STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Complaint No. 102

Hon. Bruce U. Morrow
3rd Circuit Court
Detroit, Michigan

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DISCIPLINARY COUNSEL'S RESPONSE TO RESPONDENT'S OBJECTIONS TO THE MASTER'S REPORT

Disciplinary counsel answers respondent's objections to the Master's report below, in order of the significance of respondent's objections.

RESPONDENT'S BACKGROUND

Paragraph A of respondent's brief provides "Background on Judge Morrow." (R Brief at p 3) The paragraph is less impressive than may appear on the surface,

since it excludes evidence that is highly relevant to the sunny portrait it paints, and also excludes respondent's plentiful disciplinary history.

Respondent omits from this portrait the fact that he has exhibited a pattern of saying sexually inappropriate things to women. As noted in disciplinary counsel's brief in support of the Master's finding (DC Brief), in 2004 and 2005 the State Court Administrative Office (SCAO) and the Commission reprimanded respondent for, among other things, the inappropriate things he said to a woman. (DC Brief pp 10-11) Respondent also omits the evidence that in 2019 he asked a modestly dressed female prosecutor the color of her armpit hair and shared with her his own practice of shaving his armpit hair; and that in 2018 he unnecessarily injected the concept of him having sex with another male in a bathroom stall, during a hearing with another female prosecutor.

In addition, respondent neglects his history of ex parte actions. As discussed on pages 13 and 20-22 of Disciplinary Counsel's Brief, the Supreme Court suspended him in 2014 for, among other things, having an ex parte encounter with a defendant, in public, during a trial. He leaves out that the Commission admonished him for another ex parte violation in December 2018, merely six months before he had the ex parte conversation with Ms. Bickerstaff that is the subject of count one.

Finally, respondent also leaves out the fact that the Supreme Court previously suspended him for eight acts of misconduct in eight separate cases. *In re Morrow*, 496 Mich 291 (2014).

In short, the full and fair picture of respondent's history is much less flattering than the picture he offered the Commission.

RESPONDENT'S SEXUALLY-BASED ANALOGIES FOR DIRECT EXAMINATION, SEXUALLY-BASED STATEMENTS IN CHAMBERS, AND OBSERVATIONS ABOUT WOMEN'S HEIGHT AND WEIGHT, WERE ALL MISCONDUCT

Respondent argues that it was not misconduct for him to compare a direct examination to a romantic relationship that leads to sex, during a private conversation with Ms. Bickerstaff. (R Brief at pp 11-15) He also argues that the words, analogies, and examples he used when talking with counsel in chambers were not misconduct. He notes that sex is a common metaphor in judicial writing and in bar journals, citing pieces that use words related to sex, such as "making love," "intercourse," "procedural foreplay," "foreplay," and "real sex." (*Id*. at pp 39-41)

What respondent overlooks is that there is a big difference between using those words in writings that are directed to the world at large, devoid of intimacy and the aura of judicial authority over the listener or reader, and doing what *he* did in the context in which *he* did it. While sitting very close to Ms. Bickerstaff, at the prosecution table, he had a face-to-face, intimate discussion during which he

verbally used analogies and words relating to sex, anticipating that his doing so would make her blush.

In chambers with Ms. Bickerstaff and Ms. Ciaffone, respondent was face-to-face with them for about two hours, in circumstances in which they did not feel free to leave, during which he consistently used sexual analogies to make his points. He talked about Ms. Ciaffone's personal sexual biases and experiences, and joked with familiarity about the size of an alleged murderer's penis and the alleged murderer's apparently exaggerated belief in his sexual prowess. He used the words, "doggy style," "dick" or its functional and informal equivalents, and "fucked." The writings he cites did not concern any of these intimacies in these types of settings, and they do nothing to justify or minimize his words and actions with the women.

In the courtroom, respondent overtly eyed the bodies of both women, guessed their height and weight, and announced his intent to assess Ms. Bickerstaff's muscle mass. He did all of these things while he enjoyed a position of power over them. When his words are viewed in their actual context, not the alternative context through which he would like the Commission to view them, they were clearly misconduct.

Respondent seeks to isolate each statement he made to Ms. Bickerstaff and Ms. Ciaffone during the in-chambers discussion, and to argue that when viewed in isolation, none of the statements constitute misconduct. However, his statements

cannot be viewed in isolation, because they were all part of one conversation. When viewed in their totality, they violated the canons. That totality should be kept in mind as respondent's individual arguments are addressed below.

RESPONDENT'S USE OF THE WORD "FUCKED" IN THE CONTEXT IN WHICH HE USED IT IN CHAMBERS WAS MISCONDUCT

Respondent argues that the First Amendment protects his use of the word "fucked" in chambers. (R Brief at pp 41-43) The fallacy in respondent's argument is shown in part by the fact that it has no limits – it would extend First Amendment protection to every profanity a judge utters, under any circumstance. For the reasons stated below, the First Amendment does not go nearly so far. While it protects *some* public expressions of *every* vulgarity by any person, it does not follow that a judge is free to be as publicly profane as he likes while acting as a judge.

As Canon 2(A) makes clear, "A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." The standard for judges is not the limit of what the First Amendment protects for a member of the public. It is the requirements of dignity and respect and integrity required to uphold the honor and integrity of the judicial office. In the context in which respondent used his particular vulgarities, he was disrespectful and undignified, and he demeaned his judicial office. None of that activity is protected by the First Amendment.

Respondent cites no case to support his argument that he had a First Amendment right to use the language he did, even in violation of his ethical responsibilities. Disciplinary counsel are aware of no cases that provide that support. There appears to be no State of Michigan case that addresses the relationship between the First Amendment and judicial freedom to be profane.[1]

There are cases in other jurisdictions that make clear respondent does not have the First Amendment right to vulgarity that he seeks. For instance, the United States Supreme Court distinguishes between things a public employee says as a citizen, which get First Amendment protection, and those the employee says in his official capacity, which do not. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *Garcetti* establishes that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 422.

Whether respondent was speaking as a public official or as a citizen is a question of law. *Omokehinde v. Detroit Bd. of Ed.*, 563 F.Supp.2d 717, 724 (E.D. Mich. 2008). The question is answered by looking to the content, audience, setting,

[1] There is a Michigan case in which a judge argued that a canon limiting campaign speech violated the First Amendment. The Michigan Supreme Court ultimately held that campaign speech deserves heightened protection, and Canon 7(B)(1)(d) could not prohibit the potentially misleading, but not literally false, statements a judge made during his election campaign. *In re Chmura*, 461 Mich 517, 532 (2000); *In re Chmura*, 464 Mich 58 (2001)(after remand).

and impetus for the employee's speech. *See Weisbarth v Geauga Park Dist.*, 499 F.3d. 538, at 545-46 (6th Cir. 2007); *Haynes v. City of Circleville*, 474 F.3d 357, 362 (6th Cir. 2008).

Respondent was speaking as a public employee when he made the statements that the Master found to be misconduct. He spoke about a case over which he was presiding. His audience was the attorneys who were trying that case in his courtroom. The setting for the speech was his courtroom and his judicial chambers. The impetus for his speech was ostensibly to teach and provide feedback to two inexperienced assistant prosecutors. The authority of his office commanded their presence. Accordingly, the First Amendment does not protect his profanity or vulgarity or disrespect.

Respondent inexplicably argues that the context of a criminal trial justifies his use of the word "fuck," because criminal proceedings involve difficult subjects and take place in high-stress, high-volume dockets in which judges and attorneys should not have to walk on eggshells. This argument does not survive scrutiny. A judge need not walk on eggshells to be respectful toward others. To the contrary, a judge should be aware of when he is being disrespectful. For most people, there is no need to step gingerly to avoid using words and power in a way that disrespects others. Rather, a little common courtesy suffices. Unfortunately, respondent did not extend common courtesy in this case.

To the extent respondent claims he was uncertain about the boundaries of propriety, he knew the Commission might not approve of his use of the word "asshole," a word that is much less problematic than the words he used here. He said as much to the jurors in the *Matthews* trial. (DC Exh. 13, p 131/24-25) He is not facing difficulty here because his footsteps happened to be too firm for fragile eggshells. He is facing difficulty because he deliberately disregarded limits of which he was well aware.

RESPONDENT'S COMMENTS ABOUT DEFENDANT MATTHEWS'S TESTIMONY WERE MISCONDUCT

Respondent attempts to characterize his statement about the size of defendant Matthews's penis as an "offhand expression of skepticism" at the defendant's testimony. (R Brief at p 43) This benign characterization is belied by the evidence, which showed that:

- the alleged exaggeration with which respondent was concerned was solely about the size of this defendant's penis, not just the general tendency of defendants to exaggerate;
- it was respondent who introduced this particular alleged exaggeration into the conversation in chambers, apropos nothing counsel were otherwise discussing;
- he did not do so as an illustration of defendants' tendency to exaggerate in general, but only to mock this defendant for this exaggeration;

- respondent was laughing at what he believed to be the absurdity of Matthews's testimony as he did so;
- in sharing his amusement at this testimony, respondent was laughing at an alleged murderer's explanation for why his semen was found inside the murder victim;
- and he did so as one more gratuitous sexually charged reference in a conversation in which he made several other gratuitous sexually charged comments. (Ciaffone, 11-13-20 pp 64/24-65/10, 65/24-66/1)

Respondent denies that he used the word "dick" when referring to the defendant's penis. (R Brief at p 44) It does not matter whether he did or did not use that precise word. Every witness to this conversation heard him use that word or a functional, equally casual and disrespectful, equivalent (Ciaffone, 11-13-20, pp 65/6-11, 63/8-10; *cf*. Noakes, 11-24-20, pp 889/18-21, 906/13-17, 920/4-22). Ms. Ciaffone recalled that he laughingly said, "oh, so what—like, he's saying that, like, what he's working with, or something along those lines, was so big that it would cause a miscarriage?" (Ciaffone, 11-13-20, pp 62/24-63/3). Ms. Bickerstaff recalled that respondent laughingly said, "That guy must feel so good about himself," or something along those lines, "that his dick was big enough to, like, hurt her or hurt the baby. Like, he must feel so good about himself that he has such a big dick, like, yeah, right, my guy, or something like that" (Bickerstaff, 11-23-20, pp 401/18-402/2). When the

missing facts are included, respondent's comments were not the "offhand expressions of skepticism" about defendants' testimony that he claims, but were deliberate, unwarranted, and discourteous injections of sex into a conversation in which respondent held a position of authority over the listeners. They therefore constituted misconduct.

RESPONDENT'S INQUIRIES ABOUT THE PROSECUTORS' HEIGHT AND WEIGHT WERE MISCONDUCT

Respondent claims that asking Ms. Ciaffone and Ms. Bickerstaff about their height and weight was not misconduct, and merely admits that doing so "may be impolite." (R Brief at p 45) He accuses disciplinary counsel of attempting to "sexualize" his questions to the women. Even a casual review of the testimony shows that no one – not Ms. Ciaffone, or Ms. Bickerstaff, or disciplinary counsel – attempted to sexualize respondent's comments in any way. Rather, the testimony merely described, in purely objective terms, what respondent said and did (Ciaffone, 11-13-20, pp 70/4-71/22, 74/17-75/25; Bickerstaff, 11-23-20, pp 406/18-409/25; Tr. 12-15-20, pp 1261/23-1264/6). The Commission did not charge and disciplinary counsel did not argue that respondent behaved in a sexual manner with respect to this interaction.

Respondent also claims that the evidence that he "overtly eyed" the women's bodies should be rejected, because there is an "absence of evidence" to support the women's testimony that respondent "overtly eyed" them. (R Brief at p 46). This

argument ignores the actual evidence. Both women testified that they *saw* him look their bodies up and down. Ms. Ciaffone characterized what respondent did as the equivalent of "overtly eyeing" them (Ciaffone, 11-13-20, 350/18-25). This is the precise opposite of an "absence of evidence."

Respondent asks the Commission to disregard the women's direct testimony and instead to rely on character evidence from his two long-time friends. (R Brief p 45) Mr. Edison testified that he never saw respondent "overtly eyeing" anyone, and Mr. Fishman testified he has never seen respondent be "discourteous or disrespectful to anyone" (R Brief p 45) (Edison, 11-24-20, p 672/19-21; Fishman, 11-24-20, p 800/9-14).

The contrast between the character witnesses' testimony and the way respondent actually treated the young female APAs is striking. Respondent cannot seriously argue that his tactics, analogies, choice of words, and conduct were in any way dignified or courteous. He cannot seriously suggest that it was an accident or inadvertence that this judge, so praised by his character witnesses for his decorum, chose the sexually charged words he did when speaking with two young women. And, of course, any consideration of this character evidence also has to take into account the uncontroverted evidence that respondent asked another female prosecutor the color of her armpit hair, and with still another, gratuitously asked her to speculate about him having sex in a bathroom with another male.

MATTER OF HOCKING **DOES NOT EXCUSE RESPONDENT'S CONDUCT**

Respondent uses certain language from *In Matter of Hocking*, 451 Mich 1 (1996), to argue that his offensive words were not misconduct. (R Brief pp 36-44) The Master correctly did not adopt this argument. The Commission should reject it as well.

Hocking involved a judge's statements *on the record*, at a contentious sentencing hearing of a male lawyer. The lawyer had been convicted of criminal sexual conduct for assaulting his female client. Judge Hocking departed below the sentence recommended by the sentencing guidelines. The misconduct complaint against him alleged, in part, that his reasons for the downward departure were blatantly improper and sexist, and in part alleged that his treatment of the female prosecutor was rude.[2]

The *only* similarities between the charges in *Hocking* and this case are two of the ethical rules that both respondent and Judge Hocking were charged with violating. Like respondent, Judge Hocking was accused of being rude and discourteous to one attorney, and he was accused of a persistent failure to treat two attorneys courteously.

[2] In a companion case, Judge Hocking was charged with treating another female attorney intemperately and abusively, and admitted to being rude and discourteous to her.

Critically, the facts of *Hocking* were substantially different than the facts in this case, and did not include any of what respondent did here:

- using inappropriately sexually graphic language in a close personal setting when it was the authority of respondent's office that created the setting;
- deliberately injecting sexual language into conversations that otherwise had nothing to do with sex; again, when it was the authority of respondent's office that created the setting;
- sexually mocking the defendant in a murder case; or
- improperly questioning female attorneys about their physical appearance.

Rather, Judge Hocking engaged in dated stereotypes about women inviting sexual abuse, and did so in the course of explaining his reason to depart from sentence guidelines during a public sentence hearing. Although the stereotypes exposed the judiciary to national ridicule, the Court concluded that the inept effort to explain his decision was not misconduct. The Court was moved by the need for a judge to have latitude to explain his reaction to the facts of a case. 451 Mich at 9-14.[3]

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[3] Judge Hocking was also charged with misconduct for some sharp exchanges that he had with the attorneys in this case and another. The attorneys were female. In part because gender bias had not been charged, the Court rejected the suggestion that the mere fact that Judge Hocking's comments were directed at women demonstrated gender bias. As the Court noted, Judge Hocking would likely have made the same comments had the attorneys been male.

It is difficult to imagine that respondent would have engaged in the same conversations with male attorneys, in the same intimate way, as those he had with Ms. Bickerstaff and Ms. Ciaffone. All of the evidence in the record is that he would *not* have done so.

Respondent was not in Judge Hocking's situation. He was not explaining his decision in the case for the record. Nothing Judge Hocking said to fulfill his duty to explain his sentence in this public proceeding was remotely similar to what respondent said to Ms. Bickerstaff, privately, and to Ms. Bickerstaff and Ms. Ciaffone in chambers. Likewise, Judge Hocking's remarks at the sentencing hearing did not address personal and private facts about the attorneys and did not involve Judge Hocking eyeing or discussing anyone's bodies.

While the Supreme Court found no misconduct in Judge Hocking's words, the Court made it clear that there are times when things a judge says *can* be misconduct, even when said in connection with a case: "A judge's comments are not immune from censure simply because they are based on facts adduced at trial or events occurring during trial." 451 Mich at 13. Respondent omits that from his analysis of *Hocking*. His attempts to justify his "teachings" because they were based on things that occurred during the trial do not insulate him from the consequences of having used those teachings as an opportunity to speak inappropriately or offensively or discourteously about sex.

Whether or not the Master considered Hocking, the Commission should reject respondent's argument that *Hocking* excuses his conduct.

MS. BICKERSTAFF'S CREDIBILITY

Paragraph M of respondent's brief is entitled "Bickerstaff's false allegation." (R Brief at p 22) Respondent unsuccessfully argued at the hearing that Ms. Bickerstaff was a "liar" and that none of her testimony should be believed. The Master rejected that argument and found Ms. Bickerstaff to be credible.

Respondent asks the Commission to reject the Master's credibility determination, claiming that Ms. Bickerstaff "lied under oath" when she testified that she never told anyone that Judge Morrow had "hit on her." He further claims that she lied to disciplinary counsel by stating she had not seen the Wayne County Prosecutor's Office report regarding respondent's actions, before disciplinary counsel showed it to her. (Brief pp 22-23)

This is another example of the grossly overblown nature of respondent's defense. The first thing to stress about his claim is that whether or not Ms. Bickerstaff ever said she thought respondent was hitting on her has absolutely nothing to do with the charges in the complaint or the evidence that supports those charges. Indeed, respondent *admitted* virtually every fact that makes up those charges, which means that even if Ms. Bickerstaff were not credible, her lack of credibility would have no significant impact on the evidence of respondent's misconduct.

The second thing to stress about respondent's claim is that there is little support for it. It rests almost completely on two *possible* discrepancies between Ms.

Bickerstaff's testimony and other evidence: 1) there is a claimed discrepancy between what she told the investigators who prepared the report – Detective Kinney or Chief Bivens – about what she believed to be respondent's intent when he spoke intimately to her about sex, and what she recalls telling them; 2) there is a claimed discrepancy between what Ms. Bickerstaff told disciplinary counsel about not having previously reviewed Chief Bivens's report, and whether she had actually reviewed the report. Respondent uses these potential discrepancies, about matters that are quite collateral to his acts that gave rise to the complaint, to claim that Ms. Bickerstaff not only "lied" – that is, was deliberately untruthful – about these points, but that she is a "liar" generally.

It does not matter, to the analysis of the charges against respondent, whether Ms. Bickerstaff really did, or really did not, initially believe and report that respondent's sexually intimate conversation with her was an attempt to hit on her. Respondent is not charged with "hitting on" her, and Ms. Bickerstaff's opinion about his intent is irrelevant to whether or not his actions were misconduct. But the facts show the weakness of respondent's claim. Although Chief Bivens's report records that Ms. Bickerstaff opined that respondent was hitting on her when he spoke intimately in court, she has consistently denied that she ever provided this information to either Detective Kinney or Chief Bivens in the first place (Bickerstaff, 11-23-20 at pp 421/12-14, 422/l5-24).

In light of Ms. Bickerstaff's consistent denial, it is worth noting that the evidence that she told one of the investigators that respondent was hitting on her is hardly conclusive. Detective Kinney testified she does not recall Ms. Bickerstaff telling her that (Kinney, 11-24-20 p 858/15-19). Although Chief Bivens believes she did, based on the available information there is no way to sort out whether he properly understood what Ms. Bickerstaff told him, or whether he added his own inference to her actual words, based on his own interpretation of the events. In other words, not only is there no evidence that Ms. Bickerstaff deliberately made a false statement, there is less-than-certain evidence that she even made the statement.

Continuing his loose use of the word "liar," respondent alleges that Ms. Bickerstaff "lied" to disciplinary counsel about whether she had read Chief Bivens's report before disciplinary counsel sent her a copy of the paragraph attributed to her that included the "hitting" allegation. At the time disciplinary counsel sent the paragraph there was some uncertainty whether Ms. Bickerstaff had previously seen it (Bickerstaff, 11-23-20 at pp 615/14-22, 616/6-13). Disciplinary counsel's notes reveal that Ms. Bickerstaff told her she had not reviewed the report before receiving it from counsel, but Ms. Bickerstaff's trial testimony was that she had. (*Id*. at p 421/18-21)

Respondent claims that this discrepancy shows that Ms. Bickerstaff is a liar. His attack on her credibility places too much reliance on the stipulation that is

respondent's Exhibit M. That stipulation explains that although disciplinary counsel's notes reflect that Ms. Bickerstaff denied having previously seen the report during a telephone conversation, disciplinary counsel is "unable to ensure that Ms. Bickerstaff accurately understood her question [about having previously read Chief Bivens's report] and she accurately understood Ms. Bickerstaff's answer."

Ms. Bickerstaff took the initiative to rebut this statement that was attributed to her, when disciplinary counsel sent her the relevant paragraph from Chief Bivens's report, by promptly informing disciplinary counsel that the report was mistaken (Bickerstaff, 11-23-20 pp 422/15-24, 424/14-22, 597/6-8, 598/16-22). It is a telling rebuttal of respondent's claim that Ms. Bickerstaff is a "liar" that, if she actually were a liar, she could have simply avoided bringing to disciplinary counsel's attention the discrepancy between her recollection and the report. Not addressing the discrepancy would have caused less trouble for her and more trouble for respondent. Precisely because she is an honest person, though, she did not take the easy route.

In respondent's eagerness to accuse Ms. Bickerstaff of deliberate deception, he ignores the obvious fact that no one has a perfect memory, as well as the equally obvious fact that Ms. Bickerstaff had no motive to make, or to conceal, either of the supposed false statements he attributes to her. If there is an actual discrepancy in Ms. Bickerstaff's testimony – and it is not as clear there is as respondent assumes – the fact of a discrepancy does not mean Ms. Bickerstaff "lied" either to Chief Bivens or

to disciplinary counsel. She could have had mere failures of memory on these collateral points. There could have been a failure of understanding between her and Chief Bivens, or between her and disciplinary counsel. It is also possible that she *did* have a negative sense of respondent's intent just after her conversation with him, but as time has passed she has concluded that she did not know his intent and simply does not recollect that she once felt otherwise.

It is important to note again how truly collateral respondent's attack on Ms. Bickerstaff's credibility is. He admitted the relevant facts. His collateral attack hinges on whether she made a statement about an inference she drew regarding respondent's words to her – not on whether she made any inaccurate statement about what respondent actually said to her. Whether or not Ms. Bickerstaff ever drew the inference that respondent was hitting on her, or the people interviewing her merely thought she did, the confusion surrounding that question does not demonstrate that she ever had an intent to mislead anyone concerning what respondent did, as opposed to what he thought. It is hard to see how she could have intended to mislead as to his actual words, since he has admitted saying what Ms. Bickerstaff says he did. Any statement Ms. Bickerstaff made about his intent was an unimportant inference that had no impact on the much broader investigation of his actual actions, stripped of any inference, that form the basis of the charges in the complaint.

Respondent finds it significant that Chief Bivens forwarded his memorandum containing Ms. Bickerstaff's "false" statement, that she believed respondent was "hitting on her," to Prosecutor Kym Worthy. That is also not significant. No matter the source of the error in the report, it had absolutely no impact on this case. The balance of the report accurately describes the misconduct that is the actual basis for the complaint against respondent. It was that actual misconduct that the Master found was established at the hearing. Ms. Bickerstaff should certainly have been more careful about correcting the mistaken statement in Chief Bivens's report, whenever she first became aware of it, but her failure to do that had no impact on any aspect of this case, and remains a molehill, not the mountain respondent would like it to be.

Respondent's challenge to Ms. Bickerstaff's credibility demonstrates that he is very quick to allege that a witness who offered evidence that is harmful to him is a "liar," despite the flimsiness of his claim. It is not hard to imagine the outrage he would be loudly expressing, if disciplinary counsel had alleged *he* had lied, and did so on the basis of facts as weak as these. The Master quite properly found that Ms. Bickerstaff was a credible witness.

RESPONDENT'S OTHER ARGUMENTS

Paragraphs B through G of respondent's objections relate to the *Matthews* criminal case and are irrelevant to the judicial disciplinary proceedings. (R Brief at pp 5-11) Accordingly, disciplinary counsel will not respond to them.

Paragraphs H through J recount the testimony given at the hearing about the facts that underlie counts one, two and three. (R Brief at pp 11-19) Disciplinary counsel agree with these paragraphs, except as follows:

- In Paragraph H, respondent wrote that "he was trying to minimize airing criticism in public" when he spoke privately with Ms. Bickerstaff in the courtroom. (R Brief p 12) This is in tension with his answer to the complaint, in which he claims anyone who wanted to be a part of the conversation could have been. (Exhibit 2, paragraph 8b) It is also in tension with his conduct throughout the trial, during which he did not hesitate to air his criticisms of counsel in public.
- In Paragraph H, respondent also wrote that "Judge Morrow sat at an appropriate distance from Bickerstaff" when he analogized direct examination to sex (R Brief at p 13) The word "appropriate" is conclusory. The evidence shows that he chose not to move his chair away from Ms. Bickerstaff and instead, sat with the arms of their chairs touching and their faces a foot to a foot and a half apart as he spoke intimately with her

(Bickerstaff, 11-23-20, p 386/2-4; p 387/18-20). Although the misconduct with which respondent is charged in count one does not hinge on his distance from Ms. Bickerstaff as he said inappropriate things to her, disciplinary counsel submit that under the circumstances – including the circumstance that the conversation occurred in the courtroom during a murder trial – respondent did not maintain an "appropriate" distance.

- In Paragraph H, respondent also wrote that Ms. Bickerstaff was unclear whether he was referring to her own sexual desires or whether he was referring to the sexual desires of people in general. Respondent now claims that he meant the question as a general one. (R Brief at p 14) The impropriety of this conversation does not hinge on whether respondent's question was focused on Ms. Bickerstaff or was more general, but disciplinary counsel note that there is no evidence to support respondent's interpretation, since he did not testify and did not provide that answer to the request for his comments, the 28-day letter, or to the complaint.

Paragraphs K and L of respondent's objections discuss what occurred when Ms. Bickerstaff and Ms. Ciaffone reported his conduct, and the investigation conducted by Chief Bivens and Detective Kinney. (R Brief at pp 19-22) Disciplinary counsel have no issue with this summary. Disciplinary counsel also take no issue

with respondent's Paragraph N (Underlying Proceedings), and his recitation of the standard of review. (R Brief at pp 23-26)

Respondent argues that the Wayne County Prosecutor's Office has a "long history of animosity toward Judge Morrow." (R Brief at p 5) He cites testimony from a former assistant prosecutor and now defense attorney, Nicole James, that the office kept a "book" on respondent's supposed errors. Ms. James testified that she left the prosecutor's office in 2014 (James, 12-7-20, pp 1005/11). There was no evidence that the prosecutor's office kept a "book" on respondent after Ms. James's departure in 2014, at least five years before the acts that gave rise to this case. Further, given the judicial misconduct charges for which the Michigan Supreme Court suspended respondent in 2014, it was prudent of the prosecutor's office to keep such a "book," and doing so would not in the least be suggestive of bias.

In any event, the allegations in this case have nothing to do with any alleged animosity between the prosecutor's office and respondent. The relevant facts are nearly all undisputed. They are facts that *should* have been reported to the Commission. Respondent's claim that the prosecutor's office was biased is an attempt to avert the Commission's scrutiny of those facts.

Respondent argues that Assistant Prosecutor Joseph Kurily observed the conversation between himself and Ms. Bickerstaff at the prosecution's table and saw nothing unusual in either respondent's or Ms. Bickerstaff's conduct. (Brief, pp 14-

15) He neglects to mention that Lt. Derrick Griffin, who, unlike Mr. Kurily, actually overheard some of the conversation, was troubled by what he heard. He was aware that the conversation was of a sexual nature. He heard respondent make sexual analogies, and describe a sex act as leading to a "crescendo" (Griffin, 11-24-20, p 751/9-11). He believed the discussion may have embarrassed Ms. Bickerstaff (*id*. at pp 751/20-21, 752/16), and believed it was inappropriate and unprofessional for respondent to talk that way in a courtroom (*Id.* at pp 751/12-21, 752/16, 753/7-13). He did not interrupt respondent because he did not believe it was his place to do so; he did not feel he has authority over a judge in the judge's courtroom (*Id*. at p 753/16-22). By writing only about Mr. Kurily's subjective and uninformed impressions but omitting Lt. Griffin's more objective testimony, respondent created a misleading picture of the evidence.

MICHIGAN'S JUDICIAL DISCIPLINE SYSTEM IS CONSTITUTIONAL

Respondent argues that Michigan's judicial discipline system is unconstitutional. He does so merely to preserve this issue. He acknowledges that the Commission cannot resolve it. He also acknowledges that the Michigan Supreme Court has rejected it.[4] (R Brief at p 31) Disciplinary Counsel will not further address this argument.

[4] The Court rejected the argument in *In re Chrzanowski*, 465 Mich 468 (2001); *Matter of Del Rio*, 400 Mich. 665; (1977); and *Matter of Mikesell*, 396 Mich 517 (1976). The Court rejected it again when respondent raised it on an interlocutory basis in this case in October 2020. *Bruce Morrow, v Judicial Tenure Commission*, Order No. 162130 & (4), 10-30-20.

THE MASTER HAD DISCRETION TO CONDUCT A REMOTE HEARING

Respondent objects to the Master's decision to conduct the proceedings virtually rather than in person. (R Brief pp 32-36) For the reasons stated below, the Master had the discretion to choose whether the hearing would be by remote video, and it was a proper exercise of that discretion to opt for a virtual hearing on the facts of this case.

The Michigan Supreme Court has authorized, and even encouraged, courts to conduct virtual proceedings whenever possible, in order best to ensure the safety of all participants during the pandemic.[5] Notwithstanding this encouragement, respondent claims that MCR 9.231(B), which states that "[t]he master shall set a time and a place for the hearing …," implies that the hearing must be at a *physical* "place." He objects that the Master denied his motion for an in-person hearing without providing a reason, although he admits it was "ostensibly" because of the pandemic.

There are at least two problems with his claim. One is the obvious – nothing in the rule requires that the hearing be held in person, as opposed to virtually. The rule is silent about that distinction because the rule became effective before there was any need to hold judicial disciplinary hearings virtually. The rule's silence about

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[5] https://courts.michigan.gov/NewsEvents/Documents/ReturntoFullCapacityGuide.

the meaning of “place” in circumstances the rule could not have contemplated does not support respondent’s belief that “place” must be singular and physical.

Also problematic, for respondent’s interpretation, is that the rule was clearly not aimed at defining the “place” where a hearing is held. It merely empowers the Master to designate that time and place, without restriction. It is irrelevant to that grant of power whether the “place” is physical or virtual, and hence it is not reasonable to interpret the rule as restricting the Master’s choice of place as respondent suggests.

Respondent argues that whether the hearing is virtual or physical has a significant impact on assessing witness credibility. (R Brief at p 35) He offers no evidence to support his belief. To the contrary, in fact, the video record of the hearing demonstrates that though it was virtual, it afforded ample ability to assess the witnesses’ demeanor. The Master’s conduct during the hearing and her well thought out assessment of Ms. Bickerstaff’s credibility also show that proceeding virtually did not impair her assessment of witness credibility or negatively affect her ability to understand the witnesses. Had the Master been concerned about the efficacy of proceeding virtually, she could have changed course at any time during the testimony of the twenty witnesses. She did not do so. Clearly, she believed she was able to assess credibility and understand the witnesses. She was within her authority

to hold the hearing remotely; especially when concerns about the health consequences of having an in-person hearing were so strong.

RACE PLAYED NO PART IN THIS CASE

Respondent argues that racist rhetoric has infected this case since the beginning. (R Brief at pp 2-3) With this argument, he is trying to inflame passions despite a complete absence of supporting evidence. Race was not even mentioned until the fourth day of the hearing, when *respondent's* counsel, Ms. Jacobs, asked *respondent's* witness, Nicole James, a question about the race of a *different* judge whose name had been mentioned in the hearing (James, 12-7-20, p 1016/16). Race did not "infect" anything.

Respondent's argument rests on his assertion that Ms. Bickerstaff claimed he "hit on her" during their conversation at the prosecutor's table. (R Brief at p 3) The fact that this is his evidence of "racist rhetoric" underscores how unfounded his claim is. First, Ms. Bickerstaff does not believe she made this statement. If someone understood her to make it, she has thoroughly disavowed it. More important, if she ever did harbor the belief that an older male judge who spoke to her intimately and inappropriately about sex was trying to hit on her, that belief would not be unreasonable; and the race of the older male judge would be irrelevant to her having such a belief.

With respect to whether Ms. Bickerstaff's belief (if she ever had it) that respondent was trying to hit on her during the conversation at her table, that belief was no part of the Commission's charge or disciplinary counsel's case before the Master. It had nothing to do with Ms. Ciaffone's testimony. It had nothing to do with the facts that respondent himself has admitted.

It is telling that although respondent now makes this inflammatory claim about Ms. Bickerstaff's beliefs, during the hearing he never explored whether she had any prejudice, fear of Black men, or any other bias related to race that somehow affected her recall of the simple facts on which this case rests.

Respondent also claims that race infected the hearing because disciplinary counsel argued in closing argument that Mr. Noakes, defense counsel for Mr. Matthews, was "pompous" – which he claims was "an echo of the racist 'uppity' label used to dismiss accomplished Black men." (R Brief at p 3) The word "pompous" is defined as: "affectedly and irritatingly grand, solemn, or self-important."[6] The video recording of Mr. Noakes's testimony shows that he was, in fact, "pompous," without regard to his race.

Respondent's defense rests largely on overblown and misstated allegations. His overblown and misstated assertions about race are typical of his defense as a whole.

[6] https://www.merriam-webster.com/dictionary/pompous

THE APPROPRIATE SANCTION IS REMOVAL OR A LENGTHY SUSPENSION

Respondent argues that the *Brown* factors mitigate in favor of a light discipline, if *any* discipline is warranted. (R Brief at p 47) His unsupported analysis is simply wrong.

First, he claims there was no pattern or practice of misconduct. He argues that the prior incidents that disciplinary counsel cited were from 2004 and 2005, and the fifteen-year gap between them and the facts that gave rise to this case do not constitute a pattern. (R Brief at p 47) He does not address the two other incidents that occurred in 2018 and 2019, written about on pages 10-12 of Disciplinary Counsel's Brief. Nor does he discuss the fact that there were three incidents of misconduct in just over 24 hours involving Ms. Bickerstaff and Ms. Ciaffone. He ignores his 60-day suspension in 2014. His conclusion that there was no pattern or practice of misconduct is simply wrong.

Second, respondent summarily argues that all of the misconduct took place off the bench. (R Brief at p 47) Case law disagrees. As written about in Disciplinary Counsel's Brief on page 12, the Supreme Court considers conduct that occurs in the capacity of being a judge as "on the bench conduct." *In re Barglind*, 482 Mich 1202 (2008); *In re Susan R. Chrzanowski*, 465 Mich 468, 490 (2001).

As to *Brown* factors three and four, respondent argues that none of the alleged misconduct caused prejudice to any party and none of the alleged misconduct

implicated "the actual administration of justice." (R Brief at p 47) Disciplinary counsel agree that respondent's conduct was not prejudicial to the actual administration of justice. However, one aspect of his misconduct created an appearance of impropriety. As disciplinary counsel wrote at pages 13 and 20-22 of its brief, and on page 2 above, respondent's private conversation with Ms. Bickerstaff, in open court, during a murder trial, created an appearance of impropriety. *Cf. In re Morrow*, 496 Mich 291, 299 (2014).

As to the fifth *Brown* factor, respondent summarily argues that "All of the comments were spontaneous." (R Brief p 47) To the contrary, as disciplinary counsel wrote on pages 13-17 of its brief, all of respondent's misconduct was premeditated. Disciplinary counsel incorporate that argument here.

Disciplinary counsel agree with respondent that his misconduct did not undermine the ability of the justice system to discover the truth. (R Brief at p 47)

Respondent claims that none of the alleged misconduct involved discrimination. (R Brief at pp 47-48) Disciplinary counsel disagree. As written about on pages 4-6 and 17-18 of Disciplinary Counsel's brief, his misconduct toward Ms. Bickerstaff and Ms. Ciaffone was unequal treatment on the basis of gender. Disciplinary counsel incorporate that argument here.

Respondent claims that all of the *Brown* factors show that his misconduct is on the "less severe" end of the spectrum, and that only minimal discipline, such as

public censure, should be imposed. He provides a summary of prior cases and the discipline imposed, and argues that none of his misconduct is even close to the misconduct cited in those cases. He argues that *In re Gorcyca* is the closest analogue to his case and that like Judge Gorcyca, he should merely be publicly censured. (R Brief at p 50)

All but one of the cases respondent cites have absolutely nothing to do with sexual misconduct or sexually charged words or actions. As noted on pages 23-29 of Disciplinary Counsel's brief, there have been only two Michigan Supreme Court opinions with facts somewhat similar to this case, in that a judge engaged in sexual harassment alone, with no other accompanying misconduct. *In re Iddings*, 500 Mich 1026 (2017); *In re Honorable Steven R. Servaas*, 484 Mich 63 (2009). Respondent did not mention *Iddings*, and the omission is significant. Judge Iddings received a six-month suspension, despite expressing full remorse, working to correct his behavior, and having no negative discipline history.

Respondent also did not mention *In the Matter of Honorable Arvom Davis*, 432 Mich 1223 (1989), which, like this case, involved sexually inappropriate comments but did not involve false statements. Judge Davis, who, unlike respondent, had no prior discipline history, was removed by consent after the Commission recommended his removal. While Judge Davis's words and actions were somewhat more pervasive and more extreme than respondent's, he had not been involved in

judicial disciplinary proceedings before his removal, had not been warned about his prior behavior and educated about how to behave in the future, had not deliberately disregarded what he had been told, and had not reoffended in much the same way as he had been warned and educated against. It is also worth noting that Judge Davis was removed more than thirty years ago, when society was much less sensitive to the ways in which people in authority abused that authority in their interactions with women. Even as far back as 1989, the Commission recognized:

> Respondent's conduct has conclusively shown a lack of the requisite moral character and fitness. Due to the extreme gravity of his actions and the severe loss of respect he has caused, the Commission must recommend that sanction which most completely and finally protects all those who may be subject to the jurisdiction of his court.

(Decision and Recommendation For Order of Discipline, p 11) The same rationale applies with more force now, when there are so many women lawyers who have to practice law before male judges who have authority over them.

Pages 29-32 of Disciplinary Counsel's brief summarize cases from other states that are also somewhat similar to this case. We will not restate that full argument here, other than to suggest that those cases are much more on point than are the cases cited by respondent, and they support removal or a lengthy suspension.

Comparing respondent's misconduct to that punished in the cases he cites is difficult, because his misconduct is not at all similar to any of the misconduct in

those cases.[7] He argues that because his misconduct did not involve dishonesty, he should be minimally sanctioned, if at all. (R brief at p 50) While he was not found to have been dishonest, he affronted the judicial system in a different and equally bad way. He made it a point to speak offensively to women during a time when women are publicly speaking out about abuse in the workplace by male superiors who have power over them. He did so after having been warned by the SCAO and by the JTC about his inappropriate words to women with whom he worked. He had been counseled about what to avoid saying. In spite of all this, he intentionally ignored the counseling he received and imitated the misconduct he had been reprimanded for committing in the past. His conduct was different, but equally as bad as those judges who committed dishonest acts.

Contrary to the impression one might get from respondent's brief, judges in addition to Judge Davis, mentioned above, *have* been removed from office for misconduct that did not involve dishonesty, false statements, or misrepresentations. In *In Matter of Bert M. Heideman*, 387 Mich 630 (1972), the Supreme Court removed a judge for failing to order jury trials upon request; failing promptly to

[7] The cases respondent cites in which the Supreme Court removed a judge for acts of misconduct include: perjury (*In re Adams*, 2013); misuse of public funds, misrepresentations during the disciplinary process, violation of anti-nepotism policy, (*In re James*, 2012); fixing tickets, making false statements under oath, (*In re Justin*, 2012); and making false statements after a drunk driving incident, (*In re Noecker*, 2005). The case he cites that resulted in a one year suspension involved assigning cases to an attorney with whom the judge was having an intimate relationship and failing to disclose that relationship, and making false statements to a detective (*In re Chrzanowki*, 2001). Respondent noted that the Court imposed a nine-month suspension on a judge who interfered with an investigation and prosecution, and made an intentional misrepresentation about the purpose of text messages (*In re Simpson*, 2017). Respondent also noted that a judge who was convicted of driving while intoxicated received a ninety-day suspension (*In re Nebel*, 2010) (R Brief at pp 48, 49)

move cases through the court system; and failing to keep accurate records of proceedings. In I*n re Hon. James McCauley*, 441 Mich 590 (1993), the Court removed a judge for abuse of contempt power, unprofessional relationships and hostile attitude with employees, willful neglect of his docket, and refusal to respond to SCAO inquiries.

Respondent's objections note two cases in which a judge was suspended for 60 days, one of which involved respondent.[8] He also notes a case in which a judge was suspended for 30 days[9] and another in which a judge was suspended for 14 days.[10] Respondent's misconduct, when considered together with his history, is more serious than was the misconduct in each of those cases.

More importantly, respondent's brief does not mention two cases in which the Supreme Court imposed six-month suspensions for actions that are more on par with what he did. In *In re the Honorable Thomas S. Gilbert*, 469 Mich 1224 (2004), the Supreme Court imposed a six month suspension because a judge smoked marijuana

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[8] The cases respondent cites in which a judge was suspended for 60 days are his own 2014 case and *In re Hathaway 464 Mich 672* (2001), in which Judge Hathaway conducted an arraignment without the prosecutor, threatened to jail the defendant if he did not waive his right to a jury trial, and engaged in a pattern of untimeliness and adjournments.

[9] The case respondent cites in which a judge was suspended for 30 days is *In re Post, 493 Mich 974* (2013), in which Judge Post refused to allow a witness to invoke the Fifth Amendment and jailed an attorney who counseled his client to remain silent.

[10] The case respondent cites in which a judge was suspended for 14 days is *In re Halloran,486 Mich 1054* (2010), in which a judge was dishonest in managing the courtroom and reporting to the State Court Administrator's Office.

at a concert and admitted that he had used marijuana two times a year, including after becoming a judge. In *In re Honorable Warfield Moore*, 464 Mich 98 (2001), the Court imposed a six month suspension on a judge who had previously been sanctioned, for using a controversial tone, for being impatient and discourteous when addressing people in the courtroom, and for persistent interference and frequent interruption during trial.[11]

Respondent's argument is essentially that his misconduct is less serious or equal to that of judges who have only been censured. Those cases include a judge who texted a shirtless photo of himself (*In re McCree*, 493 Mich 873 (2012); being discourteous to children (*In re Gorcyca, 500 Mich 1203* (2017)); sending a defamatory letter (*In re Fortinberry, 474 Mich 1203* (2006)); accepting football tickets in court when it was clear that no bribe was involved (*In re Haley, 476 Mich 180* (2006)); having an 18-month delay between arraignment and trial (*In re Moore, 472 Mich 1207* (2005)); and arranging for release on bond for another elected official (*In re Logan, 486 Mich 1050* (2010)). While it is difficult to compare respondent's misconduct with those that have resulted in censure, disciplinary counsel suggest that his was much more serious. That is especially true in light of the facts that he had been reprimanded by the SCAO and the JTC for his prior behavior, he had been educated about how to behave in the future, and he deliberately chose to ignore the

[11] The judge had previously been censured in *In re Honorable Warfield Moore*, 449 Mich 1204 (1995).

instructions given to him. None of that is true in any of the cases in which mere censure was imposed.

Respondent's sanction argument is perhaps more telling than he realizes. It makes clear that he still does not understand that he did anything wrong. He is willing to accept the bare minimum sanction in recognition of the Master's findings, but there is nothing in his brief that demonstrates any acknowledgment that he committed misconduct. In addition, his argument trivializes his actions through a classic, but badly outdated, "boys will be boys" defense.

Respondent overlooks one other very important distinction between his situation and that in most of the cases he cites. Not only does he have no remorse, he is also a repeat offender. He offended even after having been warned about his conduct. That puts him into a different, and far worse, category than that of most of the judges whose sanctions he cites.

CONCLUSION

Disciplinary counsel ask that the Commission reject every one of respondent's challenges to the Master's findings of fact and conclusions of law. We urge the Commission to recommend a sanction that either removes respondent or imposes a suspension significantly greater than the 60-day suspension that proved inadequate to control his misconduct in 2014. In that regard, disciplinary counsel note that

respondent's term expires on December 31, 2022, and he will be ineligible to run again. A suspension until December 31, 2022 is appropriate.

Respectfully submitted,

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