinary counsel presented no evidence to the contrary—and they even elected not to call Deena Finnegan as a witness. So disciplinary counsel's assertion is worse than speculation; it's a refusal to accept undisputed evidence.

> minute. When am I supposed to do the dismissal, now or later? This says a delayed sentence with a dismissal with prejudice upon successful completion, so I guess that means *I'm supposed to keep those open for the time being*. [3238; Exhibit 1m at 12 (emphasis added)].[2]

The court decided to "follow protocol," which meant getting a presentencing report and having Konschuh return for sentencing. (Exhibit 1m at 13).

At the March 31, 2018 hearing (Exhibit 1p), the court did not mention MCL 750.485. Instead, the court recited the agreement that Konschuh worked out with the prosecutor and held that the county was not entitled to restitution. (23-25). The Court then delayed sentencing until July 1, 2016. (26). In July 2016, the court dismissed the case with prejudice. (133). Consequently, Konschuh was never sentenced and did not "receive a criminal misdemeanor conviction." (2965-66; 3104).

L. Konschuh's attorney files a motion to modify the order.

Konschuh filed a civil action against certain individuals who worked for Lapeer County in May 2017.[3] (140). The lawsuit included a malicious-prosecution count, and malicious prosecution requires proof that the underlying matter was resolved in the

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[2] The Amended Formal Complaint asserts: "…[A]fter accepting respondent's nolo contendere plea, Hon. Geoffrey M. Neithercut stated that he: … accepts the plea and finds Mr. Konschuh guilty of count six, failure to account for county money." (Amended Formal Complaint, ¶26). Note that the Amended Formal Complaint adds a period after "county money." That's disciplinary counsel's attempt to make it appear that Judge Neithercut accepted Konschuh's plea. (*Id.*) The full transcript, quoted above, reveals that Judge Neithercut reversed himself and decided to leave the count open. (3238; Exhibit 1m at 12). Disciplinary counsel continue to argue that Konschuh's position—that Judge Neithercut left the count open instead of accepting his plea—is a "false claim[.]" (Objection at 21). But the transcript reveals that disciplinary counsel, not Konschuh, altered the quotation to suit their argument.

[3] Disciplinary counsel assert that the complaint "seems to implicate the governor" in a conspiracy. (Objection at 14). It does no such thing. (Exhibit 109). Konschuh specifically *denied* that the complaint involved the governor. (3370).

plaintiff's favor. (140). Tom Pabst, Konschuh's attorney, argued that "the criminal proceedings terminated in Konschuh's favor with a no contest plea to an arguable misdemeanor that was ultimately dismissed." (143).

In February 2018, Pabst filed a *Motion for Entry of Order Nunc Pro Tunc.* (Exhibit 1T, 135). Konschuh did not see the motion before Pabst filed it. (2978). The motion argued that Konschuh pleaded only that "there may be an interpretation of MCL 21.44 that supports the argument that he should have reported the collection of these funds to the State or other appropriate entity for accounting purposes." (136-37). It asked the court to correct the record by stating that Konschuh did not plead guilty to a misdemeanor. (*Id.*) Pabst explained: "I always felt that there was a mistake made here, that that stipulation controls the deal. That's the deal we had. I was thrilled at that deal. It did not include 750 or any misdemeanor whatsoever, period. And if there is any doubt about it, like any facilitation, like any mediation that's been reduced to writing, the writing controls. That's my view." (2776-2777). Consequently, the motion argued "that [Konschuh] didn't get the deal that he did agree to and stipulated to with the prosecutor[.]" (2887).

The court denied Konschuh's *nunc pro tunc* motion in the criminal case. (144). Then, in the civil case, Judge Kumar granted the defendants' summary-disposition motions and concluded that Konschuh pleaded to a misdemeanor. (145-46).

M. Konschuh disclosed a conflict with Sharkey in contested matters but usually not in uncontested matters.

Chief Judge Holowka suspended Konschuh in July 2014 after he was charged with five felony counts. (549). Konschuh returned to the bench in July 2016. (562).

When he returned to his judicial duties, Konschuh asked Chief Judge Holowka to authorize retaining an ethics expert to assist with recusals and conflicts. (2409. Exhibit 112). Judge Holowka denied that request. (2409, Exhibit 113). He told Konschuh to "handle the criminal cases at the pretrial level, potential adjournments, scheduling, ministerial acts, … that if anything was going to be contested like a preliminary examination," he should recuse himself. (3183).

In Lapeer County, "it was common knowledge" that Sharkey represented Konschuh. (603; 790). Sharkey appeared before Konschuh after he became prosecutor in January 2017. (562). Konschuh did not have a policy of disqualifying himself from any case involving Sharkey. (563-65, 567). He made disclosures on the record—although not in every case. (565). If a matter involved traffic offenses or probation, he did not address his association with Sharkey. (565-66).

Some witnesses attested to cases in which Konschuh did not disclose any relationship with Sharkey. (Caughel, 652; Zeleney, 665; Hart, 675, Jaworski, 803). But Colleen Starr testified that she heard one of Konschuh's disclosures about Sharkey. (590). She also noted that she had a written record of a disclosure in one case. (597). Although Starr also mentioned files for which she lacked a disclosure, she acknowledged that those cases represented a "very small percentage of the overall cases that [she] had in front of Konschuh[.]" (595, 609). Lawrence Gadd also testified that Konschuh discussed his background with Sharkey before a facilitation in which Sharkey was Gadd's opposing counsel. (2550).

In addition to statements from the bench, Konschuh placed disclosure statements on the attorneys' tables, as Starr testified. (588, 607-08). Although Starr testified that the disclosures were not always available (608), Konschuh's court reporter, Michelle Schrader, testified that Konschuh referenced these disclosures from the bench every Wednesday during the court's criminal docket. (2711). At a May 2017 hearing in *People v Davis,* Konschuh specifically referred counsel to his written disclosures. (2703). He made a similar statement in *People v Wilson.* (2706).

Sharkey charged Konschuh $415,250 for legal services. (84; 552). Konschuh did not receive his itemized bill until October 2017. (553; 2448). Until that time, Sharkey had not given Konschuh any billing statements and Konschuh had no idea how much Sharkey was going to charge him. (2399; 3198-99).

N. Konschuh disclosed a conflict with Turkelson in contested matters but usually not in uncontested matters.

When Konschuh was appointed to the 40th Circuit Court in Lapeer County in 2013, Tim Turkelson took over the prosecutor's office. (561). Konschuh and Turkelson have an acrimonious relationship. For example, Turkelson sent an email calling Konschuh a "bitch." (1341, 1343). In another profanity-laden email exchange, Turkelson called Konschuh a "[f]ucking dick." (1349). Turkelson also blames Konschuh for his election loss in the 2016 campaign for Lapeer County prosecutor. (1350-51).

But Turkelson sometimes appeared before Konschuh after losing his campaign for prosecutor in 2016. (564). Similar to his approach to Sharkey, Konschuh did not have a blanket policy of disqualifying himself from any case involving Turkelson.

(563-65). If a matter involved traffic offenses or probation, he did not address his relationship with Turkelson. (565-66). Konschuh made disclosures on the record, although not in every case. (565).

Turkelson filed a motion to disqualify Konschuh in one case, which Konschuh granted. (1381).

O. Konschuh did not disclose any conflicts involving Richardson.

Attorney David Richardson ran as a write-in candidate for the 40th Circuit Court in 2016. (2917). Konschuh did not encourage Richardson to run; to the contrary, he advised against it. (2917-18; 2524). But Konschuh endorsed Richardson at some point in the campaign. (2918).

Richardson appeared occasionally before Konschuh but not on substantive matters. (2927). Konschuh did not recall making any disclosures about his friendship with Richardson. (567). But attorney Carol Ann Jaworski testified that she recalled Konschuh disclosing his work with Richardson. (802).

P. Konschuh answers inquiries from the Michigan State Police.

In 2014, Mark Pendergraff was an officer with the Michigan State Police. (1588). He retired in 2017 and is now an investigator with the Shiawassee County Prosecutor's Office. (1588, 1613). In 2014, Finnegan told Pendergraff that she needed him to investigate Konschuh. (1592).

Konschuh first met with Pendergraff on April 29, 2014. (697). Konschuh told Pendergraff that he used BounceBack money to reimburse himself for office-related expenses. (698). He also mentioned using BounceBack funds to buy refreshments for crime victims as well as celebratory items like flowers, cards, and cakes, and plaques.

(699). Konschuh also said that he spent close to $1,800 of his own money on water for the prosecutor's office. (709; 3102).

Despite the substantial passage of time, Konschuh did everything he could to provide information to Pendergraff. Through a series of meetings, Konschuh provided Pendergraff a list of expenditures and copies of receipts. (380; 712). Pendergraff encouraged Konschuh to bring him more receipts. (1619, 1623-24). Pendergraff acknowledged that Konschuh was cooperative. (1615). Pendergraff also spoke to others during his investigation. Biscoe told Pendergraff that the rules applicable to the funds at issue were "foggy," "fuzzy," "iffy," and "gray." (993, 1033).

Q. Konschuh answered inquiries from disciplinary counsel.

After the Judicial Tenure Commission received two requests for investigation concerning Konschuh, disciplinary counsel issued an initial request for information on April 14, 2016. Konschuh submitted a timely response on July 6, 2016.

"Tab C" to Konschuh's July 6, 2016 response (Exhibit 95) is Konschuh's best effort to itemize office expenses that he paid. (406). It included all of the receipts that he provided to Pendergraff. (512). His July 2016 submission to disciplinary counsel inadvertently included his "Tab K," which lists unreimbursed charitable contributions. (402; 502, 514). He did not realize the error until January 2019, when he informed disciplinary counsel. (505-06).

Konschuh cooperated with disciplinary counsel during its investigation:

- Disciplinary counsel issued a "28-day letter" on December 14, 2016, outlining allegations against Konschuh and requesting a response. He submitted a lengthy written response on February 8, 2017.

- Disciplinary counsel sent another request for information on January 25, 2017. Konschuh filed timely responses on March 3, 2017.

- Disciplinary counsel subsequently made an informal request for additional information. Konschuh submitted a detailed letter on May 22, 2017.

- On February 26, 2018, Disciplinary counsel issued another request for information. Konschuh responded on April 23, 2018.

- Disciplinary counsel sent a second 28-day letter—its fifth request for responses—on October 3, 2018. Konschuh filed a timely response on January 14, 2019. Exhibit 94F.

On February 6, 2019, the Commission filed a request for appointment of a master along with a complaint. Konschuh filed a timely answer on April 2, 2019.

R. The master's rejected all allegations of misconduct save one.

The master held hearings in June, July, August, and September of 2019. During that time, the master heard from 39 witnesses and examined 350 exhibits. (*Master's Findings of Fact and Conclusions of Law* ("Report") at 3). Then, after receiving proposed findings of fact and conclusions of law from both sides, the master issued his report on January 2, 2020.

The master concluded that disciplinary counsel failed to prove misconduct by a preponderance of the evidence except as to Count VII, which concerns Konschuh's disclosures and recusals involving Sharkey, Turkelson, and Richardson. (Report at 12). He concluded that disciplinary counsel failed to prove (a) any intentional false statements, (b) any violation of governing law or policy when using funds from the prosecutor's office, (c) any misuse of fees from training programs, (d) any improper

reimbursements, (e) any unbecoming or improper conduct with the Oysters, or (f) any misrepresentations. Disciplinary counsel now object to the master's findings.

III. STANDARD OF REVIEW

This Commission is "vested with the responsibility of determining whether to recommend to [the Michigan Supreme] Court that a judge be disciplined…" *In re Chrzanowski,* 465 Mich 468, 480-481; 636 NW2d 758 (2001). Accordingly, it reviews the master's findings of fact and conclusions of law *de novo*. *Id.*

To recommend discipline for a judge, the Commission must find that the judge was convicted of a felony, is subject to a physical or mental disability that "prevents performance of judicial duties," or is guilty of one of the following: "misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice." Const 1963, art 6, § 30. Under the Michigan Court Rules, "misconduct in office includes …

> (a) persistent incompetence in the performance of judicial duties;
>
> (b) persistent neglect in the timely performance of judicial duties;
>
> (c) persistent failure to treat persons fairly and courteously;
>
> (d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;
>
> (e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and
>
> (f) failure to cooperate with a reasonable request made by the commission in its investigation of a judge. [MCR 9.205]

Disciplinary counsel must prove that misconduct by a preponderance of the evidence. See *In re Noecker*, 472 Mich 1, 8; 691 NW2d 440 (2005).

IV. ARGUMENTS CONCERNING ALLEGED MISCONDUCT

As an initial matter, disciplinary counsel repeatedly chastise the master for not spending enough time on some arguments and spending too much time on others. They also fault the master for not providing record citations in his Report. (See, e.g., Objection at 2). This, however, is what the Michigan Court Rules actually say about the master's duty to produce a report: "…[T]he master shall prepare and transmit to the commission a report that contains a *brief statement of the proceedings and findings of fact and conclusions of law* with respect to the issues presented by the complaint and the answer." MCR 9.236 (emphasis added). The master fully complied with this rule. He had no obligation to discuss every argument, every piece of evidence, and every claim that disciplinary counsel advanced. Nor did he have a duty to include record citations throughout his report.

1. Count I: "2016 Misdemeanor and False Statements"

In Count I of the Amended Formal Complaint, disciplinary counsel assert that Konschuh made a false and misleading representation on February 19, 2018 when his attorney filed a *Motion for Entry of Order Nunc Pro Tunc* (Exhibit 1t). This motion asserted that Konschuh did not plead to a misdemeanor under MCL 750.485 and asked the court to clarify that fact retroactively. (*Amended Formal Complaint*, ¶¶33-37). Disciplinary counsel argue that Konschuh really did plead to a misdemeanor and that he was trying to mislead Judge Neithercut. The master correctly held, however,

that disciplinary counsel failed to prove this alleged misconduct. (Report at 5). The Commission should adopt the master's conclusions.

1.1 The master's reasons for rejecting Count I are sound.

The master gave three reasons for rejecting disciplinary counsel's argument that Konschuh made a deliberate misrepresentation. First, the master applied the Michigan Supreme Court's opinion in *In re Gorcyca,* 500 Mich 588; 902 NW2d 828 (2017). Under *Gorcyca,* it is not enough for disciplinary counsel to establish that Konschuh made a false statement about the charges against him. They must prove that Konschuh made false statements with wrongful intent. *Gorcyca,* 500 Mich at 639 ("Even though there may be some instances in which a misrepresentation and a misleading statement are not based on an actual intent to deceive, we believe that, at a minimum, *there must be some showing of wrongful intent*.") (emphasis added).[4] The master concluded that disciplinary counsel failed to prove by a preponderance of the evidence that Konschuh had wrongful intentions when making these supposed misrepresentations. (Report at 5).

That conclusion was correct; there is no evidence of wrongful intent here. Konschuh did not see the motion before his attorney, Tom Pabst, filed it. (2978). As the master concluded, Konschuh could not have intended to mislead the court when

[4] Disciplinary counsel argue that "[t]his case bears no meaningful resemblance to *Gorcyca*." (Objection at 16). That assertion misses the point. *Gorcyca* is relevant not because it resembles this case factually but because it states the controlling rule—that a false statement is judicial misconduct only when accompanied by wrongful intent. *Gorcyca,* 500 Mich at 639. Disciplinary counsel do not and cannot dispute this rule of law. (Objection at 16 (" … [T]he master was correct about what it takes for a false statement to be misconduct …")).

he had no opportunity to review the allegedly misleading statements. (Report at 5). Disciplinary counsel's argument—that Konschuh is culpable because he approved the substance of the motion before his attorney wrote and filed it—misses the mark. Konschuh could legitimately argue that he did not intend to agree to a misdemeanor, that Finnegan added that count in an unexpected revision to the complaint, and that the Court should grant retroactive relief. (2963; 2772). Approving a motion along those lines is not misconduct.

Moreover, as the master noted, the *nunc pro tunc* motion did not hide the fact that Konschuh pleaded no contest to MCL 750.485. (Exhibit 1t). It included two documents entitled "Motion/Order of Nolle Prosequi," both of which reference MCL 750.485. (Exhibit 1t). Although the motion argued that including MCL 750.485 was a mistake, the motion included a document in which Konschuh assented to a charge under MCL 750.485. Had Konschuh intended to mislead the Court, he would not have included documents showing that he did plead no contest to MCL 750.485. (And disciplinary counsel have never even *attempted* to explain how Konschuh could have misled Judge Neithercut about things that took place in front of Judge Neithercut.)

The Attorney Discipline Board addressed similar facts in *Grievance Administrator v Wax* (Bd. Opinion, 98-112-Ga, September 22, 1999) (*Attachment A*). There, the Grievance Administrator accused the respondent of lying about the contents of his appellate brief even though the respondent submitted a copy of his brief with the document that supposedly lied about it. *Id.* at 1-2. The hearing panel concluded—and the Attorney Discipline Board agreed—that, "If respondent intended

to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer." *Id.* at 2.The same rationale applies here. If Konschuh intended to mislead the court, he would not have included documents referencing MCL 750.485. (Report at 5).

Finally, the master concluded that Konschuh's motion made a good-faith legal argument. (Report at 5). The parties' agreement *was* limited to MCL 21.44 (101-102) and they never discussed adding MCL 750.485 before the hearing. (2368).[5]

Disciplinary counsel also assert that the very idea of pleading "no contest" to a civil statute "makes no sense." (Objection at 7). But Michigan citizens admit responsibility to civil infractions all the time. See, e.g., *People v Greenlee,* 133 Mich App 734; 350 NW2d 313 (1984) (addressing plea admitting responsibility to careless driving). And defendants plead guilty to non-crimes often enough that federal courts have had to consider how a plea to a non-crime affects an ineffective-assistance-of-counsel claim. *United States v Fowler*, 104 F3d 368 (CA 10, 1996) ("The conduct of an attorney who allows a defendant to plead guilty to a charge that is not a crime will be deemed constitutionally deficient on collateral attack only if, upon consideration of all of the charges against the defendant, the conduct prejudiced the defendant.").

[5] Disciplinary counsel try to explain away the substance of Konschuh's agreement by asserting that he was pleading to an *element* of the alleged crime. (Objection at 6-7). But disciplinary counsel provide no citations to support their theory. In fact, the evidence did *not* support their theory. When disciplinary counsel argue that the master "misse[d] the point" by observing that the agreement does not include a criminal charge (Objection at 7), it's really disciplinary counsel who are mistaken. The "point" is what one can discern from the testimony and written evidence. Disciplinary counsel's unsupported speculation deserves no weight.

So the prosecutor *did* surprise Konschuh when she showed up for the post-facilitation hearing with a new complaint. (3218). Konschuh was caught off guard and railroaded into an outcome inconsistent with the mediated agreement. He properly brought the issue before Judge Neithercut—and he accepted the court's ruling when it did not go his way. His *nunc pro tunc* motion was not misconduct.

It does not follow that surprise is "essential" to the master's report, as disciplinary counsel claim. (Objection at 6 n 7). Konschuh had no duty to prove surprise or provide any other explanation. The burden of proof is on disciplinary counsel. *Noecker*, 472 Mich at 8. As the master held, disciplinary counsel failed to carry that burden.

1.2 Disciplinary counsel's arguments on Count I lack merit.

Disciplinary counsel attempt to rebut these findings in several ways. They begin by asserting that the master did not address their argument that Konschuh's statements were untrue and that Konschuh really did plead to a misdemeanor. (Objection at 4). But that is false. The master's report addresses those issues: he concludes that the parties' original agreement did *not* include a misdemeanor plea and that Finnegan added the misdemeanor in her amended complaint. (Report at 4). Konschuh signed an agreement that included a reference to MCL 750.485. (*Id.*) Contrary to disciplinary counsel's arguments, therefore, the master make findings that resolve these factual issues. Those findings deserve significant weight. *In re James,* 492 Mich 553, 569; 821 NW2d 144 (2012) (noting the master's "superior position to observe the witness' demeanor and assess their credibility").

The master's resolution was correct, too. Konschuh's original agreement did not include the idea of pleading to MCL 750.485. (2963; 2772). The parties had not even discussed adding a count under MCL 750.485 (2368). Finnegan added that requirement when she amended the complaint after mediation. (2368). Konschuh signed a sentence agreement stating that he was pleading no contest to "failure to account contrary to MCL 750.485." (98-100; Exhibit 1F). So the record made it very easy to understand why Konschuh would insist that the plea was invalid and that the original agreement did not include a misdemeanor. He consented to a stipulation that did not include a criminal count, only for the prosecutor to show up with a new complaint that included a misdemeanor count he had never seen before.[6]

Next, disciplinary counsel challenge the master's reliance on *Wax*. The master followed *Wax* to conclude that Konschuh's inclusion of documents showing that he pleaded to a misdemeanor is evidence that he did not intend to mislead the court when he claimed that he did not agree to a misdemeanor. (Report at 5). In response, disciplinary counsel try to limit *Wax* by claiming that the mistaken statement in *Wax* was just about which page a statement was on. They write, "The allegation in *Wax* was that the lawyer mistakenly said, in his answer to the Attorney Grievance

[6] The master's report includes a typo regarding the date of the post-mediation hearing. It was March 8—the same date as the mediation—rather than March 31. (Report at 4). Disciplinary counsel propose that this typo had a significant effect on the master's reasoning. (Objection at 8-9). But disciplinary counsel's hypothesizing is just an exercise in speculation. Whether the post-mediation hearing occurred one hour or three weeks after mediation, Konschuh left the mediation with the understanding that his agreement was reflected in Exhibit 1i. That agreement did not include a criminal charge.

Commission's request for investigation, that a certain statement was on page 6 of the brief he attached to the statement, when it was really on page 18 of that brief." (Objection at 18). They add that "[t]here was no suggestion that the lawyer misstated the substance of the brief, but merely that he referenced the wrong page of it." (*Id.*)

Disciplinary counsel's summary of *Wax* is inaccurate. The issue in *Wax* was whether the respondent-attorney made the statement at all. *Wax,* Board Op. at 1. The respondent told the Attorney Grievance Commission that he never made the statement and directed the Commission to Page 6 of his brief as proof. *Id.* But he *did* make the statement—and it was on Page 18. *Id.* The page-number issue was relevant only because the Commission thought the respondent's citation to Page 6 was misdirection. The hearing panel and the Board concluded that the statement could not have been misdirection because the whole document—which included the statement at issue—was part of the respondent's answer. As the hearing panel wrote, "If respondent intended to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer." *Wax,* Board Op. at 2. So *Wax* is directly on point, and it supports the master's conclusions.

Third, disciplinary counsel argue that Konschuh denied several times that he pleaded guilty to a misdemeanor, and they fault the master for only dealing with one instance—Konschuh's *nunc pro tunc* motion. (Objection at 5). If the master only addressed the February 2018 motion, that's because Count I of the Formal Complaint only addresses representations in Konschuh's February 2018 motion. (*Amended Formal Complaint,* ¶¶31-37). If disciplinary counsel wanted the master to address

something more in Count I, they should have included those allegations in Count I. Accordingly, the master's conclusions are correct.

2. Count II: "Embezzlement"

In Count II, disciplinary counsel assert that Konschuh failed to comply with Lapeer County accounting and contracting procedures. (*Amended Formal Complaint,* ¶¶ 52-53). They also assert that Konschuh improperly deposited a money order into his personal checking account and then forwarded only $45.28 of the $60.28 total to the county. (*Id.,* ¶68). In other words, they accuse Konschuh of pocketing $15. The master correctly held that disciplinary counsel failed to establish this alleged misconduct by a preponderance of the evidence. (Report at 5).

2.1 The master correctly rejected disciplinary counsel's claims of policy violations and embezzlement.

Regarding disciplinary counsel's charge that Konschuh failed to comply with governing policies, the master correctly found that disciplinary counsel failed to prove that those policies really existed at the relevant time. John Biscoe—the county controller—testified that he did not think the relevant policy existed in written form in 2008. (982-83). That testimony was fatal to disciplinary counsel's argument. Although disciplinary counsel tried to salvage this claim by relying on state treasury guidelines, those guidelines are neither binding nor authoritative. (358; 1006-7). Biscoe described the treasury publication as "a guideline." (1008). And Konschuh never even saw a copy of those guidelines. (362).

Even Cary Vaughn, disciplinary counsel's expert in accounting, was unfamiliar with Lapeer County's policies. (1945). Vaughn also confirmed that state treasury

guidelines are "for training purposes only and should not be considered a legal interpretation of the items presented." (1951). He added that he could not say when these guidelines first appeared on the Treasury's website and that the Treasury removed them in 2004. (1973-74).

In contrast to this testimony from the county controller and disciplinary counsel's own expert, disciplinary counsel offered the testimony of Tim Turkelson, Konschuh's political rival. Turkelson was willing to speculate that *some* accounting policy was in effect in 2005 and that it precluded Konschuh's actions. (1212). But he provided no specifics. Moreover, he is not a credible witness. Turkelson blames Konschuh for his election loss in 2016. (1350-51). He also has a practice of sending emails that label Konschuh a "bitch" and a "fucking dick." (1341, 1349). As the master concluded, Turkelson lacks credibility. (Report at 6).

Disciplinary counsel profess ignorance at how the master could have reached the conclusion that Turkelson lacks credibility. (Objection at 31). Setting aside Turkelson's obscene emails about Konschuh, disciplinary counsel should have remembered the political rivalry between Konschuh and Turkelson. It is, after all, central to their theory that Konschuh should have recused himself in cases involving Turkelson. (*Amended Formal Complaint,* ¶¶466-67)).

Doreen Clark, John Biscoe's assistant, testified that she thought the policy dated to 1996. (1915). Clark believed she had a policy in a binder. (1915-16). But when asked about the state of this policy during the relevant timeframe—2007 to 2008, when Konschuh entered into the BounceBack agreement—Clark could not

affirmatively state that the policy was available via computer: "I cannot, I guess, confirm or deny that, because we did try to have a majority of our policies all on that J drive. But they were also, because of a ransomware, wiped completely off. But that was not till I think later." (1916). (Disciplinary counsel claim that Clark was ambivalent about whether the policy was available via computer but not whether the policy actually existed. (Objection at 3). That distinction makes no difference. Konschuh cannot be held responsible for violating a policy that was unavailable to him. See *Gorcyca,* 500 Mich App at 639 (requiring proof of wrongful intent)).

With Clark's hesitant testimony and Turkelson's lack of credibility, the master reasonably relied on the testimony of John Biscoe, Clark's supervisor. (Report at 6) ("Biscoe's testimony carries greater weight than that of his subordinate, especially since much of Clark's testimony was equivocal."). He correctly concluded, in other words, that disciplinary counsel failed to prove by a preponderance of the evidence that the policy existed in 2008.

The master was also correct to reject disciplinary counsel's claim that Konschuh stole $15 from a Transmodus check. Disciplinary counsel fault Konschuh for depositing the money order in his personal account. But Konschuh credibly testified that, to his understanding, he could not sign a money order over to the county. (188-89; 2986). That is why he deposited the $60.28 money order. (2986). Then Konschuh gave Redlin $60.28 in cash with the understanding that she would forward it to the appropriate authority. (*Id.*; 195) Konschuh's office forwarded $45.28 to the county (Exhibit 6h), which distributed that amount to the victim. (191-92).

There was no testimony about what happened to the $15 difference between $60.28 and $45.28. Konschuh testified that he did not keep any portion of the $15. (3126). Disciplinary counsel wanted the master to conclude that Konschuh must have taken it but no one testified that Konschuh kept the missing $15. Nor did the testimony allow that inference. It is not reasonable to conclude that Konschuh would handle the bulk of the money order appropriately but risk his career for $15. The master correctly held, therefore, that disciplinary counsel did not prove the allegations in Count II by a preponderance of the evidence.

2.2 Disciplinary counsel cannot establish that the master erred in rejecting Count II.

Disciplinary counsel dispute the master's conclusions about Count II. They begin with the assertion that Konschuh "offered no believable explanation for why he chose to deposit the money order into his personal account in the first place." (Report at 24). That is false. Konschuh testified that he understood that he could not forward a money order to the county. (188-89). Additionally, there was a months-long delay between the prosecutor office's receipt of the money order and Konschuh's deposit. (Objection at 23 n 22). Given his belief that he could not forward a money order and this delay, Konschuh deposited the money order in his account and then gave the equivalent cash to his assistant to forward to the county:

> A. I don't know. I remember a couple of situations where we got restitution money I thought in a money order. My staff tried to have me sign it over to the county. I guess you can't do it that way.
>
> Q. I'm sorry. Wait a minute. What did you just say?

A. My staff told—found out from the county treasurer, finance department, somebody, they wouldn't let me sign the check over to the county.

***

Q. Okay. So the reason you cashed this was because the county said, "You can't sign it over to us"?

A. Right. And we didn't want to take more time to get Sherri O'Henley back in here with another check, so I gave the money to one of my staff members, and I think we have advice of deposits to that effect.

Q. Okay.

A. The whole amount went to the county, and I put the money order in my account. [188-89]

Disciplinary counsel assert that Konschuh's belief was incorrect and that, according to county treasurer Dana Miller, he could have forwarded the money order. (Objection at 23). Assuming Miller's testimony is correct, it does not undermine Konschuh's testimony—that he *understood* at the time that he could not forward a money order.

Next, disciplinary counsel assert that Konschuh's testimony about giving Redlin $60.28 is "false." (Objection at 23). They observe that Redlin testified that she received only $45.28 from Konschuh. (2034). This clash between Konschuh's memory and Redlin's memory does not lead to the conclusion that Konschuh's testimony "false," as disciplinary counsel claim. For one thing, there is more evidence to consider, such as Konschuh's testimony that he submitted a subpoena to find out what happened to the $15, and that the county was unable to determine where it went. (192-93). For another, both Konschuh and Redlin were testifying about their

actions over a decade ago—a time lag that is hardly conducive to precise memories. Most importantly, the question was not which party had the better memory but whether disciplinary counsel proved their claims by a preponderance of the evidence.

Attempting to shift their burden of proof, disciplinary counsel write that "respondent offered no believable explanation for why he chose to deposit the money order into his personal account in the first place." (Objection at 24). They are wrong again. Konschuh testified about his reasons for depositing the money order, as discussed above. (188-89). Disciplinary counsel may not believe Konschuh's testimony but that is not the governing test. The question is whether disciplinary counsel proved by a preponderance of the evidence that Konschuh engaged in misconduct. *Haley,* 476 Mich at 189. The master correctly held that they did not.

3. Count III: "BounceBack"

Count III concerns the BounceBack program. Disciplinary counsel allege that Konschuh entered into the program without following county policies. (*Amended Formal Complaint,* ¶76). They also assert that Konschuh deposited BounceBack checks into his personal checking accounts. (*Amended Formal Complaint,* ¶84). The complaint cites 42 checks, all listing the Lapeer County Prosecutor as payee. Konschuh deposited each check into his own account. The master correctly found that disciplinary counsel failed to establish misconduct in Count 3.

3.1 The master correctly found that disciplinary counsel did not establish misconduct under Count 3.

Regarding disciplinary counsel's assertion that Konschuh did not follow the necessary policies when entering into a contract with BounceBack, the master echoed

his Count 2 finding that disciplinary counsel failed to prove that the relevant policy actually existed in 2008. (Report at 6). John Biscoe—the county controller and the person best qualified to speak on this issue—testified that he did not believe the policy was in effect in 2008. (982-83). Consequently, disciplinary counsel failed to carry its burden on this issue.

As for depositing the checks, Konschuh never disputed that he deposited these funds in his personal accounts. But he testified that he spent over $7,783 on the prosecutor's office. (714). He used the BounceBack funds to reimburse himself for a small fraction of that amount.

That was reasonable, given prevailing law on public money. According to one statutory definition, "public money" is "money collected or received by an officer of a local public entity in this state, *pursuant to any provision of law authorizing the officer to collect or receive the money*, is public money for the purposes of this act." MCL 129.11 (emphasis added). Disciplinary counsel never identify a "provision of law authorizing" the prosecutor to collect BounceBack fees. They make a brief reference in a footnote to MCL 49.153, but that statute does not authorize a prosecuting attorney to "collect or receive … money." See MCL 49.153 ("The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.") So it is doubtful that BounceBack fees are "public money" under this definition.

Although disciplinary counsel's brief does not identify any law that would make the BounceBack contract subject to MCL 129.11, they nevertheless assert that Konschuh's view of MCL 129.11 is "preposterous." (Objection at 34). Set aside the lack of civility in this kind of argument. See *Bennett v State Farm Mutual Auto Ins Co,* 731 F.3d 584 (CA 6, 2013) (explaining that calling an opposing view "ridiculous" is uncivil, and ineffective). The problem with disciplinary counsel's approach to MCL 129.11 is that a court cannot disregard the statutory text. *People v Weeder,* 469 Mich 493, 497; 674 NW2d 372 (2004). The plain text of MCL 129.11 requires a "provision of law authorizing the officer to collect or receive the money." With no applicable "provision of law" to trigger MCL 129.11, that statute does not help disciplinary counsel carry their burden.

Disciplinary counsel cited a statute governing county treasurers but that reference does them no good either. A county treasurer must "receive all money belonging to the county, from whatever source they may be derived…" MCL 48.40. BounceBack issued funds under a contract with the prosecutor's office, not the county. (1112-13). It is unclear that the funds "belong[ed] to the county"—or it is at least vague enough that it does not help disciplinary counsel carry their burden.

These ambiguous laws are exactly why John Biscoe told Pendergraff that the rules applicable to the funds at issue were "foggy," "fuzzy," "iffy," and "gray." (993, 1033). Similarly, assistant prosecuting attorney Mike Hodges could not recall thinking that the county commissioners had to approve the BounceBack contract. (1743). Even Dana Miller, the county treasurer, testified that she could not define

"public money." (2137-38). In this context, Konschuh formed the good-faith view that BounceBack funds were outside the definition of public money and, therefore, that they belonged to the prosecutor's office. (2989).

In short, Konschuh understood that he was entitled to reimbursement and the governing statutes did not clearly entitle the county to BounceBack funds. Konschuh did not commit misconduct when he used checks that he understood to belong to the prosecutor's office to reimburse himself for payments he made for the benefit of the prosecutor's office. Perhaps he could have kept a better record of what he spent for the office's benefit. But subpar record-keeping is not judicial misconduct. Disciplinary counsel failed to prove misconduct by a preponderance of the evidence. *Haley,* 476 Mich at 189.

3.2 Disciplinary counsel's objections do not establish misconduct under Count 3.

Disciplinary counsel believe that the master erred and offer several reasons to find misconduct under Count 3. None of their arguments has merit.

They assert that Konschuh did not submit the BounceBack contract to the Board of Commissioners or notify various county agencies about the program. (Objection at 25). As a factual matter, that is true. Konschuh did not obtain county approval to enter into the BounceBack program. As a legal argument, however, disciplinary counsel's assertion misses the mark. They have not established that any contractual approval requirements actually existed in 2008, when Konschuh began the BounceBack program. The best authority—county controller John Biscoe—

testified that he did not believe the policy was in effect in 2008. (982-83). So there was no legal requirement for Konschuh to obtain county permission.

To the extent disciplinary counsel mean to suggest that the BounceBack program was secret, that assertion is incorrect. Merchants had to sign up directly for BounceBack; that is why Konschuh's office notified merchants about the program and even advertised the program's existence in a local newspaper. (240-1; 2989-90). The program was public knowledge throughout the county.

Next, disciplinary counsel assert that they proved "embezzlement" because Konschuh "deposit[ed] this money into his personal accounts." (Objection at 26). They rely on MCL 750.175, which applies only when a defendant *knowingly* uses money for his own purposes:

> Any person holding any public office in this state, or the agent or servant of any such person, who knowingly and unlawfully appropriates to his own use, or to the use of any other person, the money or property received by him in his official capacity or employment, of the value of 50 dollars or upwards, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by fine of not more than 5,000 dollars.

According to its plain language, this statute applies only when a person "knowingly and unlawfully appropriates [funds] to his own use." MCL 750.175. Disciplinary counsel do not mention any caselaw applying MCL 750.175 but the Michigan Court of Appeals imposed a high burden in *People v Kalbfleisch,* 46 Mich App 25, 28; 207 NW2d 428 (1973). It wrote that "[t]he burden of the prosecution was to prove that there is no innocent theory possible which will, without violation of reason, accord with the facts." *Id.* at 28. (Disciplinary counsel, in contrast, insist that Konschuh's

"explanation is irrelevant to whether or not he helped himself to public funds." (Objection at 27)).

Of course, there is such an "innocent theory" in this case. Konschuh testified that he believed he was entitled to reimbursement and he used the BounceBack funds to cover expenses he already incurred for the prosecutor's office. (273; 2981). Disciplinary counsel's argument to the contrary works only if one disregards this explanation *and* the caselaw that requires consideration of Konschuh's explanation. *Kalbfleisch,* 46 Mich App at 28. The entire record proves that Konschuh did not "knowingly and unlawfully appropriate [funds] to his own use." MCL 750.175.

Lacking evidence to support their argument, disciplinary counsel try piling inference upon unfounded inference. They argue that Konschuh *must* have known that the funds were public funds and, given Konschuh's experience in law and business, the master should have inferred "guilty intent." (Objection at 27). This argument overlooks an important fact. Not only has disciplinary counsel failed to prove that the funds at issue were "public funds" but county controller John Biscoe believed that the issue was a "fuzzy" and complicated one. (993, 1033). And assistant prosecuting attorney Mike Hodges testified that he could not recall thinking that the county commissioners had to approve the contract with BounceBack. (1743). Disciplinary counsel make no effort grapple with the complexity of this issue—a complexity that was obvious to their own witness. Instead, they argue that the master should have *presumed* the funds at issue were public funds and then drawn negative

inferences based on that presumption. Quite rightly, the master declined to engage in this fact-finding by speculation.

Next, disciplinary counsel try to minimize the impact of John Biscoe's testimony that there was no contract-approval policy in 2008. First, disciplinary counsel argue that there really *was* such a policy. (Objection at 28-29). Then they argue that the policy is just evidence of wrongful intent, so it does not matter if it existed in 2008. (*Id.*) Then they ask the Commission to presume that Konschuh's actions were illegal even if there was no policy. (*Id.* at 29) ("Even had that policy not existed, respondent was *still* not entitled to keep any money his office received from Bounce Back, the Ohenley money order, or the sources that are the subjects of Counts IV-V (discussed below)"). Yet disciplinary counsel cite no support for that claim of illegality—no statute, no case, no rule. The master correctly concluded that disciplinary counsel's own subjective sense of public policy did not carry their burden of proving misconduct by a preponderance of the evidence. *Haley,* 476 Mich at 189.

Disciplinary counsel also claim that Biscoe testified that the policy existed in 2008, even if it was not in written form at the time. (Objections at 30 ("Although Biscoe did not think the policy was reduced to writing in 2008, he maintained that whether or not it was in writing, it was in effect in policy and practice during respondent's entire tenure as Prosecuting Attorney."). In support, they cite pages 857-58 of the hearing transcript. Those pages do not support disciplinary counsel's claim. Biscoe testifies only that there was a "practice" for "many, many years." (858). What

exactly was this practice? Was it binding? Did Konschuh know about it? Was it in effect in 2008? Biscoe answered none of these questions.

Disciplinary counsel also cite pages 896-97, where Biscoe talks about policies available via computer. Here, however, Biscoe's testimony contradicts Clark, who was ambivalent about whether the contracts policy was online during the relevant timeframe. (1916) ("I cannot, I guess, confirm or deny that, because we did try to have a majority of our policies all on that J drive. But they were also, because of a ransomware, wiped completely off. But that was not till I think later."). Given this conflicting and often ambiguous testimony, the master correctly found that disciplinary counsel failed to prove by a preponderance of the evidence that the contracts-approval policy existed in 2008.

Disciplinary counsel also cite Konschuh's testimony in an underlying civil suit. (Objection at 32). Asked about whether he was aware of a county policy requiring approval of contracts, Konschuh testified: "If it involved the county, yeah." (175). Disciplinary counsel say this testimony is evidence that Konschuh knew he was violating a county policy. The opposite is true. This testimony establishes that Konschuh understood that there was no policy that would apply to contracts affecting only the prosecutor's office, and that any policy was limited to county contracts. That understanding supports his handling of the BounceBack funds.

Disciplinary counsel complain that the master did not give more weight to the testimony of their expert witness, Cary Vaughn. (Objection at 35). Vaughn, they say, is an "expert witness on government finance." (Objection at 34). But the testimony

that supposedly should have swayed the master's analysis is Vaughn's opinion on a *legal* question. In disciplinary counsel's words, "Vaughn repeatedly and unequivocally stated that all money that comes to any county official is public money and needs to be accounted for …." (Objection at 35). Michigan law precludes expert opinion on legal questions. *Downie v Kent Products, Inc,* 420 Mich 197, 205; 362 NW2d 605 (1984) ("What the opinion of an expert does not yet extend to is the creation of new legal definitions and standards, and legal conclusions."). The master was quite right to reject Vaughn's conclusory statements on legal questions.

Finally, a word about the master's reliance on Konschuh's testimony. Disciplinary counsel faults the master for relying at all on Konschuh's testimony, and particularly for crediting his testimony about money he spent for the prosecutor's office and for which he sought reimbursement. (Objection at 39). They argue that, because Konschuh did not keep records of these payments, "[t]here is no reason … to trust respondent's credibility to such an extraordinary extent." (*Id.*)

But credibility depends to a large degree on *how* a witness testifies. See, e.g., *In re Granville's Estate,* 345 Mich 495, 499; 76 NW2d 827 (1956) ("The trial judge who heard the witnesses as trier of the facts is better able to judge of their credibility and the weight to be accorded their testimony, and we do not reverse unless the evidence clearly preponderates in the other direction."). In this case, the master heard Konschuh testify over several days and observed his demeanor over many weeks of trial. He judged not only what Konschuh said but how he said it. He saw facial expressions and posture; he gauged tone of voice. And he determined that Konschuh

was credible. That may not be the result disciplinary counsel would prefer. But it is wrong for disciplinary counsel to suggest that there is nothing beyond the cold record that bears on credibility. And the master's conclusions deserve significant weight. *James,* 492 Mich at 569 (noting the master's "superior position to observe the witness' demeanor and assess their credibility"). The Commission should affirm the master's rejection of the charges in Count 3.

4. Count IVA: "LEORTC

In Count IVA, disciplinary counsel allege "financial improprieties" related to fees that the prosecutor's office received from the Corrections Academy. They assert that Konschuh did not participate in the 2011 and 2012 seminars and improperly kept fees from the Corrections Academy. (*Amended Formal Complaint,* ¶¶349, 358). In addition, they assert that Konschuh improperly deposited checks from the Corrections Academy. (*Id.,* ¶361). The master correctly rejected these allegations and concluded that disciplinary counsel did not establish financial improprieties.

There are few factual disputes concerning the Corrections Academy or "LEORTC" fees. The prosecutor's office provided training during business hours and presenters did not need to take vacation or sick time. The Corrections Academy paid the prosecutor's office and Konschuh used those funds to benefit the prosecutor's office. As Mike Hodges testified, Konschuh handled these fees in the same manner as his predecessor, Justus Scott. (1733-36). The questions were whether this conduct was improper and, under *Gorcyca,* whether Konschuh acted with improper intent.

Disciplinary counsel did not prove that this conduct was improper. They failed to cite any law or regulation that was both (a) in effect at the time and (b) contrary to

Konschuh's handling of the Corrections Academy funds. Even disciplinary counsel's accounting expert, Cary Vaughn, was unfamiliar with Lapeer County's policies. (1945). Although disciplinary counsel relied on Treasury policies in an attempt to call into question Konschuh's handling of these funds, Vaughn confirmed that these policies are "for training purposes only and should not be considered a legal interpretation of the items presented." (1951). Even now, disciplinary counsel relies on the *opinion* of John Biscoe. (Objection at 46, citing Report at 932 ("In my opinion, yes, under that circumstance."; "In my opinion, it should be deposited with the county since he was being paid for those hours by the county.")). But Biscoe was not listed or qualified as an expert. (888-89). His opinion cannot establish a factual basis for a finding of misconduct.

Furthermore, Konschuh used these fees to reimburse himself for funds he expended on behalf of the prosecutor's office. (288-89). The prosecutor's office provided the training and the prosecutor's office received the benefits. There is no evidence that Konschuh's handling of these funds violated the law or benefitted Konschuh personally. Disciplinary counsel failed to prove their allegations by a preponderance of the evidence.

Disciplinary counsel's primary objection to the master's conclusion on this issue is that they dislike his credibility determinations. (Objection at 47, stating: "He primarily rested his conclusion on his mistaken beliefs … that the county had no policy for handling county contracts and county money, and on his uncritical acceptance of respondent's claim that he was merely offsetting money he had spent

on behalf of the prosecutor's office over the years."). The master had the benefit of seeing witnesses testify, and gauging all the intangible factors that affect credibility. He found Konschuh's testimony more credible and declined to treat Biscoe's opinions as law. Disciplinary counsel have produced no reason to second-guess those conclusions.

5. Count IVB: City of Lapeer fees

In Count IVB, disciplinary counsel assert that Konschuh improperly deposited fees from the City of Lapeer into his personal accounts. (*Amended Formal Complaint,* ¶¶372-373). They also allege that Konschuh failed to report these funds for tax purposes. (*Id.,* ¶376). Konschuh testified that he deposited funds from the City of Lapeer into his checking account as reimbursement for expenses he incurred to benefit the prosecutor's office. (338-339). Then-prosecutor Justus Scott did the same thing with City of Lapeer fees—although, instead of sharing the fees with the office like Konschuh, Justus Scott kept them for himself. (338; 351; 3304).[7]

As with previous counts, disciplinary counsel failed to produce evidence that Konschuh's actions were improper. They relied on a policy that did not exist at the relevant time, according to county controller John Biscoe. (982-83). They also rely on Treasury guidelines that, according to disciplinary counsel's own expert, are not authoritative. (1951).

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[7] This fact belies disciplinary counsel's assertion that depositing a check payable to the prosecutor's office into a personal account is "an extraordinary thing for a public official to do with money he received in his public capacity." (Objection at 23). Konschuh's actions were *not* extraordinary. Justus Scott did the same thing with money he received as prosecutor—but, unlike Konschuh, Scott did not use those funds for the benefit of the prosecutor's office. (338; 351; 3304).

The City of Lapeer arguments therefore fail for the same reasons as the Corrections Academy claims. Disciplinary counsel had the burden to prove that Konschuh's actions were actually improper and they failed to do so. Ultimately, they rely only on John Biscoe's testimony. But Biscoe himself was careful to explain that he was only offering an opinion. (932). It appears that disciplinary counsel was counting on the master to *assume* that Konschuh's actions were improper. But the master enforced disciplinary counsel's burden of proof and correctly found that disciplinary counsel failed to carry it. The Commission should do the same.

6. Count V: "Improper Reimbursements"

Count V asserts that Konschuh received improper reimbursements. Disciplinary counsel challenges Konschuh's reimbursements from "Christmas luncheons," "Secretary Day/Administrative Day celebration luncheons," and donuts. (*Amended Formal Complaint,* ¶379). In particular, this count raises (a) the December 2011 holiday luncheon, (b) the April 2012 Secretary's Day luncheon, and (c) the December 2012 Christmas luncheon. Disciplinary counsel alleges that these reimbursements were "not subject to reimbursement under the Michigan Department of Treasury guidelines." (*Amended Formal Complaint,* ¶380). The master correctly found that disciplinary counsel did not carry their burden of proof.

The master was right to reject disciplinary counsel's arguments that the luncheons were not for training or staff development. The idea that a luncheon could never involve celebrating a holiday *and* training was always disciplinary counsel's invention. They never produced any law or facts to support that either-or theory. In contrast, Konschuh testified consistently and credibly that the holiday and

Administrative Professionals Day luncheons had a dual purpose: they were both social events and opportunities to discuss and improve office operation. (390). And other witnesses supported this testimony. Strong and Beatty confirmed that these luncheons involved discussions of cases and scheduling. (2323; 2589). And, in contrast to disciplinary counsel's attempts to define "training" narrowly, John Biscoe testified that "training" includes staff development. (1065). Testimony from Konschuh, Strong, and Beatty established that these lunches qualified as staff development. Therefore, Konschuh properly sought reimbursement for these lunches as "training."

Disciplinary counsel's reliance on the "Michigan Department of Treasury guidelines" was also misplaced. (*Amended Formal Complaint,* ¶380). There is no evidence that Konschuh had any obligation to follow the Michigan Department of Treasury Guidelines. Cary Vaughn, disciplinary counsel's expert, confirmed that the state treasury guidelines are "for training purposes only and should not be considered a legal interpretation of the items presented." (1951). John Biscoe described the treasury publication as "a narrative" and "a guideline." (1008). So these guidelines are not law and Konschuh had no obligation to follow them.

Nor is there evidence that these guidelines were in effect when Konschuh accepted reimbursements for the 2011 and 2012 luncheons. Vaughn testified that the Treasury removed these guidelines from its website in 2004. (1973). So disciplinary counsel did not prove the allegations in Count V by a preponderance of the evidence.

7. Count VI: "Abusive Demeanor"

Count VI alleges that Konschuh improperly campaigned for Dave Richardson when he "made telephone calls" and placed "numerous" lawn signs. It also alleges

that Konschuh displayed an improper demeanor at the Oysters' home by using a "confrontational and irate tone of voice" and displayed "an aggressive, belligerent, and/or arrogant attitude." (*Amended Formal Complaint,* ¶440). Disciplinary counsel assert that Konschuh said Judge Nick Holowka had been a "pain in [his] ass for 30 years." (*Id.,* ¶444).

The master correctly concluded that disciplinary counsel failed to prove these allegations. The Code of Judicial Conduct only prohibits judges from "publicly endors[ing] a candidate for a *nonjudicial* office." Canon 7(A)(1) (emphasis added). Richardson was running for a judicial office so, as the master concluded, Konschuh was free to endorse him. (Report at 8).

As for Konschuh's allegedly objectionable language, the master concluded that there was "conflicting testimony" and that disciplinary counsel did not prove by a preponderance of the evidence that Konschuh "used any inappropriate language or demeanor with the Oysters." (Report at 9). The master was right to conclude that disciplinary counsel failed to meet their burden. The Oysters may have a different (albeit conflicting) recollections but Konschuh's testimony established that he was cordial to the Oysters and did not use profanity. (544). The Oysters' own report to the Judicial Tenure Commission corroborated Konschuh because it does not mention Konschuh using profanity at all. (1184).

True, the Oysters did not like Konschuh's visit. Bonnie Oyster described Konschuh's demeanor as "very insistent that I should know" and "[q]uite belligerent, like I should know." (1136). She testified that she felt like she was "[in] court, I guess,

in front of him." (1139). Those statements indicate that Bonnie Oyster was uncomfortable with the conversation, but they are not evidence of judicial misconduct. As the master concluded, "the Code of Judicial Conduct does not prohibit [j]udges from being very insistent." (Report at 9). Nor does it prohibit judges from asking questions and probing the veracity of an individual's factual statements. The master was correct to conclude that disciplinary counsel failed to prove by a preponderance of the evidence that Konschuh committed judicial misconduct in his meeting with the Oysters.

Disciplinary counsel's response to the master's findings on Count VI is to accuse him of "mischaracterizing and excluding important facts." (Objection at 55). What are these "important facts"? Disciplinary counsel complain that "[t]he master did not address respondent's strong feelings about Richardson and Judge Holowka." (*Id.*) But the Code of Judicial Conduct does not include prohibit judges from having certain feelings. The issue under Count VI was whether Konschuh mistreated the Oysters. Konschuh's "strong feelings" about Judge Holowka have nothing to do with that question.

Disciplinary counsel also raise the master's failure to "note that when respondent appeared at Mrs. Oyster's door to complain, she told him that no one had sought the family's permission to put up the Richardson sign … in response to which he told Mrs. Oyster that he did not have to seek anyone's permission, and that no one had the right to take the sign down." (Objection at 55-56). In fact, Konschuh was right: Bonnie Oyster admitted that she did *not* own the property where Konschuh's

sign was placed. (1152). Many people asked the Oysters for permission anyway. (1163). But there was no evidence that anyone was *required* to obtain the Oysters' permission. And, in any event, this issue is not relevant to whether Konschuh committed misconduct during his interaction with the Oysters.

Aside from raising irrelevant issues, disciplinary counsel fault the master's credibility determinations. They complain that "the master did not resolve the conflict between [Bonnie] and Samuel's testimony on [the] one hand and respondent's testimony on the other." (Objection at 56). But the master didn't need to decide which witness was more credible. He only needed to determine whether disciplinary counsel proved their claims by a preponderance of the evidence. *Noecker,* 472 Mich at 8. They did not.

That leaves disciplinary counsel's final charge: that their witnesses are more credible than Konschuh: "The preponderance of the evidence—i.e., the testimony of Mrs. Oyster and her son, as compared with the testimony of respondent, whose credibility has been repeatedly impeached—is that his testimony is false." (Objection at 56). In fact, the Oysters had substantial credibility problems. Take Bonnie Oyster's testimony, for example. She said the discussion with Konschuh took place on October 7, 2016 (1132) when it was actually October 5, 2016 (1132-33). She admitted that she was "[n]ot sure just how it went" when asked what happened next on October 5, 2016. (1136). She testified that Konschuh used the word "ass" (1138) but then testified that she didn't recall whether Konschuh used profanity: "I don't recall. I didn't—most of

it was against Holowka when he said that." (1139). Bonnie Oyster's testimony lacked credibility by itself.

Things only got worse for disciplinary counsel when Samuel Oyster testified. At that point, the master faced a series of glaring conflicts between Samuel Oyster's testimony and Bonnie Oyster's testimony:

- Bonnie Oyster said that Samuel Oyster was listening to the conversation while "watching the news." (1140). But Samuel said he overheard the conversation from the kitchen. (1164).

- Bonnie Oyster described Konschuh as pacing. (1138). Samuel testified that Konschuh was "standing stationary." (1173).

- Samuel Oyster said that Konschuh was wearing jeans and a long-sleeve shirt, "which [he] thought was odd." (1173). Bonnie Oyster testified that Konschuh was wearing "khaki shorts and a t-shirt." (1138).

  Samuel Oyster testified that Konschuh used the word "fuck." (1164). But Bonnie Oyster's written report to the Judicial Tenure Commission did not describe Konschuh using profanity. (1184). Samuel tried to explain away this discrepancy by saying that Bonnie Oyster would not type profane words because "[s]he's a devout Christian[.]" (1186). But Bonnie Oyster used the word "ass" at the hearing without difficulty. (1138).

- Samuel Oyster testified that he removed Richardson's sign. (1189). In fact, Dave Richardson's wife, Julie Richardson, removed it. (2517).

Although Samuel Oyster asserted that Konschuh used the word "fuck," his testimony is not credible because (a) he was not near Konschuh at the time and admitted that he had difficulty hearing (1165); and (b) Bonnie Oyster did not recall Konschuh using that word. (1139). Likewise, Bonnie Oyster's claim that Konschuh used the word "ass" is not credible because that assertion does not appear in her contemporaneous report. (1184).

Given these facts, the master reasonably concluded that disciplinary counsel failed to prove by a preponderance of the evidence that Konschuh committed misconduct in his discussion with the Oysters. The Commission should affirm that conclusion.

8. Count VII: "Failure to Disclose or Disqualify"

Count VII alleges that Konschuh failed to disclose conflicts and improperly failed to disqualify himself in cases involving Dave Richardson, Mike Sharkey, and Tim Turkelson. (*Amended Formal Complaint,* ¶¶ 457, 476). Konschuh spoke to Chief Judge Holowka about potential conflicts in criminal matters and decided to disclose his potential conflicts in any contested matter. (3183). If a matter was uncontested, he believed he could handle it without disclosures or recusals. (565-66, 2917, 3183). The master concluded, however, that Konschuh was required to disclose potential conflicts in *all* cases, whether contested or not, and that he committed misconduct by failing to do so. Konschuh accepts the master's conclusion and will follow it in all future cases.

9. "Misrepresentations"

A. "Misrepresentations Charged in Count VIII"

Count VIII asserts that Konschuh made misrepresentations to the Michigan State Police (that is, to Pendergraff) and to the Judicial Tenure Commission. The master correctly held that disciplinary counsel failed to prove these allegations by a preponderance of the evidence.

Disciplinary counsel assert that Konschuh lied when he said that he paid for (a) lunches and meals for the prosecutor's office, (b) lunches and snacks for crime

victims, (c) flowers, cards, water, and cakes, (d) plaques for retiring members of the prosecutor's office, and (e) plaques for retiring police officers. (Objections at 58). These statements were not misrepresentations. Konschuh regularly spent his own money on refreshments, meals, and similar items for his staff. (277; 522-24; 3088). He bought cookies for the office, and ice and refreshments for office events. (524, 529-30). He bought rounds of drinks and appetizers at post-trial celebrations. (699-70; 3087). He even purchased a dishwasher for the office. (1733-34; 2304). Cathy Strong corroborated Konschuh's testimony, testifying that he purchased lunches and snacks for crime victims. (2321-2322).

Next, disciplinary counsel assert that Konschuh falsely stated in his July 6, 2016 answers that Tab C represented $16,854.30 in out-of-pocket expenditures for the prosecutor's office. (*Amended Formal Complaint,* ¶¶540-41). Disciplinary counsel allege that this representation is false because (a) Tab C includes expenditures from before Konschuh became prosecuting attorney; (b) Tab C includes expenses that Konschuh did not pay for; (c) Tab C includes improper governmental expenditures; (d) Tab C includes expenditures that Konschuh was reimbursed for; and (e) Tab C includes coffee and cookies for his May 6, 2013 investiture. (*Id.,* ¶542).

Konschuh's exhibit was truthful. In fact, he expressly stated that the exhibit included "older documentation to show that there was a pattern of purchasing things for the office with these types of funds …." (Exhibit 95, Page 157). So he did not represent that *every* receipt was a non-reimbursed expense during the relevant timeframe. As for the inclusion of refreshments from his investiture, disciplinary

counsel overlooks Konschuh's explanation that he also used those cookies in the victims advocate's room. (Exhibit 94e, ¶ 20).

Additionally, disciplinary counsel assert that Konschuh falsely stated that he did not know about "Lapeer County's 'Grants, Contracts, and Agreements' policy." (Objection at 62). The testimony at trial proved that Konschuh was speaking the truth. County controller John Biscoe testified that he did not think the policy existed in 2008 when Konschuh entered into the BounceBack agreement. (982-83). That explains why Konschuh never received a book of county policies upon joining the prosecutor's office and why Strong did not receive a binder of applicable policies. (209; 2984). Strong confirmed that the office did not receive a binder. (2296).

It is also doubtful that the contracts policy was in effect in 2008. Biscoe testified that he did not believe the policy existed in written form in 2008, when Konschuh entered into the BounceBack agreement. (982-83). He testified that the contracts policy was uploaded to the county server in 2009, after the prosecutor's office entered into the BounceBack agreement. (*Id.* at 983). Consequently, disciplinary counsel failed to carry their burden of proof on this issue.

The final alleged pre-trial statement at issue in disciplinary counsel's objections is Konschuh's statement that he did not use an angry and controversial tone of voice with the Oysters. (Objections at 62). Again, Konschuh testified truthfully. As detailed above, the Oysters' testimony is conflicting on central points, such as what exactly Konschuh said and whether he used profanity. Konschuh's

testimony was unequivocal and persuasive. Disciplinary counsel did not establish any misrepresentations.

B. "Misrepresentations at the Formal Hearing"

Disciplinary counsel also contend that Konschuh made misrepresentations during the hearing and they ask the Commission to consider these new allegations under MCR 9.235 ("The complaint may be amended to conform to the proofs or to set forth additional facts, whether occurring before or after the commencement of the hearing."). In the alternative, they assert that these supposed misrepresentations "are highly probative of respondent's credibility." All of the alleged misrepresentations are just restated versions of the disciplinary counsel's underlying allegations. For example, they allege that Konschuh violated county policy and then allege that he made a misrepresentation by testifying that he never heard of the policy. Like the underlying allegations, disciplinary counsel's new misrepresentation allegations lack merit.

Disciplinary counsel begin with the assertion that Konschuh falsely testified that Judge Neithercut did not accept his plea. (Objection at 63). In support, they cite footnote 27 of their brief. (*Id.*) But footnote 27 has nothing to do with Konschuh's plea before Judge Neithercut. (*Id.* at 33, n 27).

Next, they challenge Konschuh's testimony that he spent over $7,700 out of his pocket on the prosecutor's office. (Objection at 63; see also 3321-3322). They challenge certain portions of Konschuh's estimate, such as the total water bills (3323-24) and the inclusion of alcohol-related expenses (3328). (Disciplinary counsel assert that alcohol would not be reimbursable under county rules (3328; 3375). But Konschuh

did not understand the funds to belong to county. He had no reason, therefore, to apply the county's rules). Knocking that estimate down, they say, proves that Konschuh testified falsely. But that overlooks Konschuh's repeated assertion that he was just providing receipts that were still available, and that there were many unaccounted-for expenses. (See, e.g., 3327). The $7,700 figure that Konschuh provided to Judge Neithercut was short. (3329). Konschuh's total expenses for the office were closer to $16,000. (3318-19).

Disciplinary counsel assert that Konschuh "told the [M]aster that he only purchased gift cards for staff members who had missed Secretaries['] Day lunches, not Christmas lunches. (Objection at 63, citing 399). But the page that disciplinary counsel bases its claim on does not say what disciplinary counsel says it does. One will search Page 399 in vain for the statement that Konschuh bought gift cards only Secretaries' Day and "not Christmas lunches," as disciplinary counsel represents.

Next, disciplinary counsel argue that Konschuh made a misrepresentation when he told the master that the office luncheons discussed above involved training. (Objection at 63). Konschuh told the truth. The holiday and Administrative Professionals Day luncheons had a dual purpose: they were both social events and opportunities to discuss and improve office operation. (390). Other witnesses corroborated this testimony. (2323; 2589).

Disciplinary counsel challenge Konschuh's claim that he did not know about a "Grants, Contracts, and Agreements" policy. (Objection at 64). The record provided ample support for Konschuh's testimony. Even John Biscoe testified that he did not

believe the policy existed in written form in 2008, when Konschuh entered into the BounceBack agreement. (982-83). Doreen Clark, Biscoe's assistant, was unsure whether the policies were online in 2009: "I cannot, I guess, confirm or deny that, because we did try to have a majority of our policies all on that J drive. But they were also, because of a ransomware, wiped completely off. But that was not till I think later." (1916). With this record, disciplinary counsel cannot establish that Konschuh's testimony was false.

Disciplinary counsel argue that Konschuh falsely stated that "his APAs handled trials, including jury trial, on behalf of the City of Lapeer." (Objection at 64, citing 334). This is what Konschuh actually said: "Occasionally assistant prosecutors would handle a jury trial for the city. Very rarely." (334). Disciplinary counsel assert that Konschuh's testimony was false because, according to its witnesses, the City of Lapeer only tried two cases between 1996 and 2003, and the prosecutor's office handled neither case. (Objection at 64).

Disciplinary counsel's argument overlooks Konschuh's testimony that he was using the term "trials" to include formal hearings. (3100-01). They have not argued, much less proven, that there were no formal hearings during the relevant timeframe. Moreover, disciplinary counsel do not—and cannot—dispute that the prosecutor's office handled non-trial matters for the City of Lapeer. (331-32). These included pre-trials. (332). So there is no dispute that the prosecutor's office did, in fact, earn fees from the City of Lapeer. At worst, therefore, Konschuh made a non-material error about whether any of the cases at issue went to trial. Because this issue is

nonmaterial, disciplinary counsel cannot prove that Konschuh intended to mislead the master. See *Gorcyca,* 500 Mich App at 639 (requiring proof of wrongful intent).

V. ARGUMENTS ADDRESSING SANCTIONS

In re Brown, 461 Mich 1291; 625 NW2d 744 (2000), is the leading case in Michigan on judicial sanctions. There, the Michigan Supreme Court held that judicial discipline must be proportionate, and that similar misconduct should receive a similar sanction. *Id.* at 1292. The Court noted that "unexplained disparities and punishment" have the effect of undermining "the public's faith in [the] just and fair administration" of the judicial system. *Id.* at 1293. The Commission must ensure that the recommended discipline in one case is commensurate with recommendations in other cases: "[I]t is incumbent upon the [Commission] that it undertake a reasonable effort… To ensure a consistent rule of law with respect to its constitutional responsibilities as well as to enable this Court to effectively carry out its own constitutional responsibilities." *Id.* at 1295.

Brown provides a non-exclusive list of factors to guide this analysis. The first *Brown* factor states: "misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct[.]" *Brown,* 461 Mich at 1292. In this case, the misconduct at issue is Konschuh's failure to recuse himself or disclose conflicts in all cases involving Sharkey, Richardson, and Turkelson. This misconduct was neither an "isolated instance of misconduct" nor a "pattern or practice." Rather, Konschuh's recusal decisions arose from a unique set of circumstances—criminal proceedings on charges Konschuh believed to be politically motivated. Those circumstances are neither common nor likely to repeat.

Second, *Brown* provides that "misconduct on the bench is usually more serious than the same misconduct off the bench." *Brown,* 461 Mich at 1292. Here, the misconduct took place on the bench.

Third, *Brown* states that "misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety[.]" *Brown,* 461 Mich at 1293. In this case, there is no evidence that the misconduct was actually prejudicial to the administration of justice. Following instructions from Chief Judge Holowka, Konschuh skipped disclosure and recusal only in uncontested or non-substantive matters. (565-66, 2917, 3183). Disciplinary counsel does not allege that Konschuh's alleged bias affected any particular case.

Fourth, "misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does not." *Brown,* 461 Mich at 1293. Generally, this factor focuses on the *appearance* of prejudice rather than actual prejudice. *In re Haley,* 476 Mich 180, 188; 720 NW2d 246 (2006) (holding that judge created appearance of impropriety by accepting football tickets while on the bench). Given the master's findings regarding conflicts, the misconduct here arguably implicated the administration of justice.

Fifth, "misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated." *Brown,* 461 Mich at 1293. Konschuh's decisions on recusal and disclosure were not spontaneous. Their deliberation, however, reflects Konschuh's desire to do the right thing: he asked his chief judge to hire an ethics

expert and, when the chief judge declined to do so, Konschuh follows the chief judge's instructions. (2409; Exhibits 112-113, 3183).

Sixth, "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." *Brown,* 461 Mich at 1293. Konschuh's disclosure and recusal decisions did not affect truth-finding in any way. He skipped disclosure and recusal issues only in non-substantive or uncontested matters. (565-66, 2917, 3183).

Seventh, "misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship." *Brown,* 461 Mich at 1293. There are no allegations that Konschuh's misconduct involved discriminatory intent of any kind. *Id*. at 1292-1293].

Based on the complete record, five of the seven *Brown* factors call for a less severe sanction. Caselaw supports this conclusion as well. Applying the *Brown* factors, the Michigan Supreme Court has removed judges only for the most severe misconduct—and when, at a minimum, those judges made misrepresentations. See *In re Brennan,* 504 Mich 80; 929 NW2d 290 (2019) (removing judge who hid the extent of her relationship with a witness, failed to disqualify herself from her own divorce proceeding, destroyed evidence, and made false statements under oath); *In re McCree,* 495 Mich 51; 845 NW2d 458 (2014) (removing judge who had affair with witnesses,

engaged in ex parte communications, and lied under oath); *In re Adams,* 494 Mich 162; 833 NW2d 897 (2013) (perjury); *In re James,* 492 Mich 553; 821 NW2d 144 (2012) (misuse of public funds, misrepresentations during disciplinary process, violation of anti-nepotism policy); *In re Justin,* 490 Mich 394; 809 NW2d 126 (2012) ("fixing" tickets, false statements under oath); *In re Noecker,* 472 Mich 1; 691 NW2d 440 (2005). (false statements after drunk driving accident).

The Court suspended a judge for a year when the judge appointed an attorney with whom she was having an intimate relationship to act as counsel in 56 cases. *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001). The judge did not disclose the relationship in those cases. *Id.* at 470. She also made false statements to a detective who was investigating the murder of the attorney's wife. *Id.* at 472. Another judge received a nine-month suspension for interfering with a police investigation of his judicial intern and making an intentional misrepresentation. See *In re Simpson,* 500 Mich 533, 571; 902 NW2d 383 (2017).

Less serious misconduct has resulted in shorter suspensions. *In re Nebel,* 485 Mich 1049; 777 NW2d 132 (2010) (suspending judge for 90 days because he drove while intoxicated); *In re Hathaway,* 464 Mich 672; 630 NW2d 850 (2001) (suspending judge for 60 days where judge conducted arraignment without prosecutor, threatened to jail defendant if he did not waive jury right, and had a pattern of untimeliness and adjournments); *In re Post,* 493 Mich 974; 830 NW2d 365 (2013) (imposing 30-day suspension where judge refused to allow invocation of Fifth Amendment and jailed attorney who counseled client to remain silent); *In re Halloran,* 486 Mich 1054; 783

NW2d 709 (2010) (suspending judge for 14 days based on dishonesty in managing courtroom and reporting to State Court Administrator's Office).

Finally, the Supreme Court has censured judges for less serious errors that do not involve dishonesty. See *In re Gorcyca,* 500 Mich 588; 902 NW2d 828 (2017) (censuring judge for discourteous conduct to children involved in parents' divorce and custody proceedings); *In re Servaas,* 484 Mich 634; 774 NW2d 46 (2009) (censuring judge who moved outside of judicial district and drew lewd pictures); *In re Haley,* 476 Mich 180; 720 NW2d 246 (2006) (censuring judge who accepted football tickets in court); *In re Moore,* 472 Mich 1207; 692 NW2d 834 (2005) (censuring judge for eighteen-month delay between arraignment and trial); *In re McCree,* 493 Mich 873; 821 NW2d 674 (2012) (censuring judge for texting shirtless photo of self); *In re Logan,* 486 Mich 1050; 783 NW2d 705 (2010) (censuring judge for arranging another elected official's release on bond); *In re Fortinberry,* 474 Mich 1203; 708 NW2d 96 (2006) (censuring judge for sending defamatory letter).

The misconduct at issue here—failing to recuse or notify litigants of potential conflicts in non-substantive and uncontested matters—is most similar to the misconduct that led to censure. Although it occurred on the bench, it did not affect the substance of any case. See *Haley,* 476 Mich at 180 (judge accepting football tickets on the bench). It is a matter of bad form rather than corrupt intent. See *Moore,* 472 Mich at 1207 (judge who allowed 18-month delay between arraignment and sentence). It does not involve dishonesty, which appears to be necessary for removal or a lengthy suspension. Compare *Chrzanowski,* 465 Mich at 470 (one-year

suspension for misusing appointment authority, failing to disclose relationship in 56 cases, and dishonesty to detective).

There is no evidence that Konschuh was acting from a "dishonest or selfish" motive when making recusal decisions. *In re Morrow,* 496 Mich 291; 854 NW2d 89 (2014) (explaining that "dishonest or selfish conduct warrants greater discipline than conduct lacking such characteristics"). To the contrary, he was following instructions from Chief Judge Holowka: "Based upon the direction from the chief judge and the State Court Administrator's Office, I was instructed to handle the criminal cases at the pretrial level, potential adjournments, scheduling, ministerial acts such as taking a plea and a sentence in a minor misdemeanor-type case, that if anything was going to be contested like a preliminary examination and the prosecutor requested that I recuse myself I would do so." (3183). So censure is the appropriate remedy.

Disciplinary counsel urge the Commission to follow *In re James,* 492 Mich 553; 821 NW2d 144 (2012), and remove Konschuh. They state that Sylvia James "was removed from the bench for financial improprieties… [.]" (Objection at 26, citing *James*). In fact, James was removed for misusing funds *and* using a clothing policy to deny access to court *and* rehiring an unqualified magistrate *and* violating an anti-nepotism policy *and* making misrepresentations during the disciplinary process. *James,* 492 Mich at 557. *James* is nothing like this case.

In short, the master correctly determined that Konschuh's only misconduct was failing to disclose potential conflicts or recuse in all cases involving, Sharkey,

Turkelson, and Richardson, including uncontested and non-substantive matters. The correct discipline for that misconduct is censure.

VI. CONCLUSION

The master was right to reject the vast majority of disciplinary counsel's allegations. The idea that Konschuh would intentionally embezzle county funds to provide donuts, coffee, and other refreshments for his staff never had merit. Disciplinary counsel may have a different view about how to classify the funds at issue but it doesn't follow that Konschuh committed intentional misconduct. As for the claim that Konschuh failed to adequately disclose conflicts, Konschuh accepts the master's findings. He believed that he was following the governing standards by addressing conflicts only when a matter reached a substantive issue. But he understands the master's conclusion and will follow it in the future.

Judge Byron Konschuh has served the people of Lapeer County with honor for decades. He respectfully submits that the panel should allow him to continue doing so by (a) accepting the master's findings and (b) imposing only censure.

Respectfully submitted,

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Dated: March 9, 2020

Attachment A

Grievance Administrator,

Petitioner/Appellant,

v

Harvey I. Wax, P-22054,

Respondent/Appellee,

98-112-GA.

Decided: September 22, 1999

BOARD OPINION

The Grievance Administrator filed a formal complaint alleging, in Count One, that respondent violated MRPC 3.3(a)(1) and MRPC 8.4(b) by making a false statement in an appellate brief. Count Two charges respondent with violating various rules by making a false statement in his answer to the request for investigation. After the Administrator rested, Tri-County Hearing Panel #1 dismissed both counts pursuant to MCR 2.504(B)(2). The panel also took respondent's motion for sanctions under advisement. The Administrator has filed a petition for review asking this Board to reverse only the dismissal of Count Two of the formal complaint. The Administrator also seeks an order directing the panel to deny respondent's motion for sanctions. We affirm the hearing panel's order of dismissal, and we narrowly conclude that sanctions are not appropriate in this case.

The first question before us involves respondent's denial, in answer to the request for investigation, that he made a certain statement in the appellate brief at issue in Count One (but not at issue in this review). Count Two alleges that:

> Respondent violated his duties and responsibilities by denying that he misled the Court of Appeals and directing the Attorney Grievance Commission to page 6 of Appellant's Brief when Respondent knew or should have known that the relevant portion of Appellant's Brief was at page 18.

As is set forth more completely in the panel's report (appended to this opinion), respondent admitted at the hearing that page 18 of the brief does contain the statement he denied making. The panel's report states in pertinent part:

> With respect to count II, respondent testified after having been called for cross-examination by petitioner's counsel, MCR 9.115(H), that, although his response to the request for investigation contained a misstatement, he did not intend to mislead or knowingly misrepresent a material fact to the grievance administrator. Rather, he stated that his focus was directed to a different portion of his brief by the nature of the request for investigation and the allegations against him. He acknowledged neglect and haste in examining his pleadings before filing his answer to the request for investigation, but stated that he in no way intended to mislead or prevaricate.

> We find that the respondent's testimony is credible and has not been contradicted by any evidence offered by the petitioner. If respondent intended to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer. To the extent that the brief itself was incorporated into Mr. Wax's written response, the answer to the request for investigation is internally inconsistent, not patently false. The petitioner has not proven by a preponderance of the evidence that respondent knowingly made a false statement of material fact in connection with a disciplinary matter, and has not established a violation of MRPC 8.1(a), 8.4(a-c) or MCR 9.103(C), or MCR 9.104(1-4) or (6). Count II likewise must be dismissed.

On review, the Administrator argues that the hearing panel's decision to dismiss Count Two is not supported by the evidence. We disagree. This Board reviews the factual findings of a hearing panel for proper evidentiary support. Grievance Administrator v Donald H. Stolberg, Nos 95-72-GA; 95-107-FA (ADB 1996) (affirming panel dismissal), citing Grievance Administrator v James H. Ebel, 94-5-GA (ADB 1995). In applying this standard of review, it is not our function to substitute our own judgment for that of the panel or to offer a *de novo* analysis of the evidence. Grievance Administrator v Carrie L. P. Gray, 93-250-GA (ADB 1996). And, because the hearing panel has the opportunity to observe witnesses during their testimony, we defer to the panel's assessment of their demeanor and credibility. Grievance Administrator v Neil C. Szabo, 96-228-GA (ADB 1998); Grievance Administrator v Deborah C. Lynch, No 96-96-GA (ADB 1997). See also In re McWhorter, 449 Mich 130, 136 n 7 (1995).

The Administrator argues that:

> The hearing panel apparently focused its analysis on whether Respondent had "knowingly" made false statements of material fact in his Answer [to the request for investigation]. However, Respondent's state of mind is irrelevant to a finding of misconduct pursuant to MCR 9.103(C) and MCR 9.113(A).
>
> The only relevant issue is whether Respondent made the offending statement in the Appellant's Brief.

In other words, the Administrator is arguing for strict liability in the event of a misstatement in response to a request for investigation. The rules wisely do not provide for this.

The first rule relied upon, MCR 9.103(C), is not applicable here. Thus, although the panel did not state this basis for its ruling, the panel correctly concluded that this rule was not violated. MCR 9.103(C) plainly refers to the duty of an attorney who is not a respondent to assist the Administrator in an investigation. A respondent's duty is governed by MCR 9.113(A), and it is to file an answer to the Administrator's request "fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct." That rule further provides: "Misrepresentation in the answer is grounds for discipline."

Of course MCR 9.113(A), and, assuming for the sake of argument that it is applicable, MCR

9.103(C), must be read in light of MCR 9.104(6) and MRPC 8.1(a) which provide that knowing misrepresentation in connection with a disciplinary investigation is misconduct. We need not now decide the precise mental state necessary to support a finding of misconduct under MCR 9.113(A). It was not recited in the charging paragraph in the formal complaint, and was therefore not addressed by the panel. Moreover, we reject the notion that respondent's state of mind is irrelevant and we find no basis to disturb the panel's determination in this case that respondent's unintentional misstatement in answer to the request for investigation does not amount to misconduct.

The Administrator also asks that we order the panel to dismiss the respondent's motion for sanctions which has been taken under advisement. The Administrator argues that the hearing panel has no authority to entertain a motion for sanctions against the Attorney Grievance Commission or its counsel in light of MCR 9.125 (immunity) and 9.128 (costs). Respondent argues, more persuasively, that MCR 2.114's provisions on sanctions are made applicable to discipline proceedings through MCR 9.115(A). We need not decide this question now because we find that, in any event, a violation of MCR 2.114(D) has not been established. Unfortunately, however, the question is a close one. But, although the case against respondent lacks merit, we are not prepared to say that the petitioner's filings in this matter rise to the level of sanctionable conduct. Accordingly, in the interest of adjudicative economy, we decline to remand this matter or to permit further proceedings by the panel on respondent's motion for sanctions. The panel's order of dismissal is affirmed.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Roger E. Winkelman, and Nancy A. Wonch concurred in this decision.

Board Members Grant J. Gruel, Albert L. Holtz, Michael Kramer, and Kenneth L. Lewis were absent and did not participate.