STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Formal Complaint No. 97

Hon. Richard B. Halloran, Jr.
Third Circuit Court

Master's Report and Recommendation
Re Respondent's Motion for Summary Disposition

Preliminary Comment

Judge Richard B. Halloran, the Respondent, has filed a motion for the summary disposition of Formal Complaint No. 97, charging him with judicial misconduct.

Michigan Court Rule (MCR) 2.116(C)(10) provides for summary disposition of an action if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

The Examiner and the Respondent are in agreement that the factual circumstances giving rise to the formal complaint are not in dispute and that the question to be answered is whether or not Respondent is entitled to dismissal as a matter of law.

On November 9, 2015, counsel presented arguments on the motion, which was then decided on the record on November 10, 2015.

There being no factual issues for resolution, the public hearing previously scheduled for November 30, 2015, was cancelled. Whether a public hearing is ultimately necessary is yet to be determined.

Opinion

Judge Halloran is assigned to the Family Division of the Wayne County Circuit Court. Among other matters, he presides over divorce cases. Formal Complaint No. 97 charges him with judicial misconduct in granting judgments of divorce without taking sworn testimony to establish the court's jurisdiction or the statutory grounds for divorce.

Judge Halloran admits that from the middle of June 2013, through December 2014, sworn testimony was not used in the four cases specifically identified in the complaint and in a large number of other cases when the parties to the action were represented by attorneys. In those cases he determined court jurisdiction and the grounds for divorce by taking judicial notice of the parties' pleadings wherein they admitted the court's jurisdiction and that there was an irreparable breakdown of the marriage, using the precise language statutorily mandated by the Legislature.

In many of those cases, Judge Halloran discussed at length with the attorneys his desire to use the aforementioned procedure and the reasons therefore. He further asked the attorneys if they had concerns or objections to the aforementioned procedure none were ever voiced. Similarly, none of the judgments rendered during the relevant period of time were ever the subject of appellate review or trial court modification challenging the use of the aforementioned procedures.

Judge Halloran's reason for using the abbreviated procedure was to modernize and expedite the trial procedure to establish court jurisdiction and the grounds for divorce. Its use was permissible within judicial discretion and violated no statute or court rule. He further contends that if he erred, his mistake was made in good faith to improve trial practice and that it does not equate to judicial misconduct.

The scope of a judicial misconduct charge is framed by the allegations in the formal complaint. Formal Complaint No. 97 premises the charge of judicial misconduct on Judge Halloran's alleged violations of Michigan Compiled Law (MCL) 522.9(1), MCL 522.6 and Michigan Court Rule (MCR) 3.210. It is further charged that the violation of those provisions give rise to a host of consequences that establish judicial misconduct.

The remedy for dissolving a failed marital relationship by a judicial judgment of divorce is strictly statutory in origin and has no roots in the common law. MCL 522.9(1) confers on courts hearing divorce actions the jurisdiction or authority to do so. It does nothing more. It has nothing to do with trial practices or procedures. It does not speak to judicial duties or responsibilities, or to violations by a judge or anyone else. It is simply a statute vesting a court with jurisdiction and nothing more. The contention that Judge Halloran violated this statutory provision is without merit.

MCL 552.6 sets forth a single statutory ground for divorce, the precise manner in which that ground is to be pleaded in the plaintiff's complaint for divorce and the procedures for establishing the factual existence of the ground for divorce. Alternative procedures are prescribed for establishing the ground for divorce:

(1) A judge may, in the exercise of discretion, determine the existence of the ground for divorce by taking judicial notice of the defendant's answer to plaintiff's complaint wherein the

existence of the statutory ground for divorce is admitted; or (2) by using evidence presented in open court. This construction is consistent with "the reach" or legal effect of judicial admissions.

Judicial admissions are formal admissions in pleadings that have the legal effect of withdrawing the admitted fact or facts from issue and dispensing wholly with the need for proof of the facts admitted.

In Radke v. Miller, Padstock and Stone, 453 Mich 413 (1996), the Michigan Supreme Court focused on "the reach" of judicial admission and at page 418 said:

> "Admissions under MCR 2.312 are 'judicial' admissions. 2 McCormick, Evidence (4th ed), § 254, p 142, n 11. In contrast to 'evidentiary' admissions, i.e., admissions of a party opponent under MRE 801(d)(2), judicial admissions are not really 'evidence' at all:
>
> "Rather they are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact [*Id.*, p 142].
>
> "In essence, admissions under MCR 2.312 are more a matter of civil procedure than of evidence law. The party who makes such an admission 'has conclusively (or 'judicially') admitted such facts . . . and the opposing side need not introduce evidence to prove the facts.' 2 Jones, Evidence (6th ed), § 13C:14, p 310 (Nov 1995 supp). "

If the judicial admission is generated by MCR 2.111(C)(E), rather than MCR 2.312, the legal effect of the judicial admission remains the same. It dispenses entirely with the need for evidence or proofs to establish the fact or facts judicially admitted.

The Institute of Continuing Legal Education (ICLE), in its publication entitled Michigan Civil Procedures, states in Vol. 1, Page 452, Sec. 727:

> "The Michigan Court Rules pigeonhole the responsive pleas to just four types of responsive statements to each allegation in the affirmative pleading: (1) an 'explicit' admission, (2) 'no contest,' (3) an 'explicit' denial, or (4) 'the

> pleader lacks knowledge or information sufficient to form a belief as to the truth of the allegation.' MCR 2.111(E). The first two, as admissions, serve to establish the allegation as conclusive and binding. The second two require the aforementioned pleader to prove the allegation.'

Simply stated, if an allegation of fact is admitted, the fact is deemed established without the necessity of proofs. If the allegation of fact is denied, then and only then, must the pleader offer proofs to establish the allegation of fact. It is interesting to note that this particular publication has been edited by the Honorable Robert P. Young Jr., Chief Justice of the Michigan Supreme Court, and is consulted and relied upon by judges and lawyers.

Routinely in civil litigation, judicial admissions are used to determine material facts without the need of testimony or proofs. A classic example is the personal injury action for damages arising out of an automobile collision. Defendant denies negligence but admits that he was the owner and operator of the vehicle involved in the collision. Without more, ownership and operation are deemed established and efforts are directed toward the resolution of disputed facts.

The use of judicial notice and judicial admissions should not be underused. They are effective tools and there is no law or court rule that prohibits their use in divorce litigation.

It is also relevant to consider the mandate of MCR 2.114 (A)(C)(E) requiring attorneys and parties without attorneys to sign their pleadings filed in the case. Per the rule, the effect of the signature constitutes a certification that to the best of the signer's knowledge, or based on reasonable enquiry, the contents of the signed document are well grounded in fact. If the rule is violated the signer is subject to court-imposed sanctions.

Respondent further claims that even if he erred in using the abbreviated procedure he acted with due diligence, good faith, and with the reasonable belief that the procedure was permissible. In

support of his conclusions that such behavior does not rise to judicial misconduct, he cites MCR 9.203(B), which provides in part:

> " . . . an erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct."

The decision to use the abbreviated procedure was deliberately and thoughtfully made with the purpose of improving a trial practice by the elimination of unnecessary proofs. As previously indicated, the procedure does have a sound, arguable legal basis. The circumstances here are totally different from those in the Commission's earlier cases involving Judges William Hague and Bruce Morrow. In those cases, willful violations of clear and unambiguous laws and a superintending control order were involved. Such is not the situation here. Respondent did not "go rogue." He had a legal basis and reason for changing procedures, in an attempt to improve the judicial process.

The alleged violation of MCR 3.210(A) to support the charge of judicial misconduct is extremely tenuous. The objective of the rule is to create a waiting or cooling period between the filing of the complaint for divorce and the taking of proofs to obtain the divorce. Its only objective is clearly to avoid a rush to judgment. It is also important to note that under section (5)(C) of the rule a default judgment of divorce may be taken without the need of sworn testimony.

Judge Halloran sits in the Family Division of the Wayne County Circuit Court, a court in a metropolitan area with a population of approximately 1.76 million people. The judges in the Family Division have large dockets with some difficult and contentious cases. The presiding judge of the division states that each judge in the division has an active case load of 1,000 cases and 60,000 post-judgment cases. Divorce litigation does not always end when the judgment is entered. In keeping dockets current and in compliance with State Court Administrator's and Chief Judge's mandates on case disposition times, maximum use of court resources and courtroom time is essential.

As attested to in the attached letters from Judge Halloran's colleagues, his compliance with time standards is very good and to that end he has used innovative procedures that differ from those traditionally used by other judges. Simply because his procedures were different, it does not make them violations of statutes or court rules. They are simply different.

It is also worth contemplating the consequences of any determination that invalidates the use of judicial notice and judicial admissions to establish court jurisdiction and grounds for divorce. Respondent's judgments would be without legal effect. The Michigan Supreme Court in Stamadianos v. Stamadianos, 425 Mich 1 (1986) held that the failure of a court to establish its jurisdiction renders the judgment "absolutely void." If a party to a proceeding wherein Respondent entered the divorce judgment remarries, is the second marriage void? Is the individual a bigamist? Are children of the second marriage illegitimate? Are some intestate estate assets improperly awarded to unintended beneficiaries? Those questions should never have to be asked or answered.

Conclusion

In summary, it is recommended that the Commission grant Judge Halloran's motion for summary disposition and dismiss or withdraw Formal Complaint No. 97 for the following compelling reasons:

(1) Judge Halloran did not engage in judicial misconduct;

(2) If he erred in judgment, it was a mistake while acting with diligence and good faith, which, as expressly provided in MCR 9.203(B), is not judicial misconduct; and

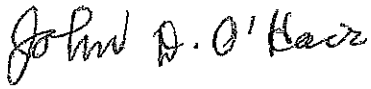
(3) In reviewing the lawfulness or propriety of the procedure utilized by Judge Halloran, the Commission would be functioning as an appellate court and/or exercising superintending control over his decisions, which it is prohibited from doing by MCR 9.203(B).

For approximately one year, Judge Halloran has been the subject of a Commission investigation and the pending formal complaint. He did no wrong.

MCR 9.200 states:

> "An independent an honorable judiciary being indispensable in our society, subchapter 9.200 shall be construed to preserve the integrity of the judicial system . . . and the rights of the judges who are governed by these rules in the most expeditious manner that is practical and fair."

Respectfully submitted,



John D. O'Hair
Master

THIRD JUDICIAL CIRCUIT
OF MICHIGAN

ROBERT J. COLOMBO, JR.
CHIEF JUDGE

701 COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVENUE
DETROIT, MICHIGAN 48226-3413

(313) 224-5430

April 7, 2015

Philip J. Thomas
18720 Mack Ave., Ste. 240
Grosse Pointe Farms, MI 48236

Re: Hon. Richard B. Halloran

Dear Mr. Thomas:

I have been made aware by the Honorable Richard B. Halloran that there is a Judicial Tenure Commission investigation pending. However, I actually knew about the investigation prior to my discussion with Judge Halloran because of information requested by the JTC. I have had no discussions with Judge Halloran about what was requested by the JTC.

This letter was requested by Judge Halloran's attorney, Philip J. Thomas. I have given Mr. Thomas permission to submit this letter to the JTC.

As Chief Judge of the Third Judicial Circuit Court, since January 1, 2014, I review monthly the Family Division – Domestic Dockets of Monthly Report of Pending Cases. Those reports show that Judge Halloran is meeting the requirements for time standard disposition in caseflow management as set forth in Supreme Court Administrative Order 2013-12. As a result, no action has been taken by the Family Division – Domestic Relations Docket Review Committee against Judge Halloran.

Judge Halloran is supportive of all the judges in the Family Division – Domestic Relations. He is always willing to provide backup or docket coverage when a judge is unavailable or in need of additional help.

If you have any further questions, feel free to contact me.

Very truly yours,

Hon. Robert J. Colombo, Jr.
Chief Judge, Third Judicial Circuit Court

RJC:j

THIRD JUDICIAL CIRCUIT
OF MICHIGAN

KATHLEEN M. McCARTHY
PRESIDING JUDGE
FAMILY DIVISION

COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVENUE
DETROIT, MICHIGAN 48226-3413

(313) 224-5481

April 28, 2015

Michigan Judicial Tenure Commission
c/o Phil Thomas
3034 West Grand Blvd.
Suite 8-450
Detroit, MI 48202
Via email at philipjthomas@aol.com

Re: Judge Richard Halloran

To whom it may concern:

You asked that I provide a letter attesting to Judge Richard Halloran work ethic. While I am unaware of the allegations being made in the Judicial Tenure Commission's (JTC) investigation, I feel I am in a position to comment on the areas I discussed with you. You have my consent to submit this letter to the JTC.

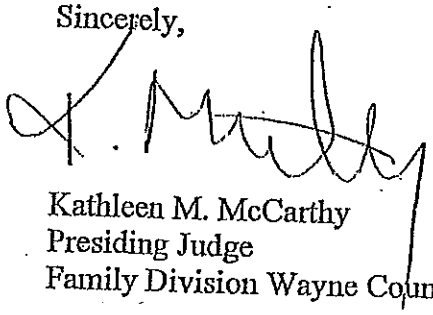
As the Presiding Judge of the Family Division of Wayne County Circuit Court, it is my obligation to ensure that all of the Family Division judges administer their cases within applicable time standards. Further, Wayne County's standard, as dictated by our Chief Judge, is much more strict than SCAO standards. Each of our judges has approximately 1,000 active cases and 60,000 post-judgment cases. In fact, each of our dockets was recently increased with the retirement of Judge Lombard.

I can tell you that Judge Halloran's docket is always within SCAO time standards and nearly always within the court's more stringent expectations. The few times he has not been, he was eager to meet with me to resolve the issue, was appreciative of the oversight, and immediately took corrective steps. I have attached last month's copy for your edification. Further, in addition to his own docket, Judge Halloran volunteers to preside over the 178 cases on the SODVPC docket with Judges Elder and Pierce, which requires he dedicate an afternoon per week to this docket along with coverage for Judges Kelley and Pierce if they are unable.

Additionally, whenever another judge had a scheduling conflict and requests assistance, Judge Halloran is one of the first judges to volunteer to cover his colleagues' hearings.

Please consider these things in context of this current investigation. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,



Kathleen M. McCarthy
Presiding Judge
Family Division Wayne County Circuit Court

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Formal Complaint No. 97

Hon. Richard B. Halloran, Jr.
Third Circuit Court
Coleman A. Young Municipal Center
2 Woodward Avenue
Room #511
Detroit, Michigan 48226

AFFIDAVIT

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

Dennis C. Kolenda, being first duly sworn, on oath deposes and says:

1. He has been continuously licensed since 1972 to practice law in the State of Michigan. From then through 1988, he clerked for the Honorable Robert B. Burns, a judge of the Michigan Court of Appeals, was the Chief Trial Attorney for the Kent County Office of the Defender, and was a litigator with the Grand Rapids law firm of Varnum Riddering Schmidt & Howlett. In November, 1988, he was elected to the Kent County Circuit Court and served on that court until March 31, 2008, when he resigned to return to the private practice of law with the law firm of Dickinson Wright PLLC.

2. Before becoming a circuit judge, he served on and eventually chaired the State Bar of Michigan (SBM) Special Committee to Revise the Criminal Code, was a member and vice-chairman of the Michigan Attorney Grievance Commission, was elected to the Council of the SBM's Criminal Law Section, and was on the faculty of numerous programs sponsored by

the Criminal Law Section, the Criminal Defense Attorneys of Michigan, the Prosecuting Attorney's Association of Michigan, the Institute for Continuing Legal Education, the Federal Bar Association, and the Michigan Judicial Institute. He also taught political science at Aquinas College in Grand Rapids, Michigan.

3. As a judge, he served by appointment of the Supreme Court on committees charged with revising the Michigan Court Rules with regard to case scheduling and alternative dispute resolution, advising the Supreme Court on proposed changes to the Michigan Rules of Evidence, and revising the Michigan Rules of Criminal Procedure. He was chairman of the latter committee charged. Almost all of the changes proposed by that committee were adopted by the Supreme Court. He also was an active member of the Rules Committee of the Michigan Judges Association; several of his proposals became rules. Finally, he continued to serve on the faculty of programs sponsored by the organizations identified above.

4. Until the advent of a Family Division in the Circuit Courts of the State, one-third of his docket as a circuit judge, which then totaled 2,000 cases, annually, consisted of domestic relations cases, almost entirely divorce cases: about 700 such cases per year. He "took proofs" in more than 5,500 such cases. He also tried dozens of divorce cases, helped negotiate settlements in hundreds of them, and heard thousands of motions in those cases.

5. From January, 1994, through December, 2000, he served as the Chief Judge of the Kent County Circuit Court. As chief judge, he actively monitored, as required by MCR 8.110(C)(2), the practices of the other judges of the court, including their handling of domestic relations cases. He was also responsible, along with the Chief Judge of the Kent County Probate Court, for crafting the Family Division in Kent County. While he sought advice from numerous other individuals, he did not delegate that task to others.

6. He also had many opportunities to observe how judges elsewhere in Michigan handled domestic relations cases. For the first six years of his tenure, he sat annually as a visiting judge on the Michigan Court of Appeals reviewing decisions by other judges, including decisions in domestic relations cases, and, in the course of doing so, read transcripts of many such proceedings. And, because willing to accept assignments which required travel to other counties, he had occasion to visit numerous circuit courts, watch proceedings there, and confer with the judges of those courts about how they handled their cases. He considered such observations and consultations very helpful to devising new and better ways to handle his cases and to recommend different procedures to his colleagues.

7. Initially, he "took proofs" in what he understood was the traditional fashion of having counsel in the case ask the testifying spouse about residence, date of marriage, date of separation, number of children born to the marriage, whether the wife was now pregnant, whether there had been an irreparable breakdown of the marriage relationship, satisfaction with the terms of any settlement, etc. When the parties were appearing in pro per, he made those inquiries. His practice before joining the Kent County Circuit Court had not involved domestic relations cases, but he had observed proofs being taken while in court for other reasons, and he made a point of observing divorce cases between his election and January 1, 1989.

8. Eventually, he adopted the practice recommended to him by numerous counsel of having the spouse offering "proofs" merely confirm that he or she had signed the complaint and that its allegations were true. He came to find that practice preferable because, in the Kent County Circuit Court, most divorce proofs were taken during the course of Miscellaneous Motion Days when numerous cases were presented to him for proofs and when the courtroom was often filled with individuals waiting for their other cases to be heard. It was common for a

judge of the court to hear 30-50 cases of varying kinds on its weekly Miscellaneous Motion Day; some days, many more cases were heard. Proofs in a dozen-plus divorce cases were common. The shorter method of taking proofs expedited proceedings, which was important given the number that were waiting to be heard, and, more significantly, minimized individuals having to testify to personal matters in a courtroom packed with strangers. The alternative procedure also helped relieve the tedium which can develop when any judge does the same thing over and over again, such as taking divorce proofs or guilty pleas. The result can be inattention, with the risk of something significant going unnoticed, and the appearance of a lack of concern or interest, which can justifiably distress litigants.

9. With the above-described experiences as background, he carefully reviewed the formal complaint in this case, transcripts of the proceedings identified in that complaint, and transcripts of other domestic relations cases before Judge Halloran. He also reviewed the law cited by the Judicial Tenure Commission (JTC) in support of its allegations against Judge Halloran. And, in the course of representing other judges before the JTC, he has read every decision by it and the Michigan Supreme Court addressing judicial misconduct. Based on his experiences and those reviews, he is of the opinion that the complained-of practice by Judge Halloran, while different than how other judges take proofs, was not erroneous as a matter of law, let alone misconduct.

10. Nothing in the statute governing divorce actions and proceedings requires the inquiries the JTC complains that Judge Halloran did not make. With regard to jurisdiction, MCL 552.9(1) provides solely that a judgment of divorce "shall not be granted" unless one of the parties resided in the State and county for stated periods immediately preceding filing the complaint. That prohibition does not require testimony or other evidence in court about

jurisdiction, but leaves the question to be addressed when there is a challenge. That is how the issue of jurisdiction is handled in all other cases. The court responds to a complaint of lack of jurisdiction. Nothing different is required in divorce cases. As a result, the validity of no divorce is undermined by a lack of inquiry on the record.

11. The only "evidence" required by the statute to be presented in open court relates to the breakdown of the marriage, but what kind of evidence is required is not specified. MCL 552.6(3) and 552.7(4). While testimony is evidence, so is data in other forms, and, while it is traditional to use the language from the statute, its use is not required. A spouse testifying that, if a divorce is not granted, he or she will not resume living with the other spouse establishes, albeit in different language, an irreparable breakdown. He disagrees that using the statutory language asks for a conclusion of law, but he concurs that Judge Halloran's alternative acceptably asked for and obtained the same information. Judge Halloran's formulation may actually have been more intelligible than parroting the stilted statutory language. What are "the objects of matrimony"? Refusing to live together says they have been destroyed, whatever they are.

12. Likewise, nothing in MCR 3.210, which governs hearings and trials in domestic relations cases, requires proofs in any particular formulation. That rule speaks only of "[p]roofs or testimony." MCR 3.210(A)(1). Like the statute's use only of "evidence," that terminology recognizes the propriety of other than testimony, and imposes no particular formulation on the proofs.

13. While he did not make the inquiry made by Judge Halloran, and does not know of other judges making that inquiry, he does recall hearing attorneys make that inquiry of their clients while "presenting proofs." They did so as a way of verifying that the marriage had broken down and could not be repaired.

14. Had he learned while Chief Judge that any of his colleagues in Kent County were handling divorce cases as Judge Halloran did, or had any of his colleagues on the Kent County Circuit Court while he was that Court's Chief Judge sought his counsel, which he was required by MCR 8.110(C)(2)(f) to give, about a proposal to take divorce proofs in a manner like that at issue herein, he would not have counseled against it because he believes it to be an acceptable and innovative way of proceeding. He would have also so informed any judge who asked him the same question after he was Chief Judge.

Further affiant sayeth not.

Dated: October 26, 2015

Dennis C. Kolenda

Subscribed and sworn to before me
this 26th day of October, 2015.

Notary Public
Kent County, Michigan
My Commission Expires: 2-10-22
Acting in Kent County, Michigan

GRAPIDS 99998-1365 384125v2

AFFIDAVIT OF ARTHUR J. LOMBARD

Arthur J. Lombard, statements under oath, that if called as a witness before the Master, he will testify as follows:

1. I retired from the Circuit Court on January 1, 2015. I initially came to the Third Circuit in 1994. I was a founding judge of Domestic section of our Family Division when it was created on October 1, 1997, and I remained there for the duration of my judicial service. Judge Halloran came to our bench shortly after the Division's creation and has remained there ever since, developing a national reputation in domestic violence issues. I have had the opportunity to work more closely with Judge Halloran than with any other current family judge.

2. For a number of years Judge Halloran and I served as each other's designated alternate, at our mutual request. During periods in which I had another official alternate, Judge Halloran invariably volunteered to cover for both of us when we were absent simultaneously.

3. His willingness to assume additional duties was never more important to me than in 2013. Judge Halloran was my designated alternate. Early in March of that year, I suffered a sudden-onset cardiac problem which required quadruple bypass surgery and the implantation of a defibrillator. A long period of recuperation and rehabilitation was ordered.

4. Our Presiding Judge initially suggested that my docket be temporarily disbursed among all the other judges of the Division. I was not enthused about the prospect. Without hesitation, Judge Halloran volunteered to handle my entire docket, along with his own, until I returned.

5. Judge Halloran performed admirably. My docket was in fine shape when I left, and continued to be so when in Judge Halloran's hands. When I resumed my duties in June, I found no cases over time standards, and no backlog in Referee reviews or post-judgment matters. Cases which were near resolution when I left had been resolved, along with many others. I was able to resume my docket as if I had not been away.

The above statements are true to the best of my knowledge, information and belief.

Arthur J. Lombard / Date 10/22/2015

Subscribed and Sworn to before
me in Manchester County, Bennington
on 10-22-15.
Notary: Gale D. Audy

My commissions expires:
Gale D. Audy, Notary Public
My Commission Expires February 10, 2019