STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Complaint No. 102

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

Lynn Helland, P32192
Disciplinary Counsel

Lora Weingarden, P37970
Disciplinary Co-counsel

3034 W. Grand Blvd.
Suite 8-450
Detroit, Michigan 48202
(313) 875-5110

Donald Campbell
Attorney for Respondent
Collins Einhorn Farrell PC
4000 Town Center, #909
Southfield, Michigan 48075
(248) 355-4141

Elizabeth Jacobs
Attorney for Respondent
615 Griswold, Ste. 1120
Detroit, MI 48226
(248) 891-9844

DISCIPLINARY COUNSEL'S BRIEF IN SUPPORT OF MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW & DISCIPLINARY ANALYSIS

INTRODUCTION

The amended complaint alleges in three counts that respondent violated various canons of judicial ethics and court rules. Disciplinary counsel has the burden of establishing the charged misconduct by a preponderance of the evidence. MCR 9.233. The Master found that the preponderance of evidence proved the facts alleged in all three counts. MCR 9.240 authorizes disciplinary counsel to file a brief in support of, or in opposition to, all or part of the Master's report. Disciplinary counsel agree with the Master's findings of fact.

The Master also found that the facts demonstrated several violations of the canons. Disciplinary counsel agree with the Master's conclusions of law, which are correct, well thought out, and clearly supported by the evidence.

The Master did not address all of the charges in the complaint, though. In particular, she did not address whether respondent's misconduct, spread over three incidents across two days, was a persistent failure to treat the victims fairly and courteously, in violation of MCR 9.202(B)(1)(c). She also did not address whether respondent's unfair and discourteous treatment was due to the fact that the victims were women, in violation of MCR 9.202(B)(1)(d).[1] Disciplinary counsel asks that

[1] The Master also did not determine whether the facts showed that respondent violated Canons 1 & 2 by failing to maintain high standards of personal conduct. Disciplinary counsel does not ask that the Commission address these charges. Although the evidence clearly shows that respondent did violate these canons, the outcome of the case will not be materially affected by whether or not these violations are a part of the mix.

the Commission address whether respondent violated these court rules, and to conclude that he did.

In Count 1, the Master found that during the trial of *People v. Matthews* in 2019, an intimate discussion at the prosecution table between respondent and one of the prosecutors, Ms. Bickerstaff, began after respondent "left the bench saying that he would talk to Bickerstaff at the Counsel's table because giving the critique from the bench might make her blush." (Report at p 3) Respondent then engaged Ms. Bickerstaff in "unnecessary and inappropriate sexual dialogue" that he knew was personal and intimate and would embarrass her.[2] (*Id*. at p 4) The Master found that by doing so, respondent violated Canons 2(B), 3(A)(14), and 3(A)(3).

In Count 2, the Master found that respondent inappropriately used graphic sexual language in his conversation with the other prosecutor in *Matthews*, Ms. Ciaffone, during an in-chambers discussion. The Master found that respondent "unnecessarily and improperly introduced both subjects (Ms. Ciaffone's own sexual experience and the size of defendant's genitalia), "as well as analogizing voir dire to asking for sex on a first date." (*Id*. at p 8) The Master recognized that respondent offered critiques to defense counsel without using sexual examples, thereby "undercutting the argument that sex was the best or only teaching tool at his disposal

[2] A central part of respondent's defense was to attack Ms. Bickerstaff's credibility. The Master rejected this defense, and found Ms. Bickerstaff credible. (Report at pp 5, 6)

for offering criticism and critique." (*Id*. at p 9) The Master found that Disciplinary Counsel proved that respondent violated Canons 2(B), 3(A)(14) and 3(A)(3).

In Court 3, the Master found that respondent asked both Ms. Bickerstaff and Ms. Ciaffone about their height and weight, and told Ms. Bickerstaff, "Well, I haven't assessed you for muscle mass yet." (Report at p 10) She also found that respondent looked each of the women up and down during this conversation. (*Id*.) She found that respondent did not explain his reason for asking the questions, and determined that the conversation was "outside the bounds of professional, respectful, and dignified conversation." The Master found that the evidence proved that in doing these things respondent violated Canons 3(A)(3) and 3(A)(14).

CONCLUSIONS OF LAW THE MASTER DID NOT ADDRESS

Unfair and Discourteous Treatment Based on Gender

MCR 9202(B)(1)(d) states that "treatment of a person unfairly or discourteously because of the person's . . . gender . . ." is misconduct. Ms. Bickerstaff and Ms. Ciaffone are young female APAs. Respondent used inappropriately graphic sexual language, sexual analogies, and sexual examples with them, while the evidence showed that he did not do so with male lawyers. As the Master noted, respondent was critical of Mr. Noakes, the male defense lawyer in *Matthews*, but did not use sexual examples with him to illustrate his point. (Report at p 8) Joseph Kurily, a male prosecutor who was assigned to respondent's courtroom, testified that

he and respondent had at least 15 conversations in which respondent gave him instructions or critiques on how to try cases. Yet respondent never sat in an intimate position with Mr. Kurily. (Kurily, 11-24-20 at pp 705/4-9, 707/10-16, 735/15-20). Respondent never used sexual analogies and he never used the sexually connoted words "tease," "climax," "crescendo" or "foreplay" when speaking with him (*Id*. at pp 736/3-737/3). Further, respondent never discussed sleeping with someone on a first date with him, and he did not use sexually-based swear words in conversation with him (*Id*. at p 737/4-16).

Respondent offered male character witnesses who denied that respondent used sexually charged language with attorneys. (Edison, 11-24-20 pp 670/20-22; 678/22-25; Fishman, 11-24-20 pp 800/22-25, 801/1-2) The contrast between their testimony about respondent's conduct, and the way he treated the young female APAs, is striking. It is difficult to imagine that respondent would introduce a sexually charged conversation with a male attorney by warning him that the conversation might make him blush, as the Master found that he did with Ms. Bickerstaff (Report p 9).

Respondent's propensity to treat women differently was demonstrated by the evidence that during the same time period of the *Matthews* trial, when he was having his sexually charged conversations with Ms. Bickerstaff and Ms. Ciaffone, he asked another young female assistant prosecuting attorney – a modestly dressed woman who was wearing a hijab in his court – about the color of her armpit hair. (Kurily,

12-7-20, p 1056, l/3-25, p 1057, l/1-14). It is very difficult to imagine that he would have asked this question of a male attorney.

It is similarly hard to imagine that respondent would question any male attorney about his height or weight, or inform a male attorney that he had not yet assessed the attorney's muscle mass, as the Master found he did with Ms. Ciaffone and Ms. Bickerstaff (Report p 11). It is also highly unlikely that respondent would overtly eye a male attorney's body in the courtroom, as the Master found he did with Ms. Ciaffone and Ms. Bickerstaff (Report p 10).

It is clear that it was Ms. Bickerstaff's and Ms. Ciaffone's gender that caused respondent to disrespect them with offensively sexual language as he did. Thus, it is clear that he violated MCR 9.202(B)(1)(d).

Persistent Failure to Treat Persons Fairly and Courteously

The Master found in counts one, two, and three that respondent violated canons which require a judge to treat every person with courtesy and respect and to be dignified and courteous to lawyers. (Canons 2(B), 3(A)(14), and 3(A)(3)). However, the Master did not address whether respondent *persistently* failed to treat the lawyers fairly and courteously, in violation of MCR 9.202(B)(1)(c). The evidence demonstrated that respondent's failure to treat persons fairly was, in fact, persistent throughout this case.

There is apparently no case law defining the word "persistent" for the purpose of Rule 9.202(B)(1)(c). The Merriam-Webster Dictionary defines "persistent" as "existing for a long or longer than usual time or continuously." (https://www.merriam-webster.com/dictionary/persistent) The Master found that over about 26 hours, between 2:57 p.m. on June 11 and when he released the jury at the end of the day on June 12, respondent was repeatedly discourteous to Ms. Ciaffone and Ms. Bickerstaff, by making inappropriate sexually charged comments. His discourteous treatment of Ms. Bickerstaff on three occasions and of Ms. Ciaffone on two occasions over the course of about 26 hours persisted for a prolonged period of the *Matthews* trial, and therefore violated the court rule.

Moreover, respondent's treatment of Ms. Ciaffone and Ms. Bickerstaff was consistent with his behavior toward other women. In the early 2000s the SCAO and the JTC investigated allegations that respondent behaved poorly with court staff. He was reprimanded in a 2004 letter from the SCAO:

> You engaged in inappropriate personal conversation with a personnel staff person asking inappropriate questions and making inappropriate personal comments . . .

(DC Exh. 11) The Commission conducted its own investigation of the same inappropriate conduct that SCAO investigated. It admonished respondent in a letter dated April 5, 2005, which read as follows:

> Similarly, the Commission cautions you against engaging in conversations with court staff which are of a personal or intimate nature and which may be regarded as offensive or embarrassing.

Respondent's disrespectful treatment of others in the way he disrespected Ms. Ciaffone and Ms. Bickerstaff has "persisted" since at least the early 2000s.

The persistence of respondent's disrespectful treatment of women is corroborated by two other relatively recent incidents. As noted above, during another criminal trial in 2019, a male and a female assistant prosecutor were both seated at the prosecution table in his courtroom while he stood in front of them (Kurily, 12-7-20, pp 1056/3-25; 1057/1-5). The female wore a hijab. Despite her display of religious modesty, respondent asked her the color of her armpit hair (*Id*. at pp 1056/1-6; 1061/25-1062/6). He also shared with her and the male that he shaves his own armpit hair (*Id*. at p 1057/15-25). While these comments were not *explicitly* sexual, they involve personal and intimate information, and the question about the color of the woman's armpit hair clearly has a sexual connotation.

In addition, in 2018, in *People v Adrian White*, respondent unnecessarily injected sex into a case that involved a search of cell phone records, and that had nothing to do with either sex or bathroom stalls. He posed the following question to a female prosecutor during a discussion about the limits of the expectation of privacy:

THE COURT: Well, how about if I was having sex with another male in that stall and we're not talking? . . .

THE COURT: We're not, we're we're just having sex.

(DC Exh. 16, p 27/13-19)

There was absolutely no case-related need for respondent to pose a graphic sex-based hypothetical question to the female prosecutor.

The comments respondent made to other women, in the early 2000s and again in 2018 and 2019, show that his persistent discourtesy toward APAs Ciaffone and Bickerstaff was consistent with, and part and parcel of, his generally persistent failure to treat females courteously, in violation of MCR 9.202(B)(1)(c).

SANCTIONS

The *Brown* Factors

The Michigan Supreme Court set forth criteria for assessing proposed sanctions in *In re Brown*, 461 Mich 1291, 1292-1293 (1999):

(1) Misconduct that is part of a pattern or practice is more serious than isolated instances of misconduct.

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

(3) Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.

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

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

(6) Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.

(7) Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

(1) <u>Misconduct that is part of a pattern or practice is more serious than isolated instances of misconduct</u>.

Respondent has exhibited a pattern of saying sexually inappropriate things to women. As written about above, in 2004 SCAO reprimanded respondent for a variety of misconduct. With respect to his treatment of a female court employee, the SCAO letter stated:

> You engaged in inappropriate personal conversation with a personnel staff person asking inappropriate questions and making inappropriate personal comments . . .
>
> It is inappropriate to discuss matters of a personal nature with staff unless that individual is an acquaintance or friend (in the instance described above, the staff person was new to you). . .
>
> You need to discontinue this pattern of behavior <u>immediately</u>. Specifically, you should . . . refrain from initiating or participating in inappropriate conversations with staff regarding topics of a personal nature.

(DC Exh. 11)

The Commission conducted its own investigation and admonished respondent for the same conduct that SCAO investigated. With respect to respondent's treatment of women, the Commission's 2005 letter told respondent:

> The Commission is concerned about your practice of "hugging" persons at the court, whether court personnel, attorneys or others. Your perception that individuals have no objection or consent may not be accurate. Many persons may feel they are in no position to object even if they consider the contact to be objectionable. . . . **Similarly, the Commission cautions you against engaging in conversations with court staff which are of a personal or intimate nature and which may be regarded as offensive or embarrassing.** (emphasis added)

(DC Exh. 10). These letters show that respondent has long been on notice that he should be cautious in his interactions with females, including no longer having intimate personal conversations that may be offensive or embarrassing.

Respondent was well aware that his first conversation with Ms. Bickerstaff – which was the subject of count one – "may be offensive or embarrassing." He warned her that it might be exactly that, just before talking with her. He had an intimate conversation with her anyhow, despite the SCAO and Commission warnings that he not do so.

As written above, respondent also engaged in inappropriate sexual conversations in at least two other relatively recent situations: a) When he asked a female prosecutor the color of her armpit hair, and shared with her that he shaves his

own armpit hair; and b) when, in another case, he unnecessarily injected the concept of him having sex with another male in a bathroom stall.

The comments respondent made in the early 2000s and again in 2018 and 2019, to five women in total, show that his 2019 comments to Ms. Bickerstaff and Ms. Ciaffone were not isolated. Rather, they were part of a long-standing pattern. This factor weighs heavily in favor of a severe sanction.

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

Respondent committed the misconduct described in counts one and three in in his courtroom. He committed the misconduct described in count two in his chambers, during and in connection with a trial. The Supreme Court considers conduct that occurs in a judge's capacity as judge, but not literally "on the bench," to be "on the bench conduct." *In re Susan R. Chrzanowski*, 465 Mich 468, 490 (2001); *In re Barglind*, 482 Mich 1202 (2008); *In re Adams*, 494 Mich 162 (2013). This factor weighs in favor of a more severe sanction.

(3) Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.

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

Respondent's conduct was not prejudicial to the actual administration of justice. However, one aspect of it created an appearance of impropriety. Respondent told Ms. Bickerstaff, in open court, that he had something to say to her, then came off the bench and had an intimate conversation while sitting close to her at the prosecution table. Defense counsel was not present. (Bickerstaff, 11-23-20, p 390/3-5) He did this during a five-minute break in the proceedings, when there were members of the public present. As the Supreme Court noted while suspending respondent in 2014, a private meeting with one party during the proceedings, in a public place, creates the appearance of impropriety. *In re Morrow*, 496 Mich 291, 299 (2014).

(5) <u>Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.</u>

Respondent's conduct in all three counts was premeditated or deliberated, not merely spontaneous. The facts that the Master found with respect to count one include that respondent told Ms. Bickerstaff that what he had to say might make her blush (Report at p 3; Bickerstaff, 11-23-20, p 385/4-7; Kurily, 11-24-20, p 700/22-24; DC Exh. 2, ¶ 6; DC Exh.4, ¶ 9). His words clearly reveal that he had thought about what he was going to say and about the effect it would have on Ms. Bickerstaff. He followed through on his thoughts by sitting very close to her and having the intimate conversation he knew might make her blush.

The facts the Master found with respect to count two, which addressed the in-chambers discussion, also make clear that respondent's sexually charged comments were premeditated or deliberated. The statements and their contents were:

- When Ms. Ciaffone explained why the DNA evidence was relevant, respondent disagreed and said, "all that shows is that they fucked. Like that's all it shows, that they fucked" (Ciaffone, 11-13-20 at p 57/1-18; Bickerstaff, 11-23-20, p 400/2-8; *cf*. DC Exh. 2 ¶12b, 12c [respondent "probably did use that word"]).
- After asking Ms. Ciaffone what her definition of "non-traditional sex" was, respondent said that her view of the evidence was a product of her own bias and inexperience (Ciaffone, 11-13-20, p 59/20-25; Bickerstaff, 11-23-20, p 403/8-12; Noakes, 11-24-20, p 919/6-22).
- Respondent expressed his belief that the sexual encounter was done "doggy style" (Ciaffone, 11-13-20 at pp 60/1-6; Bickerstaff, 11-23-20, p 403/6-7; Noakes, 11-24-20, p 907/6-8).
- While discussing defendant Matthews's testimony that he did not want to have sex in the traditional way because he may hurt the baby with whom the murdered woman was pregnant, respondent laughed and stated words to the effect of "oh, so what –like he [is] saying that, like,

what he's working with . . . was so big that it would cause a miscarriage[?]" (Ciaffone, 11-13-20 at pp 62/24-25; 63/1-7).

- While criticizing Ms. Ciaffone's voir dire, respondent proposed the following sex-based voir dire questions to the attorneys: "if I want to have sex with someone on the first date, what do I ask them?" When no one responded, respondent said, "I would ask them, 'Have you ever had sex on a first date?" What's the next question I would ask them?" When no one answered, respondent said words to the effect of, "I'd ask, 'Would you have sex with me on a first date?" (Ciaffone, 11-13-20, pp 66/22-67/11; Bickerstaff, 11-23-20, pp 400/23-401/5; Noakes, 11-24-20, p 922/1-11; *cf.* DC Exh. 2, ¶ 15; DC Exh. 4, ¶35).

As Ms. Ciaffone testified, "it felt like every example that he gave always kept going back to sex or the way someone looked. It felt like they all kept—every example or teaching moment he maybe tried to have about anything always went back to a sexual explanation" (Ciaffone, 11-13-20, p 62/9-13).

Whether or not respondent's *first* sexual references in chambers were premeditated, at some point during those two hours, as he repeatedly spoke in sexually explicit ways in several different contexts, it became clear that his sexual references were quite deliberate. He controlled the conversation, and after each

sexual reference, he had every opportunity to reassess his use of further sexual references. He purposely chose to continue making them.

Respondent's words and conduct that are the basis for count three were also premeditated. After leaving his chambers, he could have taken the bench. Instead, he deliberately followed the women to the prosecution's table, to initiate a conversation that was *only* about the women's height, weight, and muscle mass (Report at p 10). The fact that he followed them to initiate just that conversation demonstrates his premeditation.

In fact, respondent effectively admitted that this discussion was premeditated, though he has fabricated an implausible reason for engaging in it. He wrote in his Answer to Complaint that the exchange was:

> . . . **part of a continuation of the in-chamber's discussion that was centered on bias.** APA [Bickerstaff] had earlier posed the question, "Don't you think I'm tough enough" to be able to receive and accept a frank critique, right after asking for that critique. The questions were to communicate that Judge Morrow had his doubts that she was emotionally, spiritually, or physically able to accept an honest and thoughtful critique based on the experience during their discussions.

(Answer to Complaint Paragraph 30)(emphasis added). Respondent's explanation makes little sense, especially since there is no logical nexus between Ms. Bickerstaff's ability to handle criticism and her height and weight. Whether or not his explanation is plausible, it does make clear that he planned his comments about the women's bodies. Between the time he left his chambers and entered the

courtroom, he had time to reconsider the sexual words and analogies he used in his chambers so that he could avoid saying inappropriate things to the women in the courtroom. By his own admission, instead of changing course, he continued the conversation he had begun in chambers.

Respondent continued to explore the women's height and weight even after Ms. Ciaffone reminded him that it is not polite to ask a woman what she weighs (Ciaffone, 11-13-20, pp 70/25-71/1; Bickerstaff, 11-24-20, p 407/14). Instead of heeding her advice, he next asked Ms. Bickerstaff about *her* height and weight, and still later, told her he had not yet assessed her muscle mass (Ciaffone, 11-13-20, pp 70/14-71/25; Bickerstaff, 11-23-20, pp 406/18-20, 407/4-20; DC Exh. 2 ¶¶17a, 17b, 17c; DC Exh. 4 ¶¶37, 38, 39). In light of Ms. Ciaffone's warning to respondent, that part of the conversation was especially deliberate, rather than spontaneous.

Pursuant to *Brown*, the fact that a substantial part of respondent's misconduct was deliberate weighs heavily in favor of a severe sanction.

(6) Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.

There is no evidence that respondent's conduct undermined the ability of the justice system to discover the truth. This factor is not an issue in this case.

(7) Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender or religion are more serious than breaches

of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

Respondent's misconduct toward Ms. Bickerstaff and Ms. Ciaffone was unequal treatment on the basis of gender. He used inappropriately graphic sexual language, sexual analogies, and sexual examples with them, while the evidence showed that he did not do so with male lawyers.

Pursuant to *Brown*, respondent's disparate treatment due to gender weighs in favor of a more severe sanction.

Other Considerations

Impact on the judiciary

Respondent's conduct has garnered a lot of negative publicity. A search of the internet reveals articles about his inappropriate comments to Ms. Ciaffone and Ms. Bickerstaff on the following news sources:

- ClickonDetroit.com
- The Detroit Free Press
- The Detroit News
- WXYZ.com
- Fox2Detroit.com
- Channel 7
- Abajournal.com

- Michiganradio.org
- You Tube
- You Tube – Judicial Tenure Commission hearing with 329-838 views of the five-day hearing.

He has put the judiciary as a whole in a negative light.

Impact on female lawyers

Ms. Bickerstaff testified that she felt "frozen" when respondent used his explicitly sexual analogies while seated with her at the prosecution table (Bickerstaff, 11-23-20 at p 388/1-16). She had two nightmares following this incident. His actions made her feel uncomfortable coming to work because of the possibility she may see him in the common areas of the courthouse. She sometimes ran into him on her way into the building, and due to his conduct in court she did her best to avoid having contact with him on these occasions; including once exiting an elevator she was on because he had entered it (*Id*. at pp 429/22-430/8, 430/18-431/7, 433/7-18). A judge should never make a woman feel that way.[3]

[3] Respondent's conduct had a negative effect on Ms. Ciaffone as well, though in a different way. Although she believed his actions to have been inappropriate, she was afraid to report them for the following reasons:

- She was worried about her case;
- She was worried no one would believe them;
- She was worried about what impact this would have on her career and on Ms. Bickerstaff's career;
- She was concerned that "these types of things can follow you your whole entire life, and that you can end up being associated with things like this forever." (Ciaffone, 11-13-20, pps 78, l/09-14)
- She was worried about what people of the courthouse would think of her;

Women lawyers who practice before respondent may have been under the mistaken impression that by 2019, sexual harassment and misconduct in the workplace are things of the past, after the highly publicized #MeToo movement, the highly publicized prosecution of male public figures for sexual assault, and the highly publicized civil litigation involving male defendants for sexual harassment. Respondent's conduct demonstrated that in his courtroom at least, sexual harassment is business as usual.

Uncharged act of misconduct

Respondent could have been, but was not, charged with engaging in an ex parte conversation with Ms. Bickerstaff when he used a sexual analogy to advise her how to examine witnesses while he spoke with her at the prosecution table. Defense counsel was not part of the conversation, and the conversation related to the case that was being tried. Members of the public who witnessed this could have legitimately believed that respondent was assisting Ms. Bickerstaff to prosecute the case. Respondent likely violated Canon 3(A)(4) by having this conversation, and he

- She was worried that she would become the subject of gossip;
- She was worried that defense attorneys would look at her differently;
- She was worried that officers on her cases wouldn't want to joke around with her because they would think she couldn't take a joke; and
- She was worried that no judges would invite her into their chambers to give her feedback.

(Ciaffone, 11-13-20, pps 78, l/33-25; p 79 l/1-6) Many of Ms. Ciaffone's reasons for not wanting to report respondent's sexually inappropriate conduct are similar to the reasons other female victims of sexual misconduct give for being reluctant to report their abuser.

created an appearance of impropriety by speaking privately with one party, in public, while the case was going on, in violation of Canon 2(A).

It is noteworthy that this was not isolated, but was part of respondent's lengthy history of engaging in ex parte actions. The Supreme Court suspended him in 2014 for, among other things, having an ex parte encounter with a defendant, in public, during a trial. The Court noted that a private meeting with a party in a public place, during the proceedings, creates the appearance of impropriety. The Court found that respondent failed to recognize the limits of his adjudicative role. *In re Morrow*, 496 Mich 291, 299 (2014). What respondent was suspended for in 2014 is practically identical to what he did here, except that here, he appeared to be partial to the prosecution instead of the defense.

In addition, in 2014 respondent left two voice messages for the officer in charge of a case pending before him, asking to speak with him about why two cell phones were still being retained for evidence. As a result, the prosecution filed a motion to recuse him from hearing the case, a circuit judge granted the motion, and the Court of Appeals affirmed, opining that he had created an appearance of impropriety that supported his disqualification under MCR 2.003(C)(1)(b)(ii) and Canon 2(A). *People v. Peete*, 331568, 2017 WL 4557254, at *2 (Mich. Ct. App. Oct. 12, 2017), judgment vacated in part, appeal denied in part, 934 N.W.2d 211 (Mich. 2019).

The Commission admonished respondent for his ex parte conduct in that case in December 2018. It was merely six months later that he had the ex parte conversation with Ms. Bickerstaff that is the subject of count one. Clearly, he did not learn from the Supreme Court's ruling against him in 2014 or from the Commission's admonition in 2018. The Commission should consider his demonstrated incorrigibility when determining the appropriate sanction here.

Prior disciplinary proceedings

As written above, this is not the first time respondent has been found responsible for misconduct. In 2014, the Supreme Court suspended him for 60 days for a range of judicial misbehavior over several cases:

- He closed his courtroom without complying with the governing court rule and impeded the proper administration of justice;
- He refused to comply with a mandatory statute regarding sentencing, even after it was brought to his attention;
- He disregarded a higher court order directing him to hold a hearing;
- He sua sponte recast a previous order, in which he had dismissed a case without prejudice, as a dismissal with prejudice, to justify his equally sua sponte dismissal of the case after it was reissued, despite the defendant's intention to plead guilty;
- As noted above, he subpoenaed a defendant's medical records without the parties' knowledge or consent at a point when the case could have gone to trial with him possibly as the trier of fact;
- He recklessly placed himself and others in his 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;

- He showed 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, which, at a minimum, created the appearance of impropriety.

In re Morrow, 496 Mich 291.

The fact that respondent has again violated the canons, just a few years after having been suspended by the Court for numerous acts of misconduct, argues in favor of a more severe sanction.

Proportionality

The Supreme Court has stated:

> This Court's overriding duty in the area of judicial discipline proceedings is to treat "equivalent cases in an equivalent manner and ... unequivalent cases in a proportionate manner."

In re Morrow, 496 Mich. at 302, quoting *In re Brown*, 461 Mich. at 1292; *In re Simpson*, 500 Mich 533, 559 (2017).

There have been only two prior 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 *In re Iddings*, 500 Mich 1026 (2017), the Court held Judge Iddings responsible for doing the following, despite objections from the victim:

Sending after-hour[s] text messages to Ms. [*****],[4] in which he discussed his marital problems and his personal feelings.

Making an offer to purchase expensive items for Ms. [*****] as Christmas gifts and inviting her to Rhianna/Eminem and other high-priced concerts.

Suggesting that Ms. [*****] accompany him to exotic locations for court-related conferences where they could share a hotel room.

Showing Ms. [*****] a sexually suggestive YouTube video of a high-priced lingerie website, Agent Provacateur.

Making comments which he admits Ms. [*****] could have reasonably interpreted as an invitation to have an affair with him.

In a letter of recommendation, while referring to Ms. [*****]'s professionalism and dependability, writing "besides, she is sexy as hell." Respondent deleted the language at the request of Ms. [*****].

Writing "Seduce [*****]" on the court computerized calendar and then directing Ms. [*****] to look at that particular date on the calendar. Respondent deleted the language at the request of Ms. [*****].

Telling Ms. [*****] that the outfits she wore to work were "too sexy."

Telling Ms. [*****] that she "owed him" for allowing her to leave work early to attend her son's after-school activities.

Reaching over her to edit documents which would have put him in physical contact with Ms. [*****].

Staring down the front of Ms. [*****]'s blouse.

While discussing his [t]riathlon training, sitting on Ms. [*****]'s desk and laying on it while she was sitting at her desk.

(500 Mich at p 1027)

[4] The name has been omitted to protect the victim's identity.

The Court wrote:

> Here, the respondent, as found by the Commission, engaged in a course of conduct constituting sexual harassment from 2012 to 2015. Although his misconduct occurred while off the bench, it was serious and related to his administrative duties as a judge. The respondent's misconduct created an offensive and hostile work environment that directly affected the job performance of his judicial secretary in her dealings with the public and the court's business and affected the administration of justice. His actions implicated the appearance of impropriety and had a negative impact on the actual administration of justice. Further, his conduct was deliberate.

(*Id*. at p 1030) The court imposed a public censure with a six-month suspension without pay. (*Id*. at p 1030)

Respondent's conduct did not last as long as Judge Iddings's did, but it was bad in its own right. The violations named in two of the three counts took place *in the courtroom*, and involved two different women. The victims were young female attorneys over whom respondent had significant power, including contempt powers and the power to dismiss their case. He used sexually charged words with Ms. Bickerstaff that included "teasing," "foreplay," climax," and "crescendo," and he explicitly used the word "sex" (Bickerstaff, 11-23-20, p 386/14-15; DC Exh. 2, ¶7d; DC Exh. 4, ¶14). He made an analogy to an orgasm.

In chambers, respondent commented on Ms. Ciaffone's inexperience with "non-traditional" sex and talked about her personal sexual biases (Report pp 8, 9; Ciaffone, 11-13-20, p 59/20-25; Bickerstaff, 11-23-20, p 403/8-12; Noakes, 11-24-

20, p 919/6-22). He created a sex-based voir dire question (Ciaffone, 11-13-20, pp 66/22-67/11; Bickerstaff, 11-23-20, pp 400/23-401/5; Noakes, 11-24-20, p 922/1-11; *cf*. DC Exh. 2, ¶ 15; DC Exh. 4, ¶35). He laughed at the size of defendant Matthews's penis and he described a sex act as "doggy style" (Ciaffone, 11-13-20 at pp 62/24-63/3; 60/1-6; Bickerstaff, 11-23-20, p 403/6-7; Noakes, 11-24-20, p 907/6-8). His comment on the evidence was that "it only shows they fucked!" (Ciaffone, 11-13-20 at p 57/1-18; Bickerstaff, 11-23-20, p 400/2-8; *cf*. DC Exh. 2 ¶12b, 12c [respondent "probably did use that word"]). He asked the women prosecutors about their height and weight, overtly eyed their bodies and announced his intention to assess Ms. Bickerstaff's muscle mass.

In *Iddings*, the victim reported Judge Iddings's behavior to the Equal Employment Opportunity (EEO). An EEO investigator determined that respondent's behavior "constituted, at a minimum, an offensive, and more probably a hostile working environment." (500 Mich at p 1028) Similarly, respondent created a hostile working environment for Ms. Bickerstaff and Ms. Ciaffone. Respondent's conduct potentially put the State of Michigan at risk for a civil lawsuit from the women, or at a minimum, a complaint with the Civil Rights Division for sexual harassment.

What really distinguishes respondent from Judge Iddings is what each did *after* becoming aware that he was the subject of an investigation. Judge Iddings self-

reported his misconduct to the Judicial Tenure Commission. In determining that a six-month suspension was adequate, the Supreme Court recognized that "Respondent is extremely remorseful over these matters, he has co-operated throughout the investigation, and he is desirous of resolving these grievances." (*Id*. at p 1029) Unlike Judge Iddings, respondent did not self-report his misconduct, and has not expressed an iota of remorse. Quite the opposite – he has argued that there was nothing wrong with what he said and/or did, and has never retracted that position.

The California Commission on Judicial Performance has recognized that "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248; *Ross*, 49 Cal.4th CJP Supp. at p. 139.) Respondent's complete failure to appreciate or admit the impropriety of his words and conduct, coupled with the facts that he had been confronted in the past for similar misconduct and that he had been educated on how to behave in the future, suggests that he lacks the capacity to reform. It is a reason he deserves a stronger sanction than Judge Iddings received.

In addition, Judge Iddings did not have a history of misconduct. Respondent, on the other hand, has already been suspended for 60 days, in 2014, for multiple acts of varied misconduct that were unrelated to each other. Before that, he had been confronted and educated by both the SCAO and the JTC about misconduct that is

similar to conduct the Master found he committed in this case. He had been admonished for still other misconduct. It is clear respondent is either incapable of conforming his behavior to the expectations of a judge, or is unwilling to do so. That, too, is a strong reason he deserves a more severe sanction than the six-month suspension imposed on Judge Iddings.

The other Michigan case that involved sexual harassment and no other misconduct was *In re Honorable Steven R. Servaas*, 484 Mich 63 (2009). On two different occasions, Judge Servaas drew sexually graphic pictures of breasts and of a penis and attached them to court files. He also commented to an employee, while they were at a retirement party, about the small chest size of another employee. The next day, he attempted to apologize to the employee about whose body he had commented. The Supreme Court rejected the Commission's recommendation of removal and instead censured Judge Servaas. In doing so, the Court noted that he had 37 years of unblemished service.

Respondent's conduct was much worse than what Judge Servaas did. His words and actions in face-to-face conversations with the female prosecutors were much more offensive, disrespectful, and discourteous than the pictures Judge Servaas drew and attached to the court files, which were not directed to any particular person. In addition, without anyone prompting him, Judge Servaas attempted to apologize to the female employee for his comment about her body. As

already noted, not only has respondent not apologized for his words and actions, he has doubled down by attempting to justify what he said and did. And while Judge Servaas had 37 years of unblemished service, respondent is at the other end of the misconduct spectrum. For these reasons, respondent should be sanctioned much more harshly than was Judge Servaas.

Although *Iddings* and *Servaas* are the only two Michigan cases that are on point, cases in other states support a strong sanction, including removal, for a judge's sexually offensive words when that judge has a prior disciplinary history involving similar conduct. In *In the Matter of the Hon. Paul H. Senzer v New York State Commission on Judicial Misconduct*, 35 N.Y. 3d 216 (New York 2000), the State Commission on Judicial Conduct removed Judge Senzer, a part-time judge, from the bench. In his private practice Judge Senzer repeatedly used vulgar language in emails to his clients, in which he repeatedly insulted other participants in the legal process. He used vulgar and sexist terms and used "an intensely degrading and vile gendered slur" to describe opposing counsel. *Id*. at p 220. The New York court held that "use of [the] gender-based slur was particularly concerning because such words denigrate a woman's worth and abilities and convey an appearance of gender bias." *Id*. at p 219. Also, Judge Senzer had a history of making sarcastic and disrespectful comments, for which he had been cautioned in the past. The New York Court of Appeals concluded:

> Such a pattern of conduct, engaged in over several months and combined with a prior caution by the Commission for making sarcastic and disrespectful comments to litigants during a court proceeding, constitutes an unacceptable and egregious pattern of injudicious behavior that warrants removal. *Id*. at p 220.

Although the comments for which respondent was charged did not take place over several months, they were at least as troubling as Judge Senzer's. Like Judge Senzer, respondent has already been admonished for similar misconduct, and has been suspended for other, unrelated, misconduct. *Senzer* suggests that respondent should be removed.

In *In the Matter of Robert A. Rand*, 332 P.3d 115 (Colorado 2014), the Colorado Supreme Court imposed a public censure, along with the judge's agreement to resign. In that case, Judge Rand made inappropriate jokes and comments and engaged in an ex parte conversations. He stipulated that he had:

> (1) joked about the physical weight of the court collection officer;
>
> (2) joked with a female juror about dancing during a break in the trial;
>
> (3) joked in private to his court clerk about the large breasts of a woman appearing before him in court;
>
> (4) commented on the physical appearance of an attorney who appeared regularly in his courtroom;
>
> (5) made comments from the bench about two attorneys appearing before him wearing "pearl necklaces," which one of the attorneys felt had a sexual connotation;

(6) invited a female public defender appearing in his courtroom to share pictures of her vacation with him and his staff in chambers;

(7) during an interview, told a female applicant for clerk about the time when a defendant in the courtroom speculated about the type of panties the clerk was wearing, and asked the applicant how she would handle that type of situation.

The parties also stipulated that, like respondent has suggested in this case, Judge Rand believed he was attempting to create a friendly atmosphere in his courtroom (*cf*. Fishman, 11-24-20, pp 793/25, 794/1-3, 15-16). They also stipulated, as is demonstrably true in this case as well, that if this was Judge Rand's goal, his attempt was misinterpreted by some (332 P.3d at p 115). Judge Rand also stipulated that he had committed some other acts of misconduct that were less serious than his inappropriate statements listed above.[5] It is clear he resigned due to his inappropriate comments of a sexual nature, rather than for those less serious acts.

Respondent's comments to the female prosecutors in this case are at least as inappropriate as the comments that resulted in removal of Judge Rand in Colorado and Judge Selzer in New York. Unlike both of those judges, respondent has not accepted responsibility. His removal would be comparable to their resignations.

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[5] Judge Rand also stipulated to having ex parte communications on two cases. In one, in separate telephone calls to each party, he informed the parties he was rejecting a negotiated plea deal. In the other, he was presiding over a case in which the defendants were his former paralegal's brother and sister-in-law, and had ex parte communications about the case with his former paralegal. He disclosed his relationship to his formal paralegal to the parties and invited them to move to recuse him. They did not do so, but he admitted he should have recused himself.

Judge Rand also stipulated that he failed to promote confidence in the judiciary by telling a 21 year old to fake drinking alcohol to avoid peer pressure. Finally, he stipulated that he had conversed with members of the audience in his courtroom after his docket had been completed, and that conversation included giving people pep talks.

In the course of removing a judge from the bench for inappropriate comments, among other things, the California Commission on Judicial Performance observed that "after 10 years on the bench, it can be expected that a judge's words and conduct will have conformed to the demands of the canons." State of California, Before the Commission on Judicial Performance; Decision and Order Removing Judge John T. Laettner from Office, p. 73, Case no. 203, November 6, 2019, https://cjp.ca.gov/pub_discipline_and_decisions Respondent has been on the bench for more than 25 years, and therefore should be expected to adhere even more closely to the canons. He has clearly not learned to do that.

RECOMMENDATION

Respondent has demonstrated, in various ways and over the course of several years, that he is unfit to serve as a judge. Disciplinary counsel recommend that he either be removed or be suspended for a substantial period.

CONCLUSION

For the reasons stated in this brief, disciplinary counsel ask that the Commission adopt the Master's report that respondent committed misconduct as charged in counts one through three of the amended complaint. Disciplinary counsel urge the Commission to address two charges the Master did not address, and to find that respondent violated MCR 9.202(B)(1)(c) and 9.202(B)(1)(d). Based on respondent's actions as proved in this case and the entirety of his disciplinary history, disciplinary counsel ask that the Commission either recommend that the Supreme Court remove respondent from office or recommend a substantial suspension without pay.

Respectfully submitted,

/s/ Lynn Helland
Lynn Helland, P32192
Disciplinary Counsel

/s/ Lora Weingarden
Lora Weingarden, P 37970
Disciplinary Co-Counsel

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