STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Complaint No. 102

Hon. Bruce Morrow
3rd Circuit Court
Detroit, MI

DISCIPLINARY COUNSEL'S REPLY TO RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION

Respondent's Proposed Findings of Fact and Conclusions of Law ask the Master to minimize the seriousness of respondent's words. Failing to appreciate their impropriety or their impact, he excuses them as merely "tasteless and offensive," "impolite," "poorly chosen analogies," "a word that many Americans view as taboo," and "distasteful comments." He is correct that his comments and actions were all of those things, but in the context in which he did them, they were violations of his ethical obligations as well.

A part of the context in which respondent interacted with the female assistant prosecuting attorneys in the *Matthews* case is that he was put on notice, in 2004 by the State Court Administrative Office and in 2005 by the Judicial Tenure Commission, that he needed to be careful about speaking in an overly intimate way with females. Respondent's proposed findings do not address his prior knowledge. Ignoring this evidence does not negate its centrality to the misconduct he committed in this case.

REPLY TO RESPONDENT'S RELEVANT STATEMENTS[1]

Paragraphs 18-49 of respondent's proposed findings argue issues that had absolutely nothing to do with the disciplinary proceedings against respondent, including:

- how he treats jurors;
- the fact that he mentors inmates, the *Matthews* voir dire, the prosecution's reliance on disputed statements;
- the prosecution's struggles with trial mechanics;

[1] Paragraph 3 of respondent's introductory statements asks why the hearing took five days. That question is curious, or perhaps reflects counsel's sense of irony. Even a casual review of the transcript shows that the hearing took ***much*** longer than it could have because the great majority of the questions respondent's attorneys asked the witnesses had little or no relevant connection to the charges against respondent; e.g., the many questions counsel devoted to the quality of the prosecutors' conduct during the *Matthews* criminal trial.

- the prosecutors' use of DNA evidence;
- the prosecution's characterization of evidence;
- the hung jury and reassignment of *Matthews* and other cases away from respondent.

This reply does not address the accuracy of respondent's claims with respect to those matters, because they are irrelevant to the questions before the Master.

In paragraph 3, 8, and 133 of his proposed findings, respondent claims that the Wayne County Prosecutor's Office and/or the Judicial Tenure Commission have tried to "twist the facts to turn Judge Morrow into a sexual predator." Neither the Wayne County Prosecutor's Office nor the Judicial Tenure Commission have twisted any facts. Although respondent's conduct was abhorrent, it did not amount to sexual predation. Most important, in light of respondent's claim, the Commission's complaint does not charge respondent with being a sexual predator and disciplinary counsel did not claim as much in their presentation of the case.

Paragraph 4 of respondent's introductory statements dramatically alleges that Ms. Bickerstaff "drew on vile, racist stereotypes about Black men" to increase the likelihood that respondent would face judicial discipline. This claim is hard to understand because respondent did not identify any vile stereotype in which he believes Ms. Bickerstaff indulged. In addition, this paragraph rests on Ms. Bickerstaff allegedly claiming that respondent "hit on her" – a statement Ms. Bickerstaff does not believe she made in the first place; which she has thoroughly disavowed, if she was ever understood to have made it; and which, in any event, was no part of the Commission's charge or disciplinary counsel's case before the Master. Although respondent makes this inflammatory claim about Ms. Bickerstaff now, during the hearing he never troubled

to explore 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.

Paragraphs 4 and 112 allege that Ms. Bickerstaff violated the Master's sequestration order by discussing with her supervisor, Patrick Muscat, that she had erred in her testimony when she estimated how many trials she had been involved in. Respondent claims that this means she cannot be trusted. It is important to note that Ms. Bickerstaff spoke with Mr. Muscat before it was known that he would be a witness, and also to note that disciplinary counsel alerted respondent's counsel and the Master of this issue before Mr. Muscat testified. It is true that Ms. Bickerstaff's concern for the accuracy of her testimony and how to correct her mistake caused her to violate the sequestration order in a small way that had no impact on either Mr. Muscat's testimony or her own. Ms. Bickerstaff's violation of the order was certainly not malicious, and the fact that it was caused by her desire to be accurate underscores why her testimony *should* be trusted.

Paragraph 7 of respondent's proposed findings claims that during the conversation in chambers he "express[ed] skepticism" about defendant Matthews's "tendency to exaggerate," and denies that doing so is misconduct. Unfortunately, he left out the significant details:

- that the alleged exaggeration with which he was concerned was about the size of the defendant's penis, not just the general tendency of defendants to exaggerate;
- that it was respondent who introduced this particular alleged exaggeration into the conversation in chambers;
- that he did not do so as an illustration of defendants' tendency to exaggerate in general, but only to mock this defendant for this exaggeration;
- that respondent was laughing at what he believed to be the absurdity of Matthews's testimony as he did so;

- and that he did so as one more sexually charged reference in a conversation in which he made several other sexually charged comments. (Ciaffone, 11-13-20 pp 64/24-65/10, 65/24-66/1)

Respondent denies using the word "dick," but every witness to this conversation heard him use that or the functional equivalent of that word. (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?" (*Id*. at 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 misconduct.

Paragraph 8 of respondent's proposed findings justifies his asking the two female assistant prosecutors about their height and weight as having been done "in the context of a discussion about one attorney's ability to handle criticism." To the contrary, there was absolutely no evidence that the conversations about the women's bodies had anything to do with anything other than the women's bodies, and certainly had nothing to do with the ability of either to handle criticism. The conversation about their bodies took place after the trial was over, after respondent had already voiced his criticisms. Further, assuming respondent *had* accurately captured the context of his remarks about the women's bodies, it is still impossible to imagine how those comments would have been an appropriate part of discussing their ability to handle criticism, since their height, weight, and muscle mass have no relationship to whether they can do so.

Paragraph 8 also claims that there is no evidence to support the allegation that respondent was "overtly eyeing" the women. To the contrary, both women described how respondent eyed them up and down as he talked about their bodies. Short of an admission by respondent, this is not the sort of act one would expect to generate any additional "supporting evidence."

Paragraph 8 heightens the drama of respondent's argument by asserting that the women's testimony about him scanning their bodies "draws on some of the worst and most dangerous stereotypes about Black men." Their actual testimony merely described respondent's act. There was no interpretation of it, and no stereotype was even involved. Again, respondent makes his highly charged accusation of bias without his attorneys having asked one question of either of the women that might elucidate whether their simple observation, that respondent looked them up and down, was somehow based on race or other prejudice.

Finally, paragraph 8 states that "spinning Judge Morrow's questions [about the women's bodies] as sexual or predatory is simply abhorrent." He provides absolutely no evidence to support his accusation that *anyone* has spun his questions in that way. No one did so. Respondent is obviously laboring to create a straw man here – the straw man of racism – to distract from the quite simple, quite objective, quite racially neutral, and quite damning facts.

Paragraph 9 of respondent's proposed findings claim that disciplinary counsel failed to prove any malicious or improper intent, and argues that there was no evidence respondent "hit on" Ms. Bickerstaff, or insulted or belittled anyone. Given the way respondent has defended the allegations against him, it bears repeating that neither the Commission nor disciplinary counsel has ever accused respondent of "hitting on" Ms. Bickerstaff.

Further, respondent's intent cannot be painted with such a broad brush. His "malicious" intent is not relevant to any of the charges against him, though it might be relevant to the sanction

imposed. His "improper" or "discriminatory" intents are perhaps relevant to whether he treated the women discourteously because of their gender, in violation of MCR 9.205(B)(1)(d), but are not relevant to whether he treated them discourteously or disrespectfully in violation of Canons 2(B), 3(A)(3), or 3(A)(14). It is a violation of those canons for respondent's actions to be disrespectful or discourteous, no matter his intent and no matter the gender of the victim.

In any event, when one considers the totality of respondent's actions during the *Matthews* case, there is no doubt that he acted with improper intent. *He* intentionally chose the words and analogies he used after telling Ms. Bickerstaff that what he had to say could or would or might make her "blush." *He* chose the sexual analogies and directed the conversation in sexual ways in chambers. *He* initiated the conversation about the women's bodies. He did each of these things after he had been warned by the Judicial Tenure Commission and the State Court Administrative Office not to have intimate or personal conversations with employees that would make them feel uncomfortable or embarrassed. He did each of these things after a decade in which a major issue in the public sphere has been the way men in power treat women.

Contrary to another claim in respondent's paragraph 14, the totality of the circumstances do demonstrate respondent's intent to treat the women poorly on the basis of their gender, as required to demonstrate a violation of MCR 9.202(B)(1)(d). Assistant Prosecutor Joseph Kurily was assigned to respondent's courtroom for 18 months. He testified that respondent often sat at the prosecution table and often critiqued his performance, but never told Mr. Kurily anything that could make him blush. (Kurily, 11-24-20, p 703/19-25.) Respondent reserved that treatment for Ms. Bickerstaff. Respondent never sat close to Mr. Kurily, with the arms of their chairs touching, their eyes locked into each other's or their heads close together. (*Id*. at pp 705/4-9, 707/10-16, 735/15-20) He reserved that treatment for Ms. Bickerstaff. Respondent never used sexual

analogies in his teachings with Mr. Kurily, and never used the words "foreplay," "climax," "crescendo," and "tease" to make his point with him. (*Id*. at pp 736/3-737/3.) He reserved that treatment for Ms. Bickerstaff. Further, respondent never discussed sleeping with someone on a first date with Mr. Kurily. (*Id*. at p 737/4-16) He reserved that treatment, and his questions about their bodies, for the women.

Paragraph 14 of respondent's proposed findings alleges that respondent is one of the best judges in the criminal division, based on the testimony of his longtime friends who are criminal defense attorneys. It is irrelevant to this proceeding whether or not respondent is a good judge in respects other than whether he treated Ms. Ciaffone and Ms. Bickertaff inappropriately. But the evidence belies respondent's claim anyhow. In addition to the warnings respondent received in 2004 and 2005 to be careful about the intimacies he shared with women, in 2014 the Michigan Supreme Court suspended respondent for:

- improperly closing the courtroom during a hearing and ordering the court reporter not to prepare a transcript;
- failing to follow mandatory statutory language in multiple criminal cases after the mandatory language was brought to his attention;
- recasting a previous order, dismissing a case *without* prejudice, as a dismissal *with* prejudice, to justify his *sua sponte* dismissal of the case after it was reissued;
- subpoenaing a defendant's medical records without the parties' knowledge or consent;
- recklessly placing himself and others in the courtroom at risk of serious harm by personally bringing a defendant convicted of several violent crimes from lockup and sentencing him without restraints or courtroom security present;

- and showing poor judgment by coming down from the bench at the start of a trial to shake hands with a criminal defendant and deliver papers to his counsel.

The Court ruled that respondent impeded the proper administration of justice, eroded the public's confidence in a fair and impartial judiciary, degraded the integrity of the judicial process and the judiciary itself, failed to recognize the limits of his adjudicative role, and created the appearance of impropriety. *In re Morrow*, 496 Mich 291 (2014). The "best judges" do not find themselves suspended by the Supreme Court for refusing to follow the law in multiple cases and the other improprieties the Court identified.[2]

Paragraph 17 of respondent's proposed findings discusses a circa 2007 or 2008 telephone conversation Joan Kennedy-Hughes had with "someone with Wayne County," in which she was offered another job if respondent's behavior was the reason she had quit her job with him. His reliance on this 11 or 12 year-old conversation to suggest some sort of impropriety in these proceedings is a perfect illustration, in miniature, of the bootstrapped arguments and *non sequiturs* on which his whole defense is based. Ms. Kennedy-Hughes's testimony shows that at a time when the Third Circuit Court had reason to be concerned about the way respondent treated the women on his staff (see disciplinary counsel's Exhibits 10 & 11), an unnamed person at an unnamed office that was somehow associated with Wayne County offered her another position if it was respondent who had caused her to leave her position in his court. That is the *only* thing her testimony shows. That is precisely what one would want a personnel office to do to protect employees who might be in a difficult situation.

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[2] Respondent attaches to his findings of fact the report Master Sosnick prepared in connection with the case for which the Supreme Court suspended him. Respondent does not identify any theory by which this report is admissible in this proceeding, and in any event, he never sought to admit it. Accordingly, disciplinary counsel object to the Master considering it now. Moreover, nothing in that report has any bearing on any aspect of this case, the facts of which took place six years after Master Sosnick wrote his report. Further, it is the opinion of the Supreme Court, not the Master's report, which is the decision in the 2014 case.

Respondent adds a little of this and a little of that to this entirely banal fact, to argue that this offer was really an attempt to bribe Ms. Kennedy-Hughes, if only she would provide some unspecified negative information about him. He then ignores Ms. Kennedy-Hughes's testimony that the caller was from Wayne County *administration* or *personnel*, *not* with the Wayne County Prosecutor's Office (Kennedy-Hughes, 12-7-20, pps 1030/14-1031/5, 1032/4-10, 1042/12-18), to attribute to the Wayne County Prosecutor's Office this made-up intent to "get" respondent. Even that is not enough to call into question the evidence of his misconduct, so he then attributes this alleged *2007 or 2008* intent to the *2019* Prosecutor's Office. That is still not enough, though, because there is no evidence that Ms. Bickerstaff or Ms. Ciaffone – the main Wayne County Prosecutor's Office witnesses to respondent's misconduct – were aware of this 2007 incident, nor is there any evidence that their office influenced their testimony in the least. In fact, all the evidence is that their office had *no* impact on their testimony.

When respondent's counsel cross-examined Ms. Ciaffone, he questioned her at length about her understanding of the phrase "red herring." Respondent's argument based on Ms. Kennedy-Hughes's testimony is one of many red herrings on which respondent has relied in these proceedings.

In paragraphs 54 and 55, respondent claims that the reason he came down from the bench and sat next to Ms. Bickerstaff was to tell her something that would make her blush and he wanted to "avoid airing criticism in public." This contradicts respondent's answer in Exhibit 2, number 21a, where respondent wrote that the "conversation took place in the midst of the courtroom where defense counsel or anyone else could have listened and even participated if they elected to do so." Paragraph 55 also justified respondent coming off the bench and sitting close to Ms. Bickerstaff by arguing that he has a deep, booming voice and he did not want the public to hear him. The

argument about respondent's "deep, booming voice" is nonsensical; even people with deep, booming voices can reduce their tone so that others cannot hear them. It was not necessary for respondent to sit so closely to Ms. Bickerstaff to accomplish this purpose.

Further, as disciplinary counsel noted in our proposed findings, respondent had not hesitated publicly to criticize either of the women during any other part of the *Matthews* trial; there was no reason for him suddenly to have that concern at the same time he was going to tell her something that would make her blush. It was the anticipated sexual analogies that he thought would make her blush, not the fact of any criticism. Respondent pretends he was doing Ms. Bickerstaff a favor by choosing to sit next to her, when instead, he was looking for an excuse to sit close to her to share his sexual analogies privately.

Paragraph 101 of respondent's proposed findings points out a possible discrepancy, between what Ms. Bickerstaff told Detective Kinney and what she told disciplinary counsel, about whether she knew respondent's intent when he discussed the sexual nature of examining a witness while sitting next to her. Respondent uses this potential discrepancy to claim that Ms. Bickerstaff not only "lied" – that is, was deliberately untruthful – about this point, but that she is a "liar" generally.

Respondent is very quick to allege that a witness with whom he disagrees is a "liar." If there is a discrepancy in Ms. Bickerstaff's testimony on this point, the discrepancy does not mean Ms. Bickerstaff lied either to Detective Kinney or to disciplinary counsel. Ms. Bickerstaff could have a mere failure of memory, or there could have been a failure of understanding between Ms. Bickerstaff and Ms. Kinney, or between Ms. Bickerstaff and disciplinary counsel. It is also possible that near the time of her conversation with respondent, Ms. Bickerstaff did have a negative sense of respondent's intent, 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. Regardless, any initial statement she made about respondent's intent was an unimportant inference about his actions that had no impact on the much broader investigation of his actual actions, stripped of inference, that form the basis of the charges here. Whether or not Ms. Bickerstaff ever drew such an inference 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.

Paragraph 105 of respondent's proposed findings notes that Detective Bivens forwarded his memorandum containing Ms. Bickerstaff's "false" statement that she believed respondent was "hitting on her" to Prosecutor Kym Worthy. Ms. Bickerstaff testified she did not make any false statements to either Detective Kinney or Detective Bivens. When disciplinary counsel sent her the paragraph in Detective Bivens's report in which she allegedly claimed that respondent had hit on her, she informed disciplinary counsel that the report was mistaken. (Bickerstaff, 11-23-20 pp 422/15-24, 424/14-22, 597/6-8, 598/16-22) Ms. Bickerstaff could have avoided bringing that error to disciplinary counsel's attention. Not addressing it would have caused less trouble for her and would have caused more trouble for respondent. Precisely because she is an honest person, though, she did not take the easy route. She has consistently disavowed making the statement (*Id*. at pp 421/12-14, 422/l15-24), and since the statement she allegedly made does not reflect well on respondent, it is a little odd that he is working so hard to claim that she did make it.

As we note below, it does not matter whether Ms. Bickerstaff did or did not infer that respondent's sexually intimate conversation with her was an attempt to hit on her when speaking to her office's investigators. It is worth noting, though, that the evidence that she did draw the inference is hardly conclusive. Detective Kinney testified she does not recall Ms. Bickerstaff telling her that respondent was "hitting on her." Although Detective 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 based on his own interpretation of the events. In any case, it is worth emphasizing that the couple of lines of inference in Detective Bivens's nine page, single-spaced, memorandum of facts is an insignificant portion of the entire investigation, which included two memoranda and two affidavits written by Ms. Ciaffone and Ms. Bickerstaff detailing all the inappropriate things respondent said and did.

Returning to his loose use of the word "liar," paragraph 108 of respondent's proposed findings alleges that Ms. Bickerstaff "lied" to disciplinary counsel about whether she had read Detective Bivens' report before disciplinary counsel sent her a copy of the paragraph attributed to her. As noted above in response to paragraph 105 of respondent's filing, there was some uncertainty whether Ms. Bickerstaff had seen the paragraph in Detective Bivens's report that is attributed to her before disciplinary counsel sent it to her. (*Id*. at pp 615/14-22, 616/6-13) Disciplinary counsel's notes reveal that Ms. Bickerstaff told her she had not reviewed Detective Bivens's report, but her trial testimony was that she had. (*Id*. at p 421/18-21) Again, if Ms. Bickerstaff were untruthful she could have avoided any problem or confusion simply by denying that she had ever read Detective Bivens's report, but she did not do so because that would not have been truthful.

Respondent's attack on Ms. Bickerstaff's credibility places too much reliance on the stipulation that is respondent's Exhibit M. That stipulation explains that disciplinary counsel is "unable to ensure that Ms. Bickerstaff accurately understood her question [about having previously read Detective Bivens's report] and she accurately understood Ms. Bickerstaff's answer." In his eagerness to accuse Ms. Bickerstaff of deliberate deception, he also ignores the obvious fact that no one has a perfect memory, as well as ignores the equally obvious fact that Ms. Bickerstaff had

no motive to make or conceal any of the supposed false statements he attributes to her. Ms. Bickerstaff should certainly have been more careful about correcting the mistaken statement in Mr. Bivens's report whenever she 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.

Paragraphs 123-125 of respondent's proposed findings cite articles, journals, and court opinions that use words related to sex, such as "making love," "intercourse," "procedural foreplay," "foreplay," and "real sex." While interesting, there is a big difference between using those words in writings and doing what respondent did. 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, knowing that his doing so would make her blush. In chambers with Ms. Bickerstaff and Ms. Ciaffone, he again had a face-to-face discussion in which he used sexual analogies, talked about Ms. Ciaffone's personal sexual biases and experiences, and joked with familiarity about the size of defendant Matthews's penis and his exaggerated sexual prowess. He verbally used the words, "doggy style," "dick" or its functional and informal equivalents, and "fucked." Finally, 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 the women. The writings he cites did not concern any of these intimacies in this sort of setting, and they do nothing to justify or minimize his words and actions with the women.

Paragraph 128 of respondent's proposed findings attempts to minimize the damage Mr. Noakes's testimony inflicts on his case. Mr. Noakes testified that respondent "may have" referred to the kind of sex defendant Matthews described as "doggy style." (Noakes, 11-24-20, p 907/ 6-8) He recalled that respondent told Ms. Ciaffone that most people do not interpret non-traditional sex

the way she does. (*Id*. at p 919/13-22) Mr. Noakes admitted that respondent "may have laughed" at defendant's testimony that he did not have traditional sex with the victim because she was pregnant and he did not want to hurt the baby. (*Id*. at p 920/4-8) Finally, Mr. Noakes admitted that respondent said words to the effect of "How big does this guy think he is?," clearly referring to his penis. (*Id*. at p 920/10-13)

Paragraph 131 of respondent's proposed findings argues that he had an innocuous reason to ask the prosecutors about their height, because he often uses height to illustrate bias and to challenge assumptions. One problem with that argument is that at the time he questioned the women about their height, it had been three days since voir dire had been conducted, so he clearly was not asking those questions for the benefit of the jury. Further, there is no evidence that respondent alerted the women that he was researching juror bias at the time he asked them personal questions about their bodies. Contrary to his attempt to spin, as laudable, his interest in the women's bodies, all of the evidence shows that his only motivation was his disrespectful desire to discuss their bodies.

Paragraph 132 of respondent's proposed findings alleges that the women attempted to "sexualize" respondent's questions about their height and weight and their belief that he was "overtly eying" their bodies. He claims disciplinary counsel cast him as a "sexual predator." Even a casual review of the testimony shows that neither Ms. Ciaffone, nor Ms. Bickerstaff, nor 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.

Paragraph 135 of respondent's proposed findings suggests that if it was okay for Ms. Ciaffone to sit so close to Ms. Bickerstaff during the *Matthews* trial, it was equally proper for him to do so. There are several defects in this argument. First, respondent is a judge who should not

have been sitting at the prosecutor's table talking privately with a prosecutor while the trial was going on. He gave the appearance of being partial during the trial. Second, he is a male who was not familiar to Ms. Bickerstaff before the *Matthews* trial began, and he was not invited to sit so close to her. Further, the problem with respondent's conduct is not, in isolation, that he sat close to her. The misconduct is in the fact that respondent sat intimately close to her while having a highly intimate and sexualized conversation with her that he knew would make blush. There is no hint that Ms. Ciaffone did any of these things.

Respondent also suggests that if it was okay for Ms. Ciaffone to use the word "fuck" in her closing argument, it was similarly okay for him to use it in chambers. Again, respondent's argument underscores that he does not appreciate the significance of context. Ms. Ciaffone had a job to do, and in doing it, she repeated in her rebuttal argument what the defendant told the police when he was interviewed. Respondent, by contrast, was regaling attorneys in his office with a sexualized conversation, mocking the prosecution's trial strategy, mocking the defendant, and deliberately choosing words that, in that context, would perpetuate the sexualized atmosphere.

Paragraph 139 of respondent's proposed findings misstates the conduct prohibited by Canon 2(B). He argues that he did not demonstrate gender bias. Canon 2(B) does not rest on gender bias. It requires a judge to treat every person fairly, with courtesy and respect, and to do so without regard to a person's race, gender, or other protected characteristic. To the extent respondent argues that his intimate conversation with Ms. Bickerstaff, his sexually charged conversation in chambers, and his analysis of the women's height and weight, do not show a lack of courtesy or respect to them, he is simply wrong.

Paragraph 140 of respondent's proposed findings argues that at worst, all disciplinary counsel proved was that he made distasteful comments. He fails to appreciate the impropriety of

his words, or their impact. He argues that his intent was to teach a young lawyer, and that shows dignity and courtesy. If this was truly respondent's intent and if he had carried out his intent in a courteous, respectful way, he would deserve the credit he is seeking. However, he cannot seriously argue that his tactics, analogies, choice of words, and conduct were in any way dignified or courteous, or that his intent was simply to teach. 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.

Paragraph 141 of respondent's proposed findings overlooks the conduct prohibited by Canon 3(A)(14) when it argues, "Judge Morrow did not discriminate." Canon 3(A)(14) does not address discrimination. In language identical to Canon 2(B), it requires a judge to treat every person fairly, with courtesy, and respect. As already noted, respondent failed to do so. In just over 24 hours, he had three disrespectful, discourteous conversations with the women. One analogized the progression of sexual foreplay, through orgasm, to the direct examination of a medical examiner, while sitting intimately close. Another conversation involved another sexual analogy, a discussion of a woman's inexperience with and bias about "non-traditional" sex, laughing about the size of a criminal defendant's penis and his belief in his sexual prowess, and the use of the words "doggy style," "dick" or its functional vernacular equivalent, and "fucked." The final conversation involved respondent guessing the height and weight of the two women and announcing his intent to assess Ms. Bickerstaff's muscle mass. Nothing about those conversations was either courteous or respectful.

RESPONDENT'S STATEMENTS ABOUT WHAT DISCIPLINARY COUNSEL FAILED TO PROVE

Paragraph 115 of respondent's proposed findings lists multiple things he believes disciplinary counsel failed to prove. Thus, he argues that disciplinary counsel failed to prove that

respondent was "hitting on" either Ms. Ciaffone or Ms. Bickerstaff. As we have stressed, it was respondent, and only respondent, who introduced the concept of "hitting on" into these proceedings. It should be abundantly clear that it has never been the Commission's or disciplinary counsel's position that respondent was "hitting on" the women.

Respondent next alleges that disciplinary counsel failed to prove respondent used the word "dick." It does not matter whether respondent used that precise word, when he used the functional equivalents of that word. The evidence is clear that he did.

Central to this contention that he did not use the precise word "dick" is his claim that Ms. Bickerstaff, the witness to that word, lacks credibility. As noted above, respondent is very casual in his allegation that Ms. Bickerstaff lied. We repeat – respondent has not identified any motive for Ms. Bickerstaff to "lie," and disciplinary counsel submit that she was a credible witness. She testified under oath for six or seven hours. (Bickerstaff, 11-23-20, p 628/7-9) There was nothing about her demeanor or her testimony that suggests she was dishonest. Most of what she testified to was corroborated by Ms. Ciaffone, Mr. Noakes, Mr. Kurily, and by respondent's own answers. Respondent's counsel scrutinized her every word with the finest of fine-toothed combs, and could find only minor and immaterial discrepancies in what is attributed to her, or what she said, over the course of more than a year. Although respondent's precise word choice does not matter, Ms. Bickerstaff's testimony that he did use the word "dick" is certainly credible.

Ms. Bickerstaff's testimony that she had nightmares after these incidents and that she avoided being near respondent outside and inside the courthouse corroborates her recollection of respondent's actions. She suffered emotional trauma that caused her to change her movements in order to avoid him. She is unlikely to have an ongoing fear of respondent if she were mischaracterizing his actions with her.

Respondent called defense attorney Lillian Diallo to testify that in her opinion, Ms. Bickerstaff is not a truthful person. (Diallo, 12-7-20, p 1078/19-22) It was clear during Ms. Diallo's testimony that she is as casual in her use of the word "lie" as is respondent's counsel, and that what she characterizes as a "lie" was really just a misunderstanding that *she* caused. Ms. Diallo's testimony shows that she disparaged unnamed police officers in court. (*Id*. at pp 1090/5-17, 24-25, 1090/1-9) Ms. Bickerstaff communicated what Ms. Diallo said to one of the officers in the group to which Ms. Diallo had referred. (*Id*. at pp 1088/5-24, 1082/13-16) There is no evidence that Ms. Bickerstaff did anything other than pass along Ms. Diallo's own words. Whether rightly or wrongly, the officer concluded that Ms. Diallo was referring to him, and became angry. (*Id*. at p 1081/5-18) When confronted with the officer's anger, Ms. Diallo accused Ms. Bickerstaff of having misstated Ms. Diallo's words. (*Id*. at p 1082/13-17) Ms. Diallo's words, captured in a transcript that was introduced into the record, invited whatever misunderstanding took place. (*Id*. at pp 1093/3 1094/25) Whether it was Ms. Bickerstaff or the officer who misunderstood them, or Ms. Diallo who retracted their meaning once confronted with the officer's anger, nothing in this exchange suggests that Ms. Bickerstaff deliberately tried to mislead the officer or twist Ms. Diallo's words. It speaks poorly of Ms. Diallo's own character that she is so willing to accuse another person of deliberate deception on facts as flimsy as these.

Contrary to Ms. Diallo's unsubstantiated opinion that Ms. Bickerstaff is a "liar," Patrick Muscat, one of Ms. Bickerstaff's supervisors, testified that he has known Ms. Bickerstaff since approximately 2011. (Muscat, 12-15-20, p 1225/23-24) He said she has progressed through the Wayne County Prosecutor's Office from a college student intern to an assistant prosecutor. Every time she seeks a new position, she is reviewed by supervisors and must be recommended for employment. (*Id*. at p 1227/19-24) In his opinion, Ms. Bickerstaff is a truthful person. (*Id*. at p

1228/1-16) Her reputation for truthfulness both within and without the Wayne County Prosecutor's Office is also good. (*Id*. at pp 1228/5-16, 1229/1-18, 1231/11-14) We reiterate: Ms. Bickerstaff was a very credible witness.

Respondent next claims there is no evidence that respondent "overtly eyed" the women or "behaved in a sexual manner." As written above and in disciplinary counsel's proposed findings, there is, in fact, direct evidence that respondent "overtly eyed" the women. On the other hand, the Commission did not charge and disciplinary counsel did not argue that respondent "behaved in a sexual manner." This is another red herring.

Next, respondent relies solely on Mr. Kurily's testimony that he saw nothing unusual when respondent sat with Ms. Bickerstaff, and that in his opinion, respondent sat at an appropriate distance from Ms. Bickerstaff during that conversation. Respondent simply ignores the contrary testimony of Ms. Bickerstaff and Ms. Ciaffone. Moreover, Mr. Kurily's assessment has little bearing on the Master's own conclusion. Mr. Kurily had no reason to be paying attention to the conversation at the time it occurred, and he was not a part of it. The Master, on the other hand, has the full facts concerning the conversation, which Mr. Kurily was lacking.

Next respondent claims that he did not use the word "climax" in its sexual sense when he was talking to Ms. Bickerstaff. This claim deserves as much weight as do his other claims. By his own admission, he was analogizing the development of direct testimony to the act of having sex. In that context, it is not reasonable to suggest that the "climax" to which he referred was anything other than an orgasm, which he analogized to the cause and manner of death. He somehow finds it mitigating that, as he characterizes it, he only said that sexual intercourse is the climax of a romantic relationship. He then says that in the context in which he used it, the word "climax" did not mean sexual intercourse. He must think his audience is very gullible if he thinks it will believe

that a reference to a climax in the context of a discussion about sexual intercourse could somehow mean anything other than an orgasm. Even under respondent's overly charitable interpretation of his words, he had no business forcing his sexual analogy on Ms. Bickerstaff, well aware of its potential to embarrass her.

Next respondent claims disciplinary counsel did not prove discriminatory intent, nor prove that his actions were motivated by the women's gender or by gender bias. We note, at pp 5-6 above, that respondent is wrong both about the significance of his intent and the evidence concerning it, and will not repeat that discussion here. In his paragraph 115(f), though, he adds the claim that his discussion in chambers could not be discriminatory because Mr. Noakes, a male, was part of it. This is another *non sequitur*. There is no connection between Mr. Noakes's own gender and the way respondent treated the two women. Further, respondent is wrong. As disciplinary counsel noted in our proposed findings, the evidence showed that the in-chambers discussion was mostly between Ms. Ciaffone and respondent, and that Mr. Noakes and Ms. Bickerstaff were essentially bystanders. Respondent's words in chambers were not directed at Mr. Noakes – they were directed at Ms. Ciaffone.

RESPONDENT'S MISPLACED RELIANCE ON *HOCKING*

Respondent attempts to defend his misconduct with a quote from *In the Matter of Honorable G. Michael Hocking*, 451 Mich 1 (1996): "It is clear—that every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline." While the quote is undoubtedly true in the abstract, respondent's reliance on *Hocking* is misplaced when applied to the facts of this case.

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 Judge Hocking 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.[3]

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.

Critically, the facts of *Hocking* were substantially different than the facts in this case, and did not include 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;
- sexually mocking the defendant; or
- improperly questioning female attorneys about their physical appearance.

Rather, Judge Hocking engaged in dated stereotypes about women inviting sexual abuse 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

[3] 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.

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.[4]

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.

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[4] 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 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 as he did with Ms. Bickerstaff and Ms. Ciaffone, in the same intimate way, with male attorneys. All of the evidence in the record is that he would not have done so.

CONCLUSION

Respondent has not called into serious question any fact on which Disciplinary Counsel's proposed findings rest. Those facts show that respondent clearly committed the misconduct with which he is charged. We urge the Master to so find.

Respectfully submitted,

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