STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

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

Formal Complaint No. 100

Master: Hon. William J. Caprathe

DISCIPLINARY COUNSEL'S OBJECTIONS TO MASTER'S REPORT

Pursuant to MCR 9.240, Lynn Helland, disciplinary counsel, and Margaret N.S. Rynier and Glenn J. Page, disciplinary co-counsel (collectively, disciplinary counsel), object to portions of the master's report, as detailed below.

INTRODUCTION AND SUMMARY

On February 6, 2019, the Judicial Tenure Commission filed Formal Complaint (FC) 100. It charged Hon. Byron J. Konschuh (respondent) with eight counts of misconduct based on multiple violations of criminal statutes, Michigan Court Rules (MCR), Michigan Rules of Professional Conduct (MRPC), and canons of the Michigan Code of Judicial Conduct (Canons). The complaint alleged that respondent committed these violations before and during his tenure as the Lapeer County Prosecuting Attorney and after he became a Lapeer County Circuit Court judge. The complaint also charged respondent with one count of misconduct for providing false information to the Michigan State Police (MSP) during their criminal investigation into his financial wrongdoings as the Prosecuting Attorney and to the Commission during its investigation.

On March 18, 2019, the Supreme Court appointed Hon. William J. Caprathe as the master. That same day, the Commission filed an Amended Formal Complaint (complaint) that added acts of misconduct to Counts VII and VIII of the original complaint.[1] On April 2, 2019, respondent

[1] Count VII of the original complaint alleged that respondent committed misconduct by failing to disclose his relationship with Michael Sharkey, the defense counsel in his criminal case, in matters in which Sharkey was the attorney of record, and/or to disqualify himself from those cases. The amendment added allegations that respondent committed misconduct by failing to disclose his relationships with attorney David Richardson and

filed his answer to the complaint together with his affirmative defenses. A public hearing commenced on June 28 and concluded on September 23, 2019. More than 35 witnesses testified and more than 350 exhibits were admitted.

On December 30, 2019, the master issued a report containing his findings of fact and conclusions of law. He determined that the evidence was sufficient to establish that respondent committed the misconduct alleged in Count VII. However, he found the evidence insufficient to establish the allegations in Counts I – VI and VIII. Disciplinary counsel agree with the master's finding that respondent committed misconduct as charged in Count VII, by failing to disqualify himself from, or disclose his relationships in, cases in which he had a serious conflict of interest.

Disciplinary counsel strongly disagree with the master's findings and conclusions regarding Counts I – VI and VIII. As to those counts, the master's report accepted many of respondent's arguments *in toto* with no analysis, and no references to the far greater evidence that contradicted respondent's claims and the report's findings. It misleadingly quoted important parts of the transcript it did cite, and made basic factual errors. It did not even address some of the most significant allegations in the complaint.

For the reasons stated below, disciplinary counsel urge the Commission to reject the master's findings of fact and conclusions of law with regard to Counts I through VI and VIII, and to find instead that the misconduct alleged in each of those counts has been established.

ARGUMENT

The report's handling of one important issue concerning the embezzlement charged in Counts III – IV so perfectly illustrates the report's overall weakness that we address it here, though

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then-Prosecutor Timothy Turkelson in matters in which they were the attorneys of record, and/or to disqualify himself from those matters. Count VIII of the original complaint alleged misrepresentations. The amended complaint expanded that count to allege additional misrepresentations.

it is out of sequence. Those counts allege that respondent took several types of funds that belonged to Lapeer County. One part of the evidence that those funds belonged to the county was a policy that money that came to a county office belonged to the county (E's Exh 5k).[2] One part of the evidence that the county had such a policy came from the testimony of Doreen Clark, long-time assistant to the county controller. Without addressing the fact that respondent's depositing the money in his own bank accounts was embezzlement whether or not the county had such a policy, the master instead focused on Ms. Clark's testimony that there was such a policy, then dismissed it (and concluded there was no policy) on the basis that her testimony was "equivocal" (MR p 6).

Ms. Clark's testimony was not equivocal (pp 1911-28). In concluding that it was, the master quoted Ms. Clark as testifying "I cannot, I guess, confirm or deny that…." and implied that this was the heart of her testimony about the existence of the policy. The master omitted the crucial remainder of the quoted sentence, which made clear that in fact, Ms. Clark was not being questioned about the *existence* of the policy at all, but only about whether the policy was on the county's shared computer drive in 2007, 2008, and 2009 (p 1916).[3] The master also did not mention Ms. Clark's actual and *un*equivocal testimony about the existence of the policy, which was that it was adopted by the county well before the events relevant to this case (pp 1914-15, 1928).[4]

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[2] Examiner's exhibits are cited as (E's Exh.); respondent's exhibits are (R's Exh.); testimony is cited to the transcript as (p); a page in the master's report is (MR p).

[3] In fact, the report did not even provide a transcript reference to the quote.

[4] Ms. Clark clarified the two issues as follows:

Question:	Is it your best belief that this grants, contracts, and agreements was in force in 2007 –
Answer:	Yes.
Question:	-'9, and '09?
Answer:	Yes. Because it was adopted by the board in 1996. Whether or not it was on the shared drive didn't mean that it wasn't in effect.

(pp 1927-28).

As is discussed further below, respondent embezzled as charged in Counts III-IV whether or not the county had a policy prohibiting embezzlement. We cite this incident here because the way the master's report ignored important parts of Ms. Clark's testimony is a theme repeated throughout, and as a result, the master fails to reckon with the misconduct the evidence established.

COUNT I
2016 CRIMINAL MISDEMEANOR PLEA & FALSE STATEMENTS

Count I charged that respondent pled no contest to a crime in 2016, and that he later made false statements about whether he had done so. The master's report did not address the charge that respondent pled no contest to a crime, nor did it address the consequences of the misconduct established by that plea. It also did not address whether the statements alleged in Count I were false. Rather, with respect to Count I the report merely found that the preponderance of evidence did not establish that respondent deliberately made any false statements (MR pp 4-5). These findings are both incomplete and against the great weight of the evidence.

Plea to Crime

The evidence clearly proved that respondent pled no contest to a crime. After he left his position to become a judge in April 2013, his successor, Tim Turkelson, discovered that for several years prior, he had been taking checks that had been issued to the Prosecutor's Office. A MSP investigation confirmed that he had deposited, into his personal accounts and accounts he held with his wife and son, $1802 that had been paid to his office. The $1802 consisted of 1) $1022 in referral fees from Bounce Back, a collection company with which he contracted to handle select bad check cases on behalf of his office (pp 81-83, 223-30; E's Exhs. 9-74); and 2) $780 in payments by the Law Enforcement Officers Regional Training Commission (LEORTC) for training sessions conducted by one of his assistant prosecuting attorneys, on county time (pp 82-83; E's Exh. 92k). The payments were made through 44 checks (E's Exhs. 9-74, 92k).

Based on the MSP investigation, in July of 2014 Special Prosecutor Deana Finnegan issued a criminal complaint charging respondent with five felony counts of embezzlement by a public official (p 81; E's Exhs. 1a, 1b). The preliminary examination commenced on September 24, 2014, before Hon. Terrance Dignan (R's Ans. ¶12). Judge Dignan bound respondent over for trial as charged to Lapeer County Circuit Court, where the case was assigned to then Genesee Circuit Court Judge Geoffrey L. Neithercut (R's Ans. ¶13; E's Exh. 1c).[5] On March 8, 2016, respondent pled no contest to a misdemeanor under MCL 750.485. Judge Neithercut accepted his plea, found him guilty, and referred him for a presentence investigation and report (E's Exh. 1cc pp 17-18). The master's report did not address this misconduct.

False Statements About Misdemeanor Plea

The evidence is also clear that respondent knowingly and deliberately made multiple false statements about his plea. First, during a November 15, 2017, deposition that was taken in connection with a lawsuit he had filed against Lapeer County, he falsely testified that he had *not* pled to a misdemeanor (p 718).[6] Three months later he repeated this false claim in a Motion Nunc Pro Tunc his attorneys filed in his criminal case (pp 135-137; E's Exh. 1t). He repeated his false denials in his answers to the Commission's inquiries during the investigation into this matter and his answer to the complaint (pp 3332, 3335-36; R's Ans. #22).

The master's report did not address whether respondent's several statements about his plea were false. Rather, it focused only on whether the statement in his Motion Nunc Pro Tunc was a *deliberately* false statement *by him*. The report determined that it was not, and on that basis exonerated respondent for any false statements about his plea (MR p 5). In reaching this result the

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5 The case was assigned Lapeer case number 14-012016-FY and Genesee case number 14-36353.

6 *Konschuh v Lapeer County, et al*, Oakland County Circuit Court case nos. 2017-SC0045-SC and 20170046-SC.

report misstated the sequence of events, relied on implausible evidence and inferences, and ignored substantial evidence that was directly contrary to its conclusion.

The pillar of the master's conclusion that respondent's denial of his plea in his motion was not deliberately false was his finding that that respondent was "surprised" when he pled to a crime, a finding the master buttressed with the finding that a certain stipulation respondent entered into shortly before his plea did not mention the crime to which he pled (MR p 5).[7] In fact, neither the pillar nor its buttress support the master's conclusion that respondent did not lie.

Some history is necessary. From the outset of the criminal case, respondent claimed that the funds in question were not "public money," and thus could not support the felony charges against him.[8] Although this "public money" claim was irrelevant to those charges, his adherence to it made it impossible for him to provide a factual basis for a misdemeanor resolution under MCL 750.485, a statute that requires county officials to account for all funds they receive in their official capacity. Respondent's position negated an element of that crime.[9]

On March 8, 2016, after litigating the "public money" issue for two years, the parties took the highly unusual step of mediating the criminal case (pp 3215-16; E's Exh. 1cc). During the mediation the parties agreed to resolve the case by respondent's plea to the "failure to account" misdemeanor under MCL 750.485 (E's Exh. 1ee pp 7-11). At the end of the mediation they signed a "stipulation and agreement," the purpose of which was to overcome the "public money"

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7 "Surprise" is essential to the report's finding that respondent's denials of his plea were not lies. To find the denials were merely an innocent misstatement, the master must have believed respondent was unaware of the crime to which he pled. The master's discussion of "surprise" clearly aims to rationalize how respondent could have been unaware of so basic a fact.

8 Respondent still maintains that same position. It is discussed in greater detail at pp 36, below, as are the rejections of that position by the judges who have considered it.

9 An element of MCL 750.485 is that respondent was required to account for all funds he had received. This was not something that was established at the preliminary exam, because it was not an element of the embezzlement charges he originally faced. As a result, the transcript of the preliminary exam would not have sufficed to establish a factual basis to the crime to which respondent pled. It was to overcome that obstacle that the parties reached the "stipulation & agreement" that is discussed next in the text.

argument (E's Exhs. 1i, 1ee p 8).[10] It provided that under MCL 21.44 the funds respondent took "could be interpreted as public monies requiring financial reporting" (E's Exhs. 1 cc p 16, 1ee pp 7-11), and thereby enabled the agreement that respondent's failure to account for the money provided a factual basis for his plea to a crime under MCL 750.485 (E's Exh. 1ee pp 8, 16).

As noted above, the master found that the plea that followed was a surprise to respondent. He rested that belief, in significant part, on the fact that the stipulation "did not mention or involve Respondent entering a no contest plea to the Criminal statue, MCL 750.485" (MR p 4). The master is correct that the stipulation did not mention the crime to which respondent pled, but misses the point. The stipulation was not focused on the charge to which respondent would plead, but only on the obstacle to the factual basis for the plea. Because the stipulation only focused on resolving the impediment to a plea, it was naturally silent about the charge to which respondent would plead. There was actually a different document – a *plea* agreement, discussed below but not mentioned by the master – which was the vehicle for agreeing to the criminal charge (E's Exh. 1f).

The fact that the master drew the wrong inference from the stipulation's silence is confirmed by assuming *arguendo* that he is correct. Under his (and respondent's) interpretation, the parties merely agreed that respondent would "plead no contest" to an "interpretation" of a civil accounting statute (E's Exh. 1i p 2).[11] That makes no sense. A person cannot enter a "no contest" plea to something that is not a crime – i. e. a civil statute – much less plead to "an interpretation

[10] Respondent filed his Motion Nunc Pro Tunc in February 2018. Ms. Finnegan explained the context that resulted in the stipulation and agreement at a hearing on the motion, on March 5, 2018.

[11] As noted, the premise for respondent's Motion Nunc Pro Tunc was his claim that he did not plead to a crime. Mr. Pabst supported that claim at the hearing on the motion by asserting that all along, respondent "never, ever, would've agreed to a crime. Never" (E's Exh. 1ee p 5). Both Judge Neithercut and Ms. Finnegan offered respondent the chance to return to his pre-plea position if he had not understood his plea. Respondent did not take that opportunity, in some tension with Mr. Pabst's quite adamant assertion (E's Exh. 1ee pp 6, 10).

of" something that is not a crime.[12] The experienced lawyers and prosecutors who agreed to the stipulation knew this full well, notwithstanding that some have later tried to claim the opposite.

That the master misconstrued the events surrounding the plea is further demonstrated by the direct and circumstantial evidence discussed below. While reviewing the evidence, it is useful to keep in mind the basis for the master's conclusion that respondent was unaware of his own plea – that he was "surprised" to be pleading to a crime (MR p 5). Thus, the report states that "the parties never discussed adding [the misdemeanor] before the post-facilitation hearing on *March 31*, 2016;" that "on *March 31*," "the prosecutor surprised respondent….with a new amended complaint;" and that respondent "felt caught off guard and pressured into an outcome inconsistent with the mediated agreement" (MR p 5) (emphases added).[13] To reach this conclusion, the master apparently accepted respondent's and Mr. Sharkey's testimony to that effect (pp 2367-68, 3218), plus the testimony of Mr. Pabst that Ms. Finnegan "pulled a fast one" by going outside of the "stipulation and agreement" (pp 2857-58; E's Exh. 1e). The master's conclusion rests on a fundamental misunderstanding about some events and his complete omission of many others.

As an initial matter, the dates the master recited are important. Ultimately, he reaches the highly improbable conclusion that a former prosecutor and then-judge was unaware of his plea to a crime, both at the time of the plea and for months afterward. The mediation, during which agreement was reached, was on March 8. The master places the plea hearing three weeks later, on March 31. *If* (as the master wrote) the parties never agreed to a plea to a crime before March 31 and there was no charging document containing the crime until March 31 – three weeks after the

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[12] Ms. Finnegan made essentially this same point during the hearing on the Motion Nunc Pro Tunc (E's Exh 1 ee pp 7, 13) ("Nobody can plead no contest to dicta"; "I was never going to let [respondent] plead to dicta.") Neither respondent nor his attorneys offered any rebuttal to her observations.

[13] It is noteworthy that the billing statement for Mr. Sharkey's representation of respondent indicate that they had discussed a misdemeanor at least two months *before* the mediation (E's Exh 2e entry dated 1-20-16).

mediation at which the agreement was reached – then perhaps it is more plausible that respondent's and his attorneys' memories had fogged a little, and maybe by March 31 they did not remember that respondent had refused to plead to any crime, so did not notice when the prosecutor snuck a criminal charge into the plea proceedings; that is, the otherwise *un*believable idea – that respondent did not know what he pled to – becomes a bit less ridiculous.

The master's premises are wrong. There was no delay between agreement and plea. The parties reached agreement on a "misdemeanor deal" at the facilitation on March 8 (Exh. 1cc p 7). Ms. Finnegan immediately drove to her office to draft an amended complaint to add the agreed charge, just as the parties anticipated she would (E's Exh. 1ee pp 7). She then met respondent and his attorneys at Judge Neithercut's courtroom (E's Exh. 1cc p 3). She provided the new charge to respondent and his attorneys for their review before they went on the record (*Id*). Neither respondent nor his attorneys raised any objection (E's Exh. 1cc). While these events make perfect sense if the parties had just hammered out an agreement that respondent would plead to the crime, they make no sense if the criminal charge was a surprise or contrary to their intent. Their silence when presented with the amended complaint demonstrates that it was exactly as they had agreed during the mediation.

That respondent and his attorneys fully expected the criminal charge is further corroborated by what they did next. After they reviewed the charge, and before the criminal case was called, respondent filled out several documents that Judge Neithercut utilized during the plea hearing (pp 91-101; E's Exhs. 1f, 1g, 1h). Respondent, Mr. Sharkey, and Mr. Pabst all admitted that they signed those documents in court; the signatures are all dated March 8, the day of the plea (pp 91-101, 2479-80, 2757, 2797, 2891). These documents unequivocally establish respondent's and his attorneys' understanding that his plea was to a crime under MCL 750.485, and not to a non-

criminal accounting offense under MCL 21.44. In fact, these documents do not even mention MCL 21.44, except indirectly at one point by reference to an "Exhibit 1" (E's Exh. 1i), which was the stipulation discussed above and which does mention the civil statute.

One of the documents respondent, Mr. Sharkey, and Mr. Pabst signed is Judge Neithercut's advice of rights (E's Exh. 1h). Respondent admitted that he filled out and initialed all information the form called for; including, critically, that he was pleading "no contest" to "Fail to Account, contr. to 750.485"; that the offense carried a maximum of 90 days in jail and a maximum fine of $500 (penalties that are completely inapplicable to MCL 21.44); and that he understood that a no contest plea "constitutes a conviction" (pp 98-101) (a phrase that has no meaning under MCL 21.44). In fact, at the top of the plea form, *in his own handwriting*, respondent twice wrote that he was pleading "no contest" to "Failure to Account contrary to 750.485."(pp 99-101).

An even more revealing document that respondent, Mr. Sharkey, and Mr. Pabst signed before the plea was the "plea agreement/sentence agreement" (E's Exh. 1f). By signing it, respondent expressly agreed to plead "no contest to Count 6 - Public Officer – Failure to Account for Public Money" under MCL 750.485 (E's Exh. 1f-section 1). *This* is the primary document the master should have consulted (but apparently overlooked) to determine whether respondent agreed to plead to a crime. Like the other documents respondent signed, the plea agreement says nothing about MCL 21.44, the accounting statute to which he would later falsely claim he had actually pled. Further, what the plea agreement does say is nonsensical if respondent were somehow entering a plea to a civil statute.

Further demonstrating that there was no surprise, at the outset of the plea hearing Ms. Finnegan made an on-the-record announcement advising Judge Neithercut that respondent would plead no contest to MCL 750.485 (E's Exh. 1cc pp 3-5). She explicitly stated that *at Mr. Sharkey's*

request, for a factual basis Judge Neithercut should "refer to our [Stipulation & Agreement] and then to the preliminary examination transcript" (E's Exh. 1cc p 3). In other words, Mr. Sharkey requested that the agreement and preliminary examination transcript together provide the factual basis for the plea. Neither respondent nor his attorneys voiced any disagreement with, objection to, or bewilderment at her announcements (E's Exhs. 1cc, 1(l) (video of proceedings)). To the contrary, when given an opportunity to respond, Mr. Pabst confirmed Ms. Finnegan's statement about the crime to which respondent would plead, though he corrected a far less important detail: "I think she stated everything correctly except there is no provision for restitution in here" (E's Exh. 1cc p 5).

During the plea process, Judge Neithercut questioned respondent and his attorneys about the plea documents and made them a part of the record (E's Exh. 1cc p 7 et seq.). While going over the plea forms, Judge Neithercut read the *criminal* penalties to respondent and his lawyers. (E's Exh. 1cc p 9). After Judge Neithercut went over the plea forms (all of which are based on a plea to a crime), and showed respondent his signatures on the forms, respondent acknowledged that he understood what he was "getting [himself] into" (E's Exhs. 1cc pp 11-12; 1h). When Judge Neithercut asked respondent how he would plead to the charge of "being a public officer who failed to account for county money" – i.e., the exact language of the criminal charge but *not* the language of the civil statute – respondent replied "No contest, Your Honor" (E's Exh. 1cc p 16). Judge Neithercut then briefly restated the factual basis with facts relevant to the crime, but not relevant to the "public money" statute. Ms. Finnegan added that those facts, "*in conjunction with* the Stipulation agreement," made out an adequate factual basis (E'x Exh. 1cc p 16) (emphasis added). Again, Judge Neithercut's and her statements made clear that the stipulation was part of the factual basis for the plea to a crime. At no point during this lengthy process did respondent or

his attorneys express surprise or reluctance of any kind. To the contrary, Mr. Pabst explicitly agreed. (E's Exh. 1cc p 16).

Then, after accepting respondent's plea, Judge Neithercut wrestled with whether to have a presentence report prepared. He said to Mr. Sharkey: "This is a misdemeanor. Does Lapeer County do presentence reports on misdemeanors, Mr. Sharkey?" (E's Exh. 1cc pp 17-18). Tellingly, Mr. Sharkey did not ask Judge Neithercut why he was talking about a misdemeanor or a presentence report. Rather, he simply responded to the question.

After briefly reviewing the events summarized above at the hearing on the Motion Nunc Pro Tunc, Judge Neithercut found it "clear" that the parties had intended that respondent would enter a plea to a crime (E's Exh. 1 ee p 17).

In his answer to the complaint respondent admitted he "…stipulated to the addition of Count 6 to the amended information…" (R's Ans. ¶¶16, 17). He admitted before the master that before the plea hearing started, he was aware of the misdemeanor count in the amended complaint, and neither objected nor questioned it (pp 3217-21). It is hard to square these answers with his and his attorneys' later claims that he was surprised by the criminal charge and did not plead to it.

At the time of his plea, respondent had been practicing criminal law for more than a quarter of a century, nearly all that time as a prosecutor. For nearly two years prior to the plea, Ms. Finnegan had been insisting on a plea to a felony while respondent had been insisting on no plea to any criminal offense (E's Exh. 1ee p 5). It is not believable that a judge and long-time former prosecutor such as respondent, and his two experienced lawyers, who had dug in their heels against any plea to any crime, all failed to notice that Ms. Finnegan was pulling a "fast one" on the record in open court, and was doing so immediately after they had reached what they now claim was a completely different agreement that involved no plea to any crime at all. The only plausible version

of these events is that Ms. Finnegan added the misdemeanor charge exactly as agreed by the parties just moments before she did so.

Respondent's awareness that his plea was to a crime was still further established by Wendi Jackson, the Genesee County probation officer who interviewed him for a Presentence Investigation report shortly after the plea (pp 117-132; Exhs. 1n, 1o). It is uncontroverted that Ms. Jackson advised respondent that her interview was in connection with his plea to a 90-day criminal misdemeanor – MCL 750.485 – Public Officer Failure To Account For Public Money (pp 824-25). It is also uncontroverted that respondent, who was accompanied by Mr. Sharkey (p 2486), did not express any objection to the interview or express any surprise that the plea was to a criminal offense rather than to a "possible interpretation of" a civil statute (pp 132, 824).

Even three weeks after the plea, at the sentencing hearing before Judge Neithercut, neither Mr. Sharkey nor respondent so much as hinted that Ms. Finnegan had pulled a fast one or that they had been surprised that the plea was to a crime. To the contrary, after confirming that he and his client had had an opportunity to review Ms. Jackson's report (E's Exh. 1p p 3), which clearly designated MCL 750.485 as the statute underlying respondent's plea in three separate places but made no mention of the civil statute (p 824; E's Exh. 1o), Mr. Sharkey advised the court that neither he nor his client had any "corrections or additions or any other requests" with respect to it (E's Exh. 1p p 3).

There is even clearer evidence that a plea to a crime is exactly what respondent had anticipated. Just eight days after his plea, and two weeks before his sentence, his current counsel, Mr. Campbell, sent a letter to the Attorney Discipline Board, with copies to the Attorney Grievance Commission and the three people who now claim they thought the plea was not to a crime: respondent, Mr. Sharkey, and Mr. Pabst (E's Exh. 1ff). The letter, required by MCR 9.120 *only*

when an attorney is convicted of a crime, stated that respondent was "convicted of the misdemeanor offense of Failure to Account for County Money contrary to MCL 750.485" (E's Exh. 1ff). The letter makes no mention of MCL 21.44. Had respondent believed he only pled to a possible interpretation of a civil statute, he would have been under no obligation to report anything to the Discipline Board or the Grievance Commission. Surely he or one of his attorneys would have caught Mr. Campbell's mistake, if they thought it was a mistake.

Consistent with the agreement between Ms. Finnegan and respondent, in July of 2016 she filed, and Judge Neithercut signed, a motion & order dismissing with prejudice "Count 6, Public Officer – Failure to account for county money, MCL 750.485" (E's Exh. 1k). Like the plea agreement from months earlier, the motion & order does not make any reference to MCL 21.44, the accounting statute to which respondent would later claim he thought he had actually pled guilty.

The evidence summarized in the last several pages demonstrates that the master was wrong to conclude that respondent "surprised" by his plea or unaware that he had pled to a crime. The question remains whether respondent is responsible for the false statements about that plea that are charged in Count I. It is now helpful to look at the context of those statements.

In May 2017 respondent filed an unseemly lawsuit against Lapeer County and the witnesses summoned to testify at his 2014 preliminary exam (E's Exh. 142).[14] In April of 2018, he amended his civil complaint to add a malicious prosecution claim, alleging that the witnesses had conspired against him.[15] Although respondent did not add this claim until 2018, Mr. Sharkey's

[14] The lawsuit was also against John Miller, the husband of witness Dana Miller, for harms he allegedly inflicted after the preliminary exam. With respect to those who testified unfavorably to him, respondent alleged that collectively, they provided false information about the checks he took, knowing that information would cause him to be charged with felonies, for the purpose of coercing him to enter a plea agreement to give up his judgeship (Exh. 142 p 15). Part of respondent's theory was that Mr. Turkelson expected to be appointed to the bench to replace him (pp 3369-70), which seems to implicate the governor in the conspiracy as well.

[15] The master's report seems to state that the malicious prosecution claim was part of the original lawsuit in May 2017 (MR p 4). It was not.

billing records show that he and respondent discussed such a lawsuit as early as March 4, 2016 – only four days before he pled to a crime (E's Exh. 2e, entry dated March 4 2016).

It is basic to a claim of malicious prosecution that to prevail, the plaintiff is required to prove that the underlying criminal proceedings were terminated in his favor (pp 2859-2860). Since respondent's underlying criminal proceedings were resolved through a plea to a crime, the criminal case was *not* resolved in his favor, so a malicious prosecution lawsuit would be dismissed. *Matthews v Blue Cross and Blue Shield of Michigan*, 456 Mich 365, 378 (1998).

Respondent was deposed in his civil case six months after he filed it, in November 2017. His deposition testimony began his attempt to rewrite the history that would otherwise destroy his eventual malicious prosecution claim. He denied that he had pled no contest to any crime, not even a misdemeanor, during the deposition (pp 717-18). This was obviously false, as thoroughly demonstrated above. But this is the context in which he filed his Motion Nunc Pro Tunc in the criminal case in February 2018. The motion denied that he had pled to a crime, just as he had maintained at his November deposition. The motion sought to have Judge Neithercut establish this falsehood as a matter of fact. Judge Neithercut declined the invitation (E's Exhs. 1ee, 1(l)).

The master did not address whether respondent's denials of his plea in his deposition and motion were false.[16] In fact, he ignored the deposition statement entirely, and focused only on the motion. With respect to that, he determined that respondent was unaware of it, and that it was not deliberately false in any event (MR p 5). These conclusions are refuted by the evidence.

The master stated that a false statement is only misconduct if respondent had a "wrongful intent," a principle for which the master relied on *In re Gorcyca,* 500 Mich 588 (2017). The master did not cite this next part of *Gorcyca*, but the case also recognized that with respect to a false

[16] For the reasons described at length above, those denials were clearly false.

statement, an intent to mislead or deceive is wrongful. (*Id*. at p 639) Although the master was correct about what it takes for a false statement to be misconduct, he failed to appreciate that *Gorcyca* actually hurts respondent's position rather than helping it.

Judge Gorcyca was accused of twice making one narrow misrepresentation regarding what she meant by a certain gesture during court proceedings. In her statements to the Commission and during a formal hearing, she maintained that she did not recall making the gesture (which was captured on video). She did not dispute making it, and offered a guess about what she "possibly" could have intended by it. There was no evidence that contradicted Judge Gorcyca's statement, other than what could be inferred from the usual meaning of the gesture and the context in which it was made. While reiterating that deliberate misstatements *are* misconduct, the Supreme Court held that this evidence was insufficient to show that Judge Gorcyca said anything deliberately false when she said she did not remember, and when she "guessed" at what the gesture meant.

This case bears no meaningful resemblance to *Gorcyca*. Respondent did not "guess." In his deposition, in the Motion Nunc Pro Tunc, and in his Answers to the Amended Formal Complaint, he categorically stated he did not plead to a crime. His Motion Nunc Pro Tunc stated: "Byron J. Konschuh did **not** plead no contest to MCL 750.485, a misdemeanor . . . ." (E's Exh. 1t p 2 ¶ 7)(emphasis in original). That was an unequivocal misstatement of the only material fact that is in the motion. Further, unlike in *Gorcyca*, the large amount of evidence that is summarized above shows that respondent *did* know that the truth of his situation was the opposite of what he asserted in his motion. *Gorcyca* should have persuaded the master that respondent's false statement *was* misconduct, rather than the opposite.

The master further excused any falsehood in the Motion Nunc Pro Tunc on the basis that respondent did not see the motion before his attorney filed it, and as such "could not intend to

mislead the Court when he had no opportunity to review it before it was filed" (MR p 5). Even if the master was correct that respondent was ignorant about the contents of his own motion, that ignorance offers respondent no protection against the identical (in all material respects) false statements he made during his deposition, in his statements to the Commission, and in his answer to the complaint. The master's report does not address this difficulty.

But the master is mistaken about respondent's ignorance of his motion as well. Respondent *admitted*, before the master, that he agreed with filing the motion and knew what it was going to claim (p 136).[17] The motion was not complicated. It raised only one issue – that respondent had not pled to a crime. Whether or not he saw the precise words, he endorsed the precise falsehood. The master did not address respondent's admission.

Further, when Mr. Pabst argued in support of the motion before Judge Neithercut, respondent, who was present, gave no indication of surprise that Mr. Pabst was claiming he had not pled to a crime, and made absolutely no effort to correct Mr. Pabst or the motion that had been filed in his name (E's Exh. 1ee). It is not plausible that a judge would inadvertently allow his attorney to misstate, to another judge, the central fact of the only issue in dispute; respondent could only have intended that Judge Neithercut *accept* Mr. Pabst's false statement. The facts that respondent told his own version of the motion's central falsehood during his deposition months before the motion was filed, and then allowed his attorney to perpetuate the motion's false statement during the hearing a month after the motion was filed, is strong evidence that he was aware of, and adopted, the false statement that was the whole purpose of that motion. The master did not address this evidence.

[17] Respondent even admitted during his testimony before the master that the representation made in the motion, that he did not plead to a misdemeanor, was "not completely true, no….It's not completely true" (p 137; see also pp 110-11, 3243). It is indicative of respondent's credibility that this admission was itself evasive; there was *no* truth to the motion's representation.

The master also rested his conclusion that respondent did not intend his motion to mislead Judge Neithercut on his belief that "Respondent did not hide the fact that he pleaded no contest to MCL 750.485," shown to the master's satisfaction by the fact that the motion "included documents referencing MCL 750.485" (MR p 5). The report found this situation comparable to *Grievance Administrator v Harvey I. Wax, (98-112-GA, 1999),* in which the Attorney Discipline Board concluded that a false statement in a pleading was not, in and of itself, *per se* attorney misconduct.

Had the master properly applied *Wax*, he would not have been nearly so impressed by the materials that accompanied respondent's motion. The allegation in *Wax* was that a lawyer mistakenly said, in his answer to the Attorney Grievance Commission's request for investigation, that a certain statement was on page 6 of the brief he attached to the statement, when it was really on page 18 of that brief. There was no suggestion that the lawyer misstated the substance of the brief, but merely that he referenced the wrong page of it. Even the Grievance Administrator did not claim that the error was intentional. The panel that dismissed the complaint observed that if the lawyer were trying to deceive, it is not likely he would have attached his brief that had the correct information. The Attorney Discipline Board not only affirmed the dismissal, it stated that it came "unfortunately" close to imposing sanctions *against the Grievance Administrator* for bringing the complaint in the first place.

This case could not be more different. Respondent's motion, filed almost two years after his plea, explicitly *denied* what the documents purported to show (E's Exh. 1t). The denial concerned a highly material fact, not a mistaken page number. While respondent's motion referred to, and included, the two dismissal orders as the master said, it did so only in the context of claiming that they "*incorrectly* state that the charge dismissed was a misdemeanor, MCL 750.485" (E's Exh. 1t p 2 ¶ 6) (emphasis added). In other words, although the motion attached some relevant

documents (but certainly not all, as the next paragraph discusses), unlike *Wax* it only did so in the context of falsely claiming that those documents were wrong as to the critical issue. And, unlike in *Wax*, there was a great deal of evidence that respondent knew his claim was false.

Further, in relying on *Wax* the master ignored what the motion omitted. It did *not* include the documents respondent could *not* explain away as mere "mistakes":

- the amended criminal complaint (E's Exh. 1e, in which the misdemeanor was Count VI) (although the motion did include the original complaint that did *not* include that charge);
- the plea forms *respondent and his attorneys* had signed (E's Exhs. 1f and 1h), that acknowledged his plea to the very crime he denied in his motion;
- the transcript from the plea hearing from March 8 (E's Exh. 1cc), that recorded his plea, *in his attorneys' presence*, to the crime he and Mr. Pabst denied in his motion (although the motion did include the much less relevant transcript of the sentence hearing on March 31, which did *not* mention the statute of conviction).

Unlike in *Wax*, respondent's motion excluded the documents that most undercut his false claim.

The master found that respondent's Motion Nunc Pro Tunc was a "legal" argument, made in "good faith" (MR p 5). Given the thoroughly discredited basis for the motion, the implication of the master's characterization is that an attorney can urge any strained *legal* position in a motion, and doing so is not a false "statement." The master's error is that respondent's motion made a *factual* claim, one that misstated the central reality on which any legal argument about the nature of respondent's plea had to be based. Whether or not the motion made a legal argument, the misconduct was the false statement on which any legal argument was based.

Nor was the master correct that respondent's argument was in "good faith." An argument cannot be in good faith when its central premise is a deliberate misrepresentation of the record.

Respondent was complicit in misleading Judge Neithercut, and as a result, violated his duty of candor to the tribunal. That is the opposite of "good faith."[18]

Respondent's willingness to embrace a false position was demonstrated further during his testimony at the formal hearing, when he made an entirely new, entirely fallacious claim: that Judge Neithercut never accepted his plea (pp 2973, 2976, 3238-39, 3382). His sole support is Judge Neithercut's statement – "well no, wait a minute" – in the following portion of the plea hearing:

> COURT: Okay. Given these facts that People—or the Court accepts the plea and finds Mr. Konschuh guilty of count six, failure to account for county money, and dismisses without prejudice counts, -- well no, wait a minute. When am I supposed to do the dismissal, now or later? This says a delayed sentence with a dismissal with prejudice upon successful completion, so I guess that means I'm supposed to keep those open for the time being.
>
> FINNEGAN: You only keep the count six charge open. I'm prepared to dismiss counts one through five today.
>
> COURT: Okay.
>
> FINNEGAN: Okay? That's our deal. And the count six charge would be dismissed or disposed of at the conclusion of the delay period if he complies with whatever this Court orders, and that would be dismissed with prejudice.
>
> COURT: On your motion, one through five are dismissed.

(E's Exh. 1 cc-page 17)

The statement "well, no, wait a minute," immediately followed by "when am I supposed to do the dismissal, now or later?" was clearly only to ascertain whether Judge Neithercut should dismiss counts 1-5 that day or at the end of the delay period; not whether or not to accept the plea. Two things are clear from this excerpt, even stripped of any additional context: Judge Neithercut did accept respondent's plea and find him guilty of the criminal misdemeanor, and respondent lacked any good faith basis to say the contrary under oath to the master.

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[18] Perhaps the master found it hard to accept what the evidence so clearly proved due to a notion that when a false statement is obviously and provably false, it must not be intentionally false; that is, a particularly brazen lie can get a pass precisely because it is brazen. If that was a factor in the master's thinking, it should not have been. The bold lie should not be rewarded for being bold.

Of course, there is context, and the context further demonstrates how divorced from reality was respondent's testimony. Immediately following the exchange on which he now relies, Judge Neithercut referred him to the probation department for a presentence investigation and report (E's Exhs. 1cc pp 17-18, 1n). There was no reason for that referral if Judge Neithercut did not accept his plea. Also, as noted above, respondent's current counsel reported respondent's conviction to disciplinary authorities, an act that makes no sense if Judge Neithercut had not accepted the plea. In addition, respondent's answer to the complaint *admitted* that Judge Neithercut accepted his plea (R's Ans. ¶26). As Hon. Shalina Kumar stated when dismissing respondent's civil case:

> While the Special Prosecutor ultimately dismissed the five felony embezzlement counts, that was in exchange for Konschuh pleading no contest to "Public Officer – Failure to Account for County Money" in violation of MCL 750.485. Judge Neithercut stated on the record that he found Konschuh "guilty" of this misdemeanor and sentenced him accordingly.

(p 146; E's Exh. 142 p 14).[19] Respondent's testimony that Judge Neithercut did not accept his plea was just another extemporaneous effort to improve his position. This testimony is another indication why the master should have concluded that respondent's credibility was suspect, but it appears the master did not take it into account.

Respondent's position in his Motion Nunc Pro Tunc that he did not plead to a criminal misdemeanor, and instead pled to "an interpretation of" a civil statute, was absurd. There is no reasonable question whether he pled to a crime. There is no doubt that Judge Neithercut accepted his plea to that crime and found him guilty as a result. Respondent was fully aware that he had pled to the crime, and his later false statements about having done so were deliberate. His arguments to the contrary are an attempt to do what he and his attorneys falsely accused Ms. Finnegan of doing at the plea – to "pull a fast one."

[19] In another basic mistake regarding the evidence, the master refers to Judge Kumar as "Judge Kumasi," despite having Exhibit 142, Judge Kumar's order.

Contrary to the master's conclusion, the evidence summarized above shows that respondent committed the misconduct charged in Count I.[20]

Count II - Embezzlement

Count II charged that respondent embezzled $15 of a $60 money order his office had received as payment of an insufficient funds check. The master found that there was "no evidence" that respondent converted this $15 (MR p 6).[21] He is simply wrong.

In 2008 respondent entered into a verbal agreement with a company named Hartland, under which Hartland sought to collect on "bad check" cases designated by his office. The amount collected was the face amount of the dishonored check plus a $35 fee (pp 157-160, 162-165, 177-178; R's Ans. ¶¶ 50-51,56; E's Exh. 6a). Respondent stopped using Hartland by the end of 2008.

In early February 2009, under the Hartland program but after it had ended, respondent's office received a Western Union Money Order as payment for a dishonored $25.28 check that had been written by Sherri Ohenley to the Past Tense Country Store in Lapeer (pp 163, 182-85, 1689-

[20] The misconduct respondent committed as charged in Count I was: a) misconduct in office and conduct clearly prejudicial to the administration of justice, as defined by Michigan Constitution Article 6 Section 30, MCR 9.205, and MCR 9.204(1); b) conduct in violation of the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A); c) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); d) conduct contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3); e) conduct in violation of MRPC 8.4, 8.4(c) and MCR 9.104(4); f) conduct that violates a criminal law of Michigan, contrary to MCR 9.104(5), to wit, MCL 750.485; g) conduct involving fraud, deceit, or intentional misrepresentations, including misleading statements to the Judicial Tenure Commission, contrary to MCR 9.202(B); h) failure to establish, maintain, enforce and personally observe high standards of conduct so the integrity and independence of the judiciary may be preserved, contrary to Canon 1; i) irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of Canon 2(A); j) conduct involving impropriety and the appearance of impropriety, in violation of Canon 2(A); k) failure to respect and observe the law, contrary to Canon 2(B); l) failure to act in a manner that promotes public confidence in the integrity of the judiciary, contrary to Canon 2(B); m) and conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b).

[21] The master's report devotes only one paragraph to the money order itself. It devotes several paragraphs to whether Lapeer County had a policy that all contracts must be reviewed by the county board of commissioners, and whether all money received by county offices must be accounted for to the county. That issue is more relevant to Count III, so will be addressed below, during the discussion of that count.

90; R's Ans. ¶57-¶62; E's Exhs. 6e, 6f).[22] The money order, in the amount of $60.28, represented the face amount of Ohenley's dishonored check plus Hartland's $35 fee (pp 182-187; Exh. 6b).

Unaccountably, the master found that respondent "had his staff deposit" the money order into his personal bank account (MR p 6), even though respondent himself admitted that on May 14, 2009, *he* cashed the Ohenley money order, and *he* deposited the entire $60.28 into his and his wife's personal bank account at Lapeer County Bank & Trust (p 188; R's Ans. ¶65; E's Exh. 6g). There was no evidence to support the master's conclusion that it was respondent's staff who deposited the money order. Depositing the money order into his own account was, in itself, an extraordinary thing for a public official to do with money he received in his public capacity. The master's report did not address the impropriety of respondent doing this, perhaps because the master overlooked respondent's admission.

Respondent testified, and also claimed in his answer to the complaint (R's Ans. Par 65), that after depositing the check in his account he gave the entire $60.28 to his staff to forward to the county treasurer's office (pp 191-192, 195, 196). That was false. Pat Redlin, a clerical employee of respondent's office, testified that on May 15, 2009, respondent gave her $45.28; that is, $15 less than what respondent had received.[23] She testified that at respondent's direction she provided the full amount respondent had given her to the Lapeer County Treasurer's Office (pp 2032-2035; R's Ans. ¶68; E's Exhs. 6h, 6i). Consistent with her testimony, the deposit advice form she provided to the treasurer's office along with the money referred to only $45.28, which it labeled as restitution for the Past Tense Country Store (E's Exh. 6h). That same day, respondent authorized

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[22] The money order was dated January 31, 2009. Respondent's chief assistant, Michael Hodges, testified that he received the money order close to that date (p. 1690). He turned it over to respondent in early May of 2009, shortly before he left respondent's office (pp 1674, 1694).

[23] At the request of respondent's counsel, Ms. Redlin read several pages of respondent's testimony concerning the money order, in which he claimed that he had provided all of it to her. Ms. Redlin understood the testimony to mean that respondent was accusing her of taking the difference between the full amount and what the county received, and stated how shocked and hurt she was by his accusation (p 2076).

an invoice voucher directing the Lapeer County Finance Department to disburse the identical amount, $45.28, to the store (pp 190-92, 2033-36; R's Ans. ¶71; E's Exh. 6i). The treasurer's office never received the remaining $15 from the Ohenley money order and Hartland never received any of their $35 fee (pp 163, 229, 1898-1902; E's Exhs. 149, 150). In other words, the evidence showed that respondent received the entirety of the money, but gave $15 less than the entirety to Ms. Redlin. The master did not address this evidence.

As noted above, it was extraordinary that respondent deposited the Ohenley money order in his *personal* bank account in the first place. He justified this by claiming he was "trying to expedite getting the restitution to a victim" (p 197). The evidence shows how strained this explanation is. Respondent's chief assistant, Michael Hodges, who received the check three months before respondent cashed it, said that while he had the check he kept trying to figure out what to do with it, including asking respondent (pp 1689-1691). Respondent's sense of urgency apparently did not extend to this period.

Further, respondent claimed he needed to cash the money order before turning the proceeds over to the treasurer because it was made payable to him, and therefore the treasurer's office could not accept it (pp 188-189). But that is false, as explained by Dana Miller, the county treasurer. A money order is cash regardless of who the designated payee is, or even if the payee is completely undesignated, and the treasurer's office would have accepted this one without difficulty (pp 2111-13). Indeed, by putting the money order into his own account, respondent actually added an unnecessary step to getting the money to the victim.

In short, respondent offered no believable explanation for why he chose to deposit the money order into his personal account in the first place. The master did not address that deficiency.

Contrary to the master's conclusion, the evidence summarized above shows that respondent committed misconduct as charged in Count II.[24]

Count III - Bounce Back

Not satisfied with the Hartland program, effective January 1, 2009, respondent entered into a written contract with Bounce Back, another collection company (pp 160-161, 217-221, 3247; R's Ans. ¶75; E's Exh. 7a). The new contract granted Bounce Back the exclusive license to operate a check enforcement program "under the Prosecuting Attorney's name, authority, and control" (p 223-226; E's Exh. 7a-§1a). Under the contract, respondent's office was to receive a $5 fee from each $40 processing fee Bounce Back collected (pp 225-228; E's Exh. 7a).

As with Hartland, respondent did not submit the Bounce Back contract to the Board of Commissioners (pp 922-23). He also did not notify the Board of Commissioners, the County Controller, the County Treasurer's Office, or the County Finance Department of the existence of the contract or the $5/check fee his office was receiving from Bounce Back (pp 231-37).

Between September of 2009 and April of 2013, respondent deposited into his personal bank accounts 42 checks sent to his office by Bounce Back. These checks, totaling $1022, represented various aggregate amounts of the $5 fee paid to his office (p 252; R's Ans. ¶¶82, 83; E's Exhs. 8, 8a). Each check was made payable either to "Lapeer County Prosecuting Attorney's" or the "Prosecuting's Attorney's Office" (pp 228-29; R's Ans. ¶83). Respondent admitted he deposited each of the 42 checks into personal bank accounts he held with his wife and son at Lapeer County

[24] Respondent's misconduct charged in Count II was: a) Conduct in violation of the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A); b) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); c) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3); d) conduct in violation of MRPC 8.4, 8.4(c) and MCR 9.104(4); e) conduct that violates a criminal law of Michigan, contrary to MCR 9.104(5), to wit, MCL 750.174 and MCL 750.485; and f) conduct involving dishonesty, fraud, deceit, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b).

Bank & Trust, Chase Bank, or Independent Bank (p. 264; R's Ans. ¶¶ 93-346; E's Exhs. 9-74). He deposited the last of the checks *after* he was informed he was appointed to the bench (pp 269-271; R's Ans. ¶346; E's Exh. 74). Even Sylvia James, who was removed from the bench for financial improprieties in *In re James*, 492 Mich 553 (2012), did not deposit her court's funds into her *personal* bank account; she at least opened an account in the name of her court.

Despite being the public official charged with enforcing criminal laws against theft and charged with interpreting the county's financial policy, respondent did not so much as keep a copy of any of the checks, or maintain the most basic of accounting ledgers to show his receipt and use of these funds (pp 256-260, 260-65, 277-78). To the contrary – he actually instructed his staff to give him the checks (pp 1820-21).

Count III alleged that respondent embezzled this Bounce Back money. The master found that respondent did deposit this money into his personal accounts, as charged, but did not address the most fundamental question of Count III (or Counts IV-V), which is whether in doing so, he embezzled public funds (MR pp 6-7). The answer is that he did.

Money a public official receives in his official capacity belongs to the public, not to him. That is the principle enforced by Michigan's criminal law through MCL 750.175, the statute respondent was first charged with violating in his criminal case: "Any person holding any public office in this state . . . who knowingly and unlawfully appropriates to his own use . . . the money or property received by him in his official capacity or employment [is guilty of a felony]."

Respondent held public office. As discussed above with respect to the Ohenley money order, and below with respect to other checks, he knowingly appropriated to his own use money he received in his official capacity. Ergo, he embezzled the money in question. He has an elaborate

explanation for why it was okay for him to do this, which is discussed in detail below, but his explanation is irrelevant to whether or not he helped himself to public funds.

Just as it was extraordinary for respondent to deposit the Ohenley money order into his personal bank account, it was equally extraordinary for him to deposit the Bounce Back checks into his personal accounts.[25] Given his position he certainly knew that it was highly irregular for him to deposit these checks. It was a situation that screamed out for protecting himself from later accusations that he took the money inappropriately. Yet, he did not tell another soul that he was putting the money into his personal accounts, or otherwise taking it for his personal purposes. He did not consult with anyone about what he was doing. It is implausible that, with years of experience as a county official, with a law degree, and with a master's degree in business administration/finance, he did not understand the public nature of these funds or the importance of maintaining accurate records or ledgers of the expenditures for which they were allegedly used. His lack of records is strong evidence of his guilty intent. The master did not address any of that.

Instead, the master focused nearly all of his attention on two ancillary, though important, issues: 1) whether respondent's handling of the Bounce Back money (and other money his office received) complied with the policy of his county; 2) whether respondent was excused for taking the money by having spent more than the amount he took on his office over the course of his career (MR pp 6-7).

Lapeer County Policy

Whether Lapeer County had a policy with respect to respondent's handling of the Bounce Back and Hartland contracts is significant, but not because it would be judicial misconduct for respondent to have violated any such policy. In and of itself, a violation of the county policy is not

[25] The "personal accounts" included deposits into his son's account, from which, respondent admitted, he did not withdraw any money (p 274).

misconduct. Rather, the question is significant because if there was a policy, and respondent was familiar with it, and his handling of the money his office received violated that policy, the violations are strong evidence of his unethical and illegal intent with respect to the money he took.

In determining that respondent did not wrongfully take the Bounce Back money, the master stated that the county did not have a policy regarding that money in 2008 (MR p 6). For the reasons discussed in the remainder of this section, it is clear that the master overlooked or misunderstood the evidence that the policy existed not only then, but throughout respondent's tenure as Lapeer County chief assistant prosecutor and prosecutor.

The policy that is the subject of all this attention from the master had two aspects that are very pertinent to this case:

1) It required that all contracts and agreements involving county departments be approved by the county board of commissioners (E's Exh. 5j). Respondent did not disclose the Hartland contract, which enabled him to receive the Ohenley money order, or the Bounce Back contract, which enabled him to receive the 42 checks that are the subject of Count III, to the board (pp 172-75, 232-235).
2) What is most important to this case, the policy required that *all* revenues be deposited with the county treasurer's office within 24 hours of receipt (E's Exh. 5j; E's Exh. 5k). Respondent did not do that for any of the Bounce Back money, or the Ohenley money order that was the subject of Count II.

The clear intent of the policy is to promote public transparency and accountability of all government contracts – the precise opposite of respondent's actions (p. 899).

The effort the master's report devotes to the existence of the policy, and the lack of effort it devotes to the embezzlement, suggests the master may not have understood the significance of

the policy to this case. Even had that policy not existed, respondent was *still* not entitled to keep any money his office received from Bounce Back, the Ohenley money order, or the sources that are the subjects of Counts IV-V (discussed below). Rather, the existence of the policy, respondent's familiarity with it, and his knowing and repeated violations of it, were just one piece of evidence – albeit an important piece – that showed his conversions of county money were knowing and deliberate.

Contrary to the master's finding, the great weight of the evidence established that the Lapeer County policy regarding contracts and receipts did exist at all relevant times, and respondent knew it existed. Three witnesses testified that the policy has been in effect since at least 2001; two of those witnesses testified that it has been in effect since at least 1996. John Biscoe, the county treasurer, was uncertain when the *written* policy was adopted, but he was certain it had always been the county's "practice" for all contracts to go "through the board" (pp 857-59, 983, 1017). Mr. Biscoe's assistant, Doreen Clark, established that the policy dated back to 1996, when respondent was the chief assistant prosecuting attorney (pp 1914-15, 1928). Finally, Tim Turkelson, who was respondent's chief assistant when respondent became Prosecuting Attorney in 2001, testified that from 2001 through 2005 respondent actually trained him in this policy (p 1212). Mr. Turkelson explained that respondent needed to do that because it was the Prosecuting Attorney's duty acting as corporation counsel – i.e., from 2001 through 2012 it was *respondent's* duty – to review county contracts in compliance with the policy (pp 1205-07).

How, then, did the master conclude that there was no policy? First, he placed great weight on Mr. Biscoe saying he "did not believe the policy existed in written form in 2008" (MR pp 5-6). While Mr. Biscoe did say this, his statement does not carry the meaning the master gives it. Although Mr. Biscoe did not think the policy was reduced to writing in 2008, he maintained that

whether or not it was in writing, it was in effect in policy and practice during respondent's entire tenure as Prosecuting Attorney (pp 857-58, 896-97). The master did not address Mr. Biscoe's full testimony, nor the fact that most of the relevant financial improprieties occurred *after* 2008.

After misunderstanding Mr. Biscoe's testimony, the master determined that Ms. Clark's testimony conflicted with Mr. Biscoe's, and concluded that he should give greater weight to Mr. Biscoe's testimony because "much" of Ms. Clark's testimony was equivocal (MR p 6). However, Ms. Clark and Mr. Biscoe actually corroborated each other on the only important point – that the policy dated back to before respondent's tenure, whether or not it was written. Further, the master's basis for discounting Ms. Clark's testimony is just wrong. Though he asserted that "much" of her testimony was equivocal, his report referred to only one supposedly equivocal statement she made, and did so in a misleading way at that. That statement is discussed at the beginning of this brief, at p 2-3. As that discussion shows, the thing that persuaded the master to disregard Ms. Clark's testimony is that she was unsure whether the policy was placed on the county's shared computer drive in 2007, 2008, or 2009 (fn 5, above; pp 1927-28); in other words, she was unsure about a minor point that had nothing to do with whether the policy was in place. In fact, Ms. Clark had no doubt the policy existed as of 1996, based on her familiarity with certain flow charts she identified that are a part of the county's policy package (p 1914; E's Exh. 5j). She was also certain because in 1996 it was a part of her duties to take minutes of board meetings, at which the policy was discussed (pp 1913-1916). The master's report that found her too "equivocal" did not mention this portion of her testimony.

Finally, the master simply disregarded Mr. Turkelson's testimony, even though it was consistent with that of Ms. Clark and Mr. Biscoe, on the basis that Mr. Turkelson "provided no specifics, and his credibility was questionable" (MR p 6). The report did not discuss what Mr.

Turkelson actually testified to or what made his credibility questionable. The omission is glaring. Respondent himself admitted that even prior to becoming prosecutor, he had been responsible for reviewing contracts submitted by other county departments in compliance with the policy (pp 149-150). He retained that duty after becoming the elected prosecutor (pp 149-156). Mr. Turkelson explained that respondent shared that responsibility with him when he was respondent's chief assistant from 2001 through 2005 (pp 1205-1208). In fact, it was respondent who explained the purpose of the policy to Mr. Turkelson, and who "walked" him "through the process" to be followed (pp 1205-1212). Mr. Turkelson also testified to interacting with the Board of Commissioners concerning the policy (p 1205); attending, on respondent's behalf, department head meetings at which the policy was discussed (p 1209); reviewing contracts and leases for other departments in accordance with the policy (pp 1206-08); and submitting expense reimbursements under the policy (1208). When he was shown the policy during the hearing, Mr. Turkelson identified it as the policy that respondent taught him (1211-12). The master does not explain why this testimony, which is fully consistent with that of Mr. Biscoe and Ms. Clark, and is also consistent with the normal operation of county government, is somehow inadequate.

It is all the more odd that the master did not credit the testimony of Ms. Clark, Mr. Biscoe, and Mr. Turkelson that the county had a policy regarding contracts and receipts, because even respondent did not deny that the policy existed (p 172). Rather, his position was that he did not follow the policy with respect to Hartland and Bounce Back because he was never made aware of it (pp 172-173, 3270; R's Ans.¶¶ 45-48, 52). Like so many of his other claims, that claim is false. During the formal hearing respondent admitted that in his deposition (given in his lawsuit against the county and the witnesses who testified against him in the criminal case), when he was asked whether he was aware, when entering into the Bounce Back contract, that the county had a policy

requiring him to notify the Board of Commissioners about all contracts, he admitted, "If it involved the county, yeah" (pp 174-175; Disciplinary Counsel's Proposed Findings pp 12-21). When concluding that the policy did not exist, the master's report did not address respondent's admissions.

Respondent's claimed ignorance of the policy should be evaluated in light of his admissions that he reviewed contracts submitted by other county departments, both when he was the chief assistant and when he became the prosecutor (p 172), as required under the policy. Given these admissions and his long tenure as a senior official in Lapeer County government, his claim that he was not aware of the county's basic financial policy is as trustworthy as his claim that he did not know he had pled to a crime.

In addition to claiming he was unaware of the county's policy regarding contracts and receipts, respondent justified not telling the county about the Bounce Back contract (as the policy required him to do) on the basis that the contract was not a "county" contract (pp 178, 180, 225-26, 248, 250, 251).[26] He claimed that as a result, the funds the contract generated were not "county" money (pp 248, 250, 259-260).

Respondent's claim that the contract with Bounce Back was not a "county" contract is on par with his claims that the money he collected was not "public" money and that he did not plead to a crime – brazen, but wrong. Bounce Back operated in the county by the authority and under the name of a county department – the Prosecutor's Office (pp 3246-49). The contract involved a fundamental function of that county department – the handling and disposition of criminal offenses. It was no different than the Hartland contract, which was supervised by respondent's then chief assistant, Michael Hodges (pp 157-160). Bounce Back relied on the power of

[26] Respondent's claim that certain contracts were not "county" contracts also extends to the Hartland contract (discussed above with respect to Count II), and the contracts that are the subject of Counts IV and V, below.

respondent's county office to compel payments of restitution to victims of bad checks (E's Exhs. 7a §3, 7a §1(a)). Respondent admitted that he authorized the Bounce Back contract for use in Lapeer County in his capacity as the county prosecutor, and that Bounce Back was a collection agency for his county office (pp 225, 349, 3246-47, 3249).

As part of his argument that the Bounce Back contract was not a county contract, respondent denied that he was a county employee (p 78). However, he admitted he was paid by the county (pp 78-79, 181). He was reluctant to admit the obvious fact that the prosecutor's office was a division of the county (pp 180-81), but admitted that his office was a department within the county (p 79) – a distinction without a meaningful difference.[27] He admitted that the county was the funding unit for his office (p 181). He admitted that as the funding unit, the county set each department's budget and paid the salary of each department head, elected or otherwise (pp 181, 849-853). He did not contest that as a department head he was notified of, received agendas for, and attended monthly meetings of county department heads to discuss various county issues (pp 245-246). He attended the Board of Commissioners' budget hearings and was allowed, as a *department* head, to address the Board regarding any budget items he felt were important to his office (p 851).

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[27] Respondent's testimony regarding his office's status as a county department demonstrates his slipperiness. He had maintained that the county policy only applied to contracts that involved the county, and that the Hartland contract was not a "county" contract (pp 174, 178). When, in this context, disciplinary counsel attempted to determine the seemingly simple fact that the prosecutor's office was a county department, the following exchanges took place:

> Q: The prosecutor's office is a division of the county or a department within the county, is it not?
>
> A: In some regards.
>
> * * * *
>
> Q: And so the prosecutor's office is a division within the county; correct?
>
> A: I wouldn't phrase it that way.
>
> Q: Isn't it a department within the county?
>
> A: In some regards.
>
> (pp 180-81)

The obvious fact that respondent's office was a county department is further supported by the testimony of his successor, Mr. Turkelson (pp 1288-1291), and by Cary Vaughn, an expert witness on government finance (pp 1939-46, 1964-65). It was also the conclusion of county controller John Biscoe (pp 1113, 1117). Mr. Biscoe testified that the *only* reason the Bounce Back contract might not technically be a "county" contract is because respondent never presented it to the Board of Commissioners for approval by the county, as he should have (pp 1112-13, 1117-18). Respondent's claim that the Bounce Back contract was not a county contract covered by the policy is preposterous. The master's report did not discuss this claim.

As noted above, the county policy also required that respondent provide all money his office received to the county. Respondent obviously did not do that with respect to the Bounce Back checks. To justify this, he makes the interesting argument that the money he took was not "public" money, and therefore he had no duty to provide that money to the public.[28] This argument fails as a matter of statutory interpretation and a matter of logic.

In making the argument, respondent relies on MCL 129.11, which states that

> Except as otherwise provided by law, money collected or received by an officer of a local public entity in this state, pursuant to any provision of law authorizing the officer to collect or receive the money, is public money for the purposes of this act.

He is adamant that there is no provision of law authorizing him to collect or receive the money that is at issue in this case, and therefore, he claims, the money his office was paid is not "public" money and he had no duty to turn it over to the public.

As an initial matter, respondent's argument puts him in an interesting quandary. He received the money that is the subject of Counts II – IV solely by the authority of his office. As discussed in Count IV, below, in some cases that money was compensation for his county

[28] This is the argument respondent litigated unsuccessfully for two years in connection with his criminal case, discussed at pp 6, above.

employees who provided services on county time. If no provision of law authorized him to obtain that money through his office, he must have obtained it illegally. Mr. Vaughn testified that collecting funds without any legal authority is "collecting illegal money" (p 1982).

If respondent used his office to collect money unlawfully, he has simply admitted to a different, and hardly better, form of misconduct. If, on the other hand, at the time he obtained the money he thought he was doing so pursuant to lawful authority, then he must have known that the money his office got *was* "public" money under MCL 129.11, contrary to what he now maintains. That is, his theory that he did not have to share the money because it was not "public" money fails if he thought he was collecting the money lawfully, since under his theory, lawful collection is what makes money "public."[29]

There is another problem with respondent's creative argument. MCL 48.158 says "No prosecuting attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business for which it shall be his official duty to attend…." Dealing with bad check cases was inherent in respondent's duty as a prosecutor. Under this law, even if he were correct that he had no duty to turn the Bounce Back money over to the county, his office and he were still forbidden to receive it.

Respondent's reliance on MCL 129.11 therefore fails to solve his problem, even if the statute means what he claims. But his interpretation is wrong. Mr. Vaughn repeatedly and unequivocally stated that all money that comes to any county official is public money and needs to be accounted for (pp 1948-1949, 1962-1963, 1964-1965):

[29] Respondent's office did, in fact, obtain the money lawfully. Respondent entered into the contracts with Hartland and Bounce Back under his authority, pursuant to MCL 49.153, to prosecute criminal cases in which his county has an interest. Therefore, his highly technical claim, that the money he received pursuant to those contract is not "public money" because no law authorized him to collect it, is mistaken.

> *Any* money that comes into the coffers of a local unit of government, whether that be through a department head or through the treasurer, whatever avenue it came into the coffer that would be a government, that would be public funds.

(pp 1949) (emphasis added). He testified in particular that *all* money/funds a prosecutor receives in his official capacity must be turned over to the county treasurer (pp 1962-1963).

The master ignored this – the most important part of Mr. Vaughn's testimony – and instead focused on several irrelevancies regarding the status of treasury guidelines (MR p 6). The master also apparently disregarded the fact that respondent would have been well aware of Mr. Vaughn's central point, both because he was a prosecutor charged with enforcing the criminal law against public officials and because he had earned a master's degree in business administration, *with emphasis on finance*, before joining the prosecutor's office (pp 76-77).

The judges who considered respondent's "public money" argument in his criminal case found that it was no defense to whether he embezzled public funds. Judge Dignan rejected respondent's argument in December 2015 (E's Exh. 1aa). He relied on MCL 750.175 and Michigan Criminal Jury Instructions 27.3 to determine that embezzlement by a public official means "*the misappropriation of any money received by the defendant in his official capacity as Prosecuting Attorney*" (E's Exh. 1aa-p 2) (emphasis in original). He added: "The Court found these monies were received by the defendant in his official capacity as Lapeer County Prosecutor. It should be noted that the statute does not mention 'public money' in defining the crime" (E's Exh. 1aa-p 2).

On February 9, 2015, Judge Neithercut denied respondent's second motion to quash and a motion for reconsideration of the "public monies" issue (p 89; E's Exh. 1z). He agreed with Judge Dignan that the definition of the legal term "public money" was irrelevant to the embezzlement

charges in this case (E's Exh. 1x p 2). The Court of Appeals and Supreme Court denied respondent's leave to appeal this ruling (pp 90-91; E's Exhs. 4a, 4b, 4d).[30]

As Judge Dignan observed, by its very terms, MCL 129.11 restricts its definition of "public money" to the act of which it is a part; i.e., the Depositories for Public Moneys Act (E's Exh. 1d p 3). Michigan's embezzlement statute is not a part of that act, so the "public money" definition does not apply. When he was later asked to clarify his ruling, he wrote: "The defendant's argument that the money in question is not public money, but rather his own money that he could do with as he pleased, is totally without merit." (E's Exh 1aa p2). He was on solid ground when he added that it was "specious and disingenuous" for respondent's attorneys to make this argument (*Id.*)

It is telling that in pursuing his very unusual interpretation of law under which a public official could put the money his office collected into his own pocket, respondent did not consult with anyone in the county or his office to make sure his interpretation made sense. He did not prepare any memo to the file to preserve in writing the legal basis for his position, just in case someone might question it someday. He did not so much as tell anyone that he was depositing the money into his own accounts. He did not keep any record of the money he took. These omissions demonstrate that, contrary to the position embraced by the master, respondent did not have a good faith belief that he was entitled to the money he took. The master did not discuss any of these indicia of bad faith.

The great weight of the evidence established that Lapeer County had a policy, which respondent was charged with applying, that included the requirements that all contracts go before the county board of commissioners and all receipts be turned over to the treasurer. The clear preponderance of evidence established that respondent was aware of that policy, despite his protest

[30] Michigan Supreme Court docket number 151930; COA docket number 326225. The COA also denied respondent's motion for reconsideration of its denial of his request for leave to appeal.

to the contrary. His argument that he, or the Bounce Back money, were exempted from the policy, flies in the face of the law, the facts, and common sense. Respondent's violations of the county policy are further evidence demonstrating that he had no entitlement, and knew he had no entitlement, to any of the checks he deposited into his own accounts; evidence the master could not appreciate, having mistakenly determined that the policy did not exist.

Offset of Embezzled Funds

As noted above, the master did not address whether respondent embezzled the Bounce Back money. In addition to concluding that respondent's taking that money did not violate any county policy, he appears to have excused any embezzlement on the basis of respondent's claim that he spent more on his office than he embezzled. (MR pp 6-7).

There is no basis for that excuse. When Judge Dignan determined that the phrase "public money" was irrelevant to whether respondent embezzled the Bounce Back money, he quoted MCL 750.175's statement that "[a]ny person holding public office . . . who knowingly and unlawfully appropriates to his own use . . . the money received by him in his official capacity" is guilty of a felony (E's Exh. 1d p 2). There is nothing in the elements of the embezzlement statute to suggest that it is a defense that the person doing the appropriation was compensating himself, under his own rules, for expenses he incurred with respect to the entity from which he embezzled. Indeed, to the extent Disciplinary Counsel were able to find relevant authority, it is to the contrary. Cf. *People v Morise*, 859 P.2d 247, 249 (Colorado Ct of Appeals 1993) (it is not a defense to a charge of embezzlement that a school official obtained $3700 from his school district without authorization, for the purpose of buying musical instruments the purchase of which had not been

authorized). The master was wrong to conclude that respondent was free to take public money (with no accounting) as an "offset" to money he allegedly spent (also with no accounting).[31]

Another problem with the master's finding that any embezzlement was offset by expenses is that it relies entirely on respondent's credibility. The expenses respondent claims, to justify just taking the Bounce Back and other funds underlying Counts IV and V in 2009 to 2013, date throughout his 13-year tenure as prosecutor. He kept absolutely no accounting records of the expenses he claims he incurred on behalf of his office. Although he has some receipts, the master had only his word to link those receipts to any office expense. There are no records that might reflect that the county "owed" him a certain balance for his expenses at any particular time, against which he was offsetting certain receipts. There is no reason, on this record to trust respondent's credibility to such an extraordinary extent. The master's report does not address this concern.

In that regard, it is significant that respondent's list of purported out of pocket expenses for his office (E's Exhs. 95, 126) is false or misleading in important respects and consists of expenses for which he was not entitled to reimbursement, as discussed below. The evidence shows that the list is really respondent's after-the-fact attempt to justify pocketing money to which he was not entitled.

Page one of respondent's list describes $7,783.66 of supposed office expenses for which he claims he found receipts (E's Exh. 126).[32] Included in this figure is more than $3,000 in Christmas and Secretaries Day luncheons for which, as discussed in Count V below, public funds cannot be used. Those amounts can therefore not justify respondent's self-help. Also included on

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[31] Judge Neithercut declined to require respondent to pay restitution because he was "presented with" the records identified on page 1 of respondent's list of claimed expenses (E's Exh.1p, p. 25). Judge Neithercut did not address the propriety of reimbursements for these expenses, nor the reliability of list. Rather, he simply declined to exercise his discretion to order restitution.

[32] Respondent testified at the formal hearing that the receipts in Examiner's Exhibits 95 and 126 were his "out of pocket expenses" (pp 3321-22).

the first page is more than $500 in plaques respondent purchased between 2004 and 2008 for retiring police officers (E's Exhs. 126, 145). Not only were these officers not employed by respondent's office, plaques, like parties, are not a public purpose for which public money can be used (p 906; E's Exh. 107 p 9).

The $7,783.66 figure also includes $1834.25 in office "water cooler bills" (E's Exh. 126). When questioned by Det/Sgt Pendergraff, respondent claimed he had *personally* spent over $1800 on water (E's Exh. 90f p 7). He made the same assertion to the Commission by listing the $1834.25 as expenditures on which he claimed he had spent his own money (E's Exhs. 95, 126). Before the master he admitted making the representation to Sgt. Pendergraff, first insisting that it was true (pp 709, 710), then later testifying that he paid "close to all of" the $1834.25 figure (pp 3102-03).

All of these claims were false. The $1834 in water expenses he claimed were the entirety of his office's water expenses from the time his office obtained a water cooler in 2002 until the water purchases ceased in 2008, as shown by the receipts he provided of the periodic purchases during those years (E's Exh. 95 at pp 52-73, 81-109). The evidence established that it was actually respondent's *staff* who paid for the water for the office cooler (pp 1474, 1520, 1722-29); respondent did not make *any* contributions to that fund (pp 1802-03, 1830-31). He only had the water invoices on which he based "his" expenses because he issued a personal check for each invoice, *after* receiving a like amount in cash from the office manager who maintained the staff's fund (pp 1806-07, 1830). Respondent's false statements about this could not have been an innocent failure of recollection.

The other problem with respondent's water claim is that bottled water is not a "public purpose" expense for which he could receive public money in the first place (pp 1952-53). The

non-public status of the water does not change because police officers, victims, or witnesses, when present at respondent's office, were not barred from drinking it (p 1954).

Also included in the $7,783.66 figure is $375.77 of what respondent described as "Coffee and Cookies" (E's Exh. 126). In another claim that is very telling of respondent's boldness and his poor character, he purchased these items for his own investiture to the judiciary, held on May 6, 2013, almost a month *after* he was sworn in as a judge, and certainly after he had left the office from which he was taking money (pp 271-73). He testified that he included this expenditure on his three page list because the day after his investiture, the leftover cookies and coffee were made available to everyone in the building (*Id*).[33] The fact that respondent's investiture leftovers were available to the public does not make them a "public purpose" expense. The fact that respondent would claim that they were reveals the flaw in his integrity.

The second page of respondent's three-page list contains $3050.73 in expenditures that include additional Christmas and Secretaries Day luncheon expenses, more than $200 in flower/plant expenses for funerals, and $665 for a child's playground slide (pp 3330-31).[34] Public funds cannot be used for any of these expenditures, so they were not eligible for his self-help reimbursement (pp 1951-53).

Public funds also cannot properly be used to pay for the $122.45 that respondent describes as "unreimb. portion of X-mas" and "unreimb. portion of Ad. Prof. Day lunch" (E's Exhs. 95 pp 159, 126). This amount represents the gratuity and alcohol purchased at the 2011 and 2012 Christmas and Secretaries Day luncheons which, as discussed below at p 60-61, respondent had falsely billed to the county as "training sessions." He cannot honestly claim alcohol and gratuities

[33] Respondent also admitted that he did not submit this expenditure for reimbursement from the circuit court budget because he did not think the court would pay it (pp 729-731).

[34] Respondent testified that he felt this was a proper office expenditure because the slide was damaged at a social function that was held at the home of one of the APAs (p 3331).

as a proper reason to help himself to public money, having previously admitted to Sgt. Pendergraff, and later testified before the master, that he knew the county did not reimburse for either (pp 363, 408, 409; E's Exh. 90e/pp 5-6).

Likewise, respondent should not have included, as justifications to help himself to secret reimbursements, a bar receipt stamped at 9:06 pm on a Friday night (pp 522-23; E's Exh. 95/p 1); other bar receipts for personal lunches he had with a few APAs (pp 523-24; E's Exh. 95 pp 6, 13), and receipts that are marked as "Training Check. Do Not Pay" (p 530; E's Exh. 95 p 170).

Also improper are the $6,000 in "estimated" expenditures that respondent claims he personally paid for, that he included on the last page of his list and for which he does not have receipts of any sort. (E's Exhs. 126, 95/p 162). The $1000 he says he spent on coffee for his office is not a proper public fund expenditure (E's Exh. 107). Neither is the $500 in paczkis, Girl Scout Cookies and cider that respondent alleges he purchased for his staff.

Finally, respondent's claimed entitlement to reimbursement for an "estimated" $400 per year, for the years 2001 through 2008, which he alleged was his personal contribution to the "Flower/Cake/Card fund," suffers from two defects. First, public funds cannot be used for such expenditures. Second, the evidence shows that respondent never contributed to the fund.

Leigh Hauxwell kept a detailed ledger for the "flower/cake/card" fund beginning in 2006. She testified that although she no longer had the ledger for the years 2006 through 2008, she knew that respondent never contributed any money to that fund in those years (pp 1802-03, 1830-31).[35]

In addition, the ledger showed that the fund's total annual expenses in each year from 2009 through 2012 were less than $400, and that staff's contributions alone exceeded the expenses of

[35] Ms. Hauxwell's recollection is corroborated by the ledger she still had for 2009 through 2012, which showed that respondent made no contributions in those years, plus the absence of evidence that anything changed between 2006-2008 and 2009-2012. (E's Exh 106)

the fund (E's Exh. 106). Testimony from staff showed that staff contributed to the fund throughout respondent's tenure as Prosecuting Attorney, including before Ms. Hauxwell took over the ledger in 2006 (pp 1268-69, 1474-75, 1721, 1800-02, 2212-14, 2303). In claiming that he contributed $400 per year to this fund, respondent has taken credit for the contributions made by his staff.

The previous pages analyze respondent's purported expenditures over the course of his tenure as Prosecuting Attorney (by which he seeks to excuse the money he took from the county), and demonstrate why many of them were not properly reimbursable even if the money he took did belong only to his office. There is an important bottom line to this analysis. The total of the most clearly non-reimbursable expenses is close to $14,000.[36] Once those expenditures are removed from the list, only about $3000 is left.[37] From 2001 through 2012 respondent took about $9300 in Bounce Back, LEORTC, training, and City of Lapeer money (pp 3371-73). In other words, the total he took far exceeded any properly reimbursable expenditures he now claims. The master's report made no effort to grapple with all these defects with respondent's claimed expenditures, and instead, simply ignored them.

For the reasons stated above, the evidence overwhelmingly supports the charge in Count III that respondent embezzled over $1000 from Lapeer County by pocketing the proceeds of the Bounce Back contract. His embezzlement is not excused by his claims that he had no duty to turn the money over to the county and that he was just offsetting his expenses on behalf of his office. His embezzlement was misconduct as charged in Count III.[38]

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[36] The items from p 1 of Examiner's Exhibit 126 that are not properly reimbursable total $6,759.14 (leaving in the water cooler, two microwaves, and dishwasher and installation). The items from p 1 of Examiner's Exhibit 126 that are not properly reimbursable total $2,223.49. The items from p 1 of Examiner's Exhibit 126 that are not properly reimbursable total $4,720.00.

[37] Even that $3000 is suspect. It includes an estimated $100 each year for attendance at Chamber of Commerce events, Bar Association lunches, and other items that are not clearly improper, but for which respondent never attempted to seek reimbursement in a timely fashion.

[38] The misconduct charged and proved under Count III was: a) violation of the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A); b) conduct prejudicial to the

COUNT IV - LEORTC and City of Lapeer

The master accurately found that for many years the Lapeer assistant prosecuting attorneys provided legal instruction at law enforcement training sessions/seminars/legal updates that were sponsored and paid for by the Law Enforcement Officers Regional Training Commission (LEORTC) (MR p 7; pp 282-83). The evidence showed that preparation for the trainings took place at respondent's office, using office equipment and supplies (pp 1417-20). Each training was conducted during business hours, and the participating APAs did not take any vacation, sick, or compensatory time from their county positions to prepare for or to participate in it (pp 283-84).

The evidence further showed that in October and again in December of 2000, while still the chief assistant under Justus Scott, respondent participated with other Lapeer APAs in two LEORTC training sessions (R's Ans. ¶366-¶370). Following each session he submitted a cost documentation sheet designating himself as the sole recipient of any compensation. He admitted having received two checks at that time from LEORTC, for a total of $600, both of which he deposited into his personal accounts (pp 320-321; R's Ans. ¶366). Respondent also admitted he did not notify the county board of commissioners, the county controller, or the county treasurer's office of the training funds his office had received, and that he did not maintain any accounting records/ledgers showing how these funds were used (R's Ans. ¶¶369, 370).

The master also correctly found that in 2011 and 2012, APA Cailin Wilson provided legal instruction at a LEORTC sponsored corrections academy in Flint/Fenton, Michigan (MR p 7; pp 1415-28; R's Ans. ¶348). Respondent did not participate in either session (p 283; R's Ans. ¶349).

proper administration of justice, contrary to MCR 9.104(1); c) conduct that exposes the legal profession to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); d) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3); e) conduct that violates MRPC 8.4, 8.4(c) and MCR 9.104(4); e) conduct that violates criminal laws of Michigan, to wit, MCL 750.175 (embezzlement by a public official over $50) and MCL 750.249 (Uttering and Publishing); and f) conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b).

In 2012 respondent even directed Ms. Wilson to submit her mileage expenses for the training *to the county* (pp 1428, 1432), then approved her mileage reimbursement voucher, authorizing *the county* to pay it (p 1432; E's Exh. 92h). Pursuant to APA Wilson's request on the cost documentation forms (p 1426), the LEORTC issued two checks, for $300 in 2011 and for $480 in 2012, made payable to the Lapeer County Prosecutor's Office (R's Ans.¶ ¶356-57; E's Exh. 92k). Despite the county resources that were used to generate this money, respondent deposited these checks into his personal bank accounts (pp 287-89; R's Ans. ¶359; E's Exh. 92k).

Unaccountably, although the master found that respondent personally took training money before 2001 and after 2011, he failed to address the intervening decade during which respondent took similar payments (MR p 7). Between 2001 and 2011, respondent and the Lapeer APAs participated in 16 LEORTC training sessions (p 302; R's Ans. ¶361). For each session, respondent submitted a cost documentation sheet designating only himself as the recipient of all compensation (p 304). He deposited 16 checks for this training, totaling $4850, into his personal bank accounts (p 323; R's Ans. ¶361; E's Exh. 92d). Once again, he admitted that he did not notify the county board of commissioners, the county controller, or the county treasurer's office of the funds that LEORTC was paying for these training sessions (pp 316-17). He also admitted that he did not maintain any accounting records/ledgers to show how these funds were used (R's Ans. ¶365).

The master further found, correctly, that between 2001 and 2008 respondent and the Lapeer APAs made court appearances on behalf of the City of Lapeer, and that the Lapeer City Attorney paid respondent for every case covered (MR p 8; pp 331, 336-38, 1467; R's Ans. ¶372). Respondent admitted that between 2001 and 2008 he received $100 to $300 each year for his and his staff's appearances on behalf of the City of Lapeer (p 338). As with the funds paid by the LEORTC, respondent deposited the City of Lapeer funds in his personal bank accounts without

notifying the board of commissioners, the treasurer's office, or county controller John Biscoe (pp 338-40; R's Ans. ¶¶372, ¶374). He also did not set up any accounting ledgers or any other methods of keeping track of how he spent the City of Lapeer funds (pp 338-40; R's Ans. ¶375). The master did not address those deficiencies, nor did he address the fact that the court appearances the APAs made on behalf of the City of Lapeer took place on county time, i.e., they did not take any vacation, sick, or compensatory time from their county employment to make said appearances (pp 337-338). That evidence was undisputed.

Respondent argued that one of the reasons he was entitled to pay himself for LEORTC training was because the county allowed him to work outside the prosecutor's office (pp 295-96, 353). The master did not address this claim, but it should be rejected. A fundamental problem with it is that the money respondent took was not only for his own work, but also, as noted above, the work of his staff and attorneys. There is no imaginable justification for respondent to keep money paid for the work of his employees, which work was performed either on their personal time or on county time.

There are other problems with respondent's claim. As an appointed county employee, he was not entitled to keep money for work he did on county time (p 932). While he could maintain separate employment after he became the Lapeer County Prosecutor, such employment had to be separate and distinct from his position as an elected official (pp 1955-57). However, the LEORTC trainings were intimately connected to his office. They were attended by police and corrections officers (pp 282-84); covered issues brought to respondent's or his APAs' attention by law enforcement personnel (pp 305-06, 1443-44); and included guest speakers from the Prosecuting Attorneys Association of Michigan (p 307).

There is yet another problem with respondent's claim that the 2001 through 2011 LEORTC trainings represented his outside employment. With respect to at least one of those sessions, conducted on September 23, 2009, respondent submitted a voucher seeking reimbursement from the county's drug forfeiture account for the food he had purchased for that training session. (E's Exhs. 92d; 92l; 97s). That submission clearly demonstrates that not only were these training sessions not respondent's outside employment, he knew that they were not.

The City of Lapeer appearances were also connected to respondent's position as the elected prosecutor, rather than outside employment. They were made on county time; the files and payments were delivered to respondent's county office; and his authority to make plea offers was based on his position as a prosecuting attorney. There was no clear line between his position as the county prosecutor and his appearances in the city cases. Any compensation for these trainings was county funds that he should have submitted to the treasurer's office (pp 932-36, 1953-59).

Although the master did not address respondent's claim that he could justify his receipt of the LEORTC and City of Lapeer money as "outside employment," the master determined that the evidence "[did] not support the allegation of financial improprieties related to the fees the prosecutor's office received from the LEORTC or the City of Lapeer" (MR pp 7-8). He primarily rested his conclusion on his mistaken beliefs, discussed above, that the county had no policy for handling county contracts and county money, and on his uncritical acceptance of respondent's claim that he was merely offsetting money he had spent on behalf of the prosecutor's office over the years.

The preceding section of this brief, which addresses the master's findings with respect to Count III, summarizes the evidence that there was, in fact, a Lapeer County policy that governed respondent's entering into financial arrangements with the LEORTC and the City of Lapeer, and

his handling of the money his office received as a result of those arrangements. That section also notes that even if there was *no* policy, respondent was not entitled to treat his office's receipts as his own piggybank. The master's conclusions with respect to the funds that are the subject of Counts IVA and IVB are just as mistaken, for exactly the same reasons, as were his conclusions that it was not misconduct for respondent to take the money that is the subject of Count III.

The weakness of the master's conclusions is underscored by the fact that even respondent proffered a different reason he, rather than the county, was entitled to this money. Respondent argued that he let his employees have flex time, and Ms. Wilson's 2011 and 2012 trainings were done on flex time (pp 353-355). The purpose of respondent's claim was to attempt to establish that Ms. Wilson did not do the training on county time, and therefore the county was not entitled to the money that was paid for the training. There was no reason for respondent to make this claim if, as the master determined, he was entitled to take money that was paid to his office for the training.

It is telling that respondent's justification is false. In fact, APA Wilson specifically asked respondent for comp time for the training, and he denied her request, explaining that his office did not offer anything like that (pp 1486-86). Mr. Turkelson and Mr. Hodges also testified that the trainings and City of Lapeer coverage were done on county time, not "flex time" (pp 1244, 1467, 1712-16). The master did not address respondent's claim or the fact that it was false.

Had the master addressed it, he would have had to grapple with the fact that if respondent was right – if APA Wilson provided the 2011 and 2012 LEORTC trainings on her own time – respondent *still* had no right to those funds himself. Rather, she did. Likewise, if the APAs did city cases on their own time, respondent had no right to those funds. They did. Either his staff did the work on county time, in which case the money belonged to the county, or they did it on their personal time, in which case the money belonged to the staff. In either case, respondent was not

entitled to it. It is both shameless and illogical for respondent to pocket money for work he claims his APAs did on their own time.

Contrary to the master's conclusion respondent's taking the LEORTC and City of Lapeer money was misconduct as charged in Counts IVA and IVB.[39]

COUNT V - Improper Reimbursements

The discussion with respect to Count III, above, mentions respondent's claim that he was entitled to help himself to various moneys paid to his office to compensate various expenses he says he made on behalf of his office. As we note in that discussion, one of the several problems with respondent's argument is that many of the expenses for which he claims reimbursement were not for public purposes for which he would be entitled to reimbursement in any event. Count V is somewhat similar. It charged that respondent submitted fraudulent reimbursement vouchers for his staff's Christmas and Secretaries Day luncheons and other food items, and deposited the proceeds into his personal bank accounts. In each voucher respondent represented that the expense was incurred as part of "training" (E's Exhs. 97aa, 97bb, 97hh, 103a through 103o).

The master concluded that the evidence did not establish the misconduct charged in Count V (MR p 8). The report identified two bases for this conclusion: 1) nearly all of the master's discussion concerned certain State of Michigan finance guidelines which, the master concluded, may not have applied to, or been known to, respondent; and 2) there was sufficient evidence to conclude that the lunches and food items really were for training (MR p 8).

[39] The misconduct charged and proved under Counts IVA and IVB was: a) violation of the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A); b) conduct prejudicial to the proper administration of justice, contrary to MCR 9.104(1); c) conduct that exposes the legal profession to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); d) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3); e) conduct that violates MRPC 8.4, 8.4(c) and MCR 9.104(4); e) conduct that violates criminal laws of Michigan, to wit, MCL 750.175 (embezzlement by a public official over $50) and MCL 750.249 (Uttering and Publishing); and f) conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b).

Whether or not the state guidelines existed or were known to respondent is largely irrelevant. The central question of Count V is whether the vouchers accurately represented that the expenses were for "training" in the first place. The master concluded, in a single sentence, that they were, but did not identify any facts to support this conclusion. His conclusion overlooked the substantial evidence that the vouchers were false.

Some history is helpful to demonstrating the vouchers' falsity. Prior to 2012 it had been the longstanding tradition of the Lapeer prosecutor's office to have annual Secretaries Day and Christmas luncheons (p 388). These social lunches were not an expense the county would reimburse (p 976). In order to be reimbursable, the luncheons and donuts had to be for training (pp 974-975, 976, 1058, 1951, 1991), because public funds can only be used for a public purpose (pp 975, 1952-1954).

Between 2001 and 2011 respondent did not seek reimbursement from the county for any of the luncheon and donut expenses, a fairly clear indication that he knew they were not reimbursable.[40] Then, in 2011 and 2012, he sought reimbursement for two Christmas, and one Secretaries Day, luncheons (R's Ans. ¶¶ 383-385, 389-392, 413-415; E's Exhs. 97aa, 97bb, 97hh). As even respondent admitted and other witnesses established, the lunches for which he sought reimbursement were no different than the previous Christmas and Secretaries Day lunches for which he had not sought reimbursement (pp 438, 443-44, 640-42, 1478-80, 1716-18, 1789-93).

On December 16, 2011, the luncheon tab, exclusive of tip and alcohol, was $125.25 (p 408; R's Ans. ¶382; E's Exh. 95 p 159). On December 20 respondent signed and submitted an "invoice voucher" to the Finance Department seeking reimbursement in that amount from his office's General Fund, in which he represented that the expense was incurred during a "Legal

[40] Respondent did, however, improperly include them in Exhibit 95, his purported expenses on behalf of the office that, he claimed, entitled him to his secret reimbursements.

Updates/Training Luncheon" (R's Ans. ¶383; E's Exh. 97aa). Based on that representation, the county approved the payment (p 955).

On April 25, 2012, the luncheon tab, without gratuity, was $174.61 (p 410; R's Ans. ¶390-391; E's Exh. 97bb). Respondent signed and submitted an "invoice voucher," again seeking reimbursement in that amount from his office's General Fund, in which he represented that the expense was incurred during a "Staff Development Luncheon" (E's Exh. 97bb). Based on that representation, the county approved respondent's voucher (p 960; E's Exh. 97bb).

On December 14, 2012, the luncheon tab was $180.66, including gratuity of $34 (p 429; R's Ans. ¶¶413-414). Three days later, respondent signed and submitted an "invoice voucher" to the Finance Department seeing reimbursement of $180.66 from the Corelogic 5000 Account (discussed further below) (R's Ans. ¶415; E's Exh. 97hh). Respondent's voucher represented that the $180.66 expense was incurred in connection with "training" (R's Ans. ¶ 416; E's Exh. 97hh). Shortly after respondent submitted this voucher to the Finance Department, county controller Biscoe contacted respondent to inquire whether the event was a Christmas luncheon. Mr. Biscoe explained that if it was, the expense was not reimbursable by the county (pp 968-70). Respondent advised Mr. Biscoe that the event was "training" (*id.*). Mr. Biscoe accepted respondent's representation "at face value" since he was the county's chief law enforcement officer, and authorized the reimbursement (p 970).

It had also long been the tradition of respondent's office that APAs would bring in donuts for the staff on Friday mornings. Respondent never sought reimbursement for this until November 2012, when he instructed his legal staff to start seeking reimbursement, and directed them to write "training" on the vouchers they submitted for that purpose (pp 1472, 1812; R's Ans. ¶¶608-610). In accord with respondent's instructions, each donut voucher represented that the expense had

been incurred as part of "training," and requested payment from the Corelogic 5000 Account (pp 973-976; E's Exhs. 103a – 103o).[41]

Contrary to respondent's repeated representations (pp 485, 496; R's Ans. ¶¶385, 393, 416, 610; E's Exhs. 97aa, 97bb, 97hh, 103a-103o), the 2011 and 2012 luncheons did not include any training or "general discussions of the operation of the office." Again, they were no different from the lunches for which he had not even tried to obtain reimbursement. The fact that they were social, not training, is clear from respondent's own words. When he was initially questioned by Det/Sgt. Pendergraff about the reimbursable purpose of these expenses, he never mentioned training. Rather, he only, and repeatedly, referred to them as "Secretaries Day" and "Christmas" lunches, to which he treated his staff as a reward for hard work and lack of raises (p 497; E's Exhs. 90c p 5, 90c p 7, 90d p 13, 90e pp 2, 4). That is not "training." It was much more recent that respondent began to explain that the purpose of the luncheons was to allow employees to freely voice their grievances or discuss any "festering issues."

The circumstances surrounding the luncheons confirm what respondent *first* told Det/Sgt. Pendergraff. There were no memos, agendas, or emails to advise the participants of the topics to be covered (pp 390-91, 398-99, 430-32, 1718). At least one office calendar from 2011 listed a December event as "Office Christmas Lunch" (pp 391-392; E's Exh. 96j). Respondent purchased gift cards for those who did not attend, suggesting – just as he told Det/Sgt Pendergraff – that the luncheons were a reward, not a training session (pp 398-99, 442, 496, 3325; E's Exh. 90d p 2).[42]

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[41] This account was funded with $5,000 paid by Corelogic Tax Services, LLC, as part of a settlement agreement of a forfeiture matter regarding property located in Lapeer County (p 420; E's Exh. 148; R's Ans. ¶400). APA Steve Beatty, acting as county corporation counsel, had represented Treasurer Miller and her office in that matter (pp 413-419; R's Ans. ¶398).

[42] Respondent claimed that he only purchased gift cards for members of the support staff in recognition of Secretaries Day. That claim is contradicted by his Christmas luncheon receipts, and subsequent testimony, showing the purchase of Christmas lunch gift cards at two separate Christmas luncheons - on December 14, 2009 (p 442) and on December 17, 2010 (p 3325).

It was clearly established by numerous witnesses that *all* of his office's Christmas and Secretaries Day luncheons were nothing more than social events in recognition of a holiday or the support staff (pp 640-42, 1478-80, 1716-18, 1789-93).[43]

The evidence also established that respondent's office did not conduct any training for which the APAs purchased donuts. Respondent testified that the donut vouchers submitted to the county starting in November of 2012 were properly labeled as "training" because the donuts were made available to victims, witnesses, police officers, and other county employees (pp 3291-94). In fact, the vouchers (E's Exh. 103a-103o) were only labeled as "training" because respondent instructed the officer manager, Leigh Hauxwell, to label them that way (p 1812). The one and a half to two dozen donuts/pastries were purchased by the on-call APAs for the office's 14 to 16 staff members (pp 1468, 1471-72, 1725-26, 1809-13). These items were placed in the private back hallway by respondent's office, near a door that required a key or a key card to access (pp 1470, 1809-12). The fact that an occasional police officer, witness, or victim, was not prohibited from taking one of the pastries does not change the purpose behind their purchase to "public" or for "training" (p 1954). In fact, respondent himself said there was no training on those Fridays for which the donuts were purchased (p 491).

Respondent also claims the 2012 Christmas luncheon voucher and the donut vouchers were properly submitted for reimbursement from the Corelogic 5000 Account because the account was intended to be used for anything that he, in his sole discretion, considered of "benefit to his office"

[43] The closest the record comes to supporting respondent's claim that the lunches were for "training" is the testimony of Cathy Strong and Tom Sparrow. Ms. Strong testified that twice a year (i.e., the Christmas and Secretaries Day lunches), they would close the office and "sit down together and communicate and talk about things, talk about office issues, talk about family matters." She also said this was "a building of relationships in the office to strengthen our work relationships" (p 2323). Mr. Sparrow similarly testified that the lunches were team-building events (pp 2160-2167). Both Ms. Strong and Mr. Sparrow seemed anxious to support respondent's position, and this is the best they could do. What is noteworthy is that if the events they describe count as "training," then every public office Christmas and Secretaries Day lunch is a "public purpose" for which managers throughout government should be seeking reimbursement from public funds.

(pp 478-79, 964-66). He knew better. Mr. Biscoe and Ms. Miller testified that the Corelogic 5000 Account was not created for respondent to use in his "sole discretion," but was created for future trainings in the area of foreclosure and other civil matters of relevance to the county (pp 964-966, 2102). That makes sense, because the funds in the Corelogic account were proceeds of a foreclosure case in which APA Beatty had provided legal representation to the Treasurer's Office. It was logical for the county to want respondent's staff to be more versed in corporation counsel matters. Mr. Biscoe's and Ms. Miller's testimony about the purpose of the account is consistent with good sense and good county practices. Respondent's claim that the account was for his sole discretion is consistent with neither. There was *no* account from which he was entitled to be reimbursed for parties and donuts.

Respondent makes the affirmative defense that these reimbursements were not misconduct because the county approved them. That is circular. County Controller John Biscoe testified that "… in any county, even as small as we are, the whole system is built on trust. The signatures are authenticating that it is a proper expenditure" (p 956). Mr. Bisoce trusted his department heads (pp 870, 956), and trusted respondent when he said the expenditures involved training" (p 956). As Mr. Biscoe stated, "… if the chief law enforcement officer said it was training, I took his word for it" (p 960). The only reason the county approved the reimbursements was because of respondent's misrepresentations. He cannot use the fraudulently obtained approval as a defense to the fraud.

Contrary to the master's finding, the evidence clearly established that the luncheons and donuts identified in Count V had nothing to do with training sessions. It was misconduct for respondent to submit false vouchers, and to obtain reimbursement for those items.[44]

[44] The misconduct respondent committed, as charged in Count V, included: a) conduct in violation of the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A); b) conduct prejudicial to the proper administration of justice, contrary to MCR 9.104(1); c) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); d) conduct

COUNT VI – ABUSIVE DEMEANOR

Count VI charged respondent with using improper language and engaging in other improper behavior during his October 5, 2016, interaction with Bonnie Oyster and her son Samuel. The master found that this misconduct was not established (MR p 9). His report regarding this count is another instance of mischaracterizing and excluding important facts.

The improper demeanor alleged in this count arose out of respondent's support of attorney David Richardson for a seat on respondent's court, and the manner that support played out in his conversation with the Oysters. Mr. Richardson, respondent's friend and law school classmate, was a write-in candidate for the court against the incumbent, Hon. Nick Holowka (pp 532-33). The master did not acknowledge, or reckon with, the undisputed evidence that respondent believed Judge Holowka was part of a "conspiracy" against him, along with other members of his bench and other county officials and the county sheriff (pp 3368-70). Respondent blamed Judge Holowka, at least in part, for the fact that he had been criminally charged with embezzling county money in 2014 (p 3364). This is the frame of mind with which he approached Mrs. Oyster's house, after he discovered that the Richardson campaign sign he had put up the previous evening was removed while a sign supporting Judge Holowka remained intact.

The master did not address respondent's strong feelings about Mr. Richardson and Judge Holowka. He also did not note that when respondent appeared at Mrs. Oyster's door to complain, she told him that no one had sought the family's permission to put up the Richardson sign (R's

contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3); e) conduct in violation of MRPC 8.4, 8.4(c) and MCR 9.104(4); f) Conduct that violates a criminal law of Michigan, to wit, larceny by false pretenses; MCL 750.218, and g) conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b).

Ans. ¶432), in response to which he told Mrs. Oyster that he did not have to seek anyone's permission, and that no one had the right to take the sign down (pp 1134, 1136).

Mrs. Oyster and her son testified that she was so frightened by the way respondent talked to her she began to shake and cry due to his aggressive and belligerent tone of voice and use of angry profanities (pp 1140, 1141/22, 1164, 1167, 1172), his agitated pacing at her front door (p 1138), and his refusal to accept her answers as to what happened to the campaign sign (pp 1134, 1139). Mrs. Oyster said that no one had *ever* spoken to her the way respondent did (p 1141). The master so minimized the fear respondent caused in Mrs. Oyster that he characterized her as merely feeling "uncomfortable" (MR p 9).

Respondent testified before the master that Mrs. Oyster was not upset and did not cry in reaction to his conduct and behavior (pp 544-546; R's Ans. ¶445). In concluding that Mrs. Oyster was merely "uncomfortable," the master did not resolve the conflict between her and Samuel's testimony on one hand and respondent's testimony on the other. The preponderance of evidence – i.e., the testimony of Mrs. Oyster and her son, as compared with the testimony of respondent, whose credibility has been repeatedly impeached – is that his testimony was false.[45] The preponderance of the evidence also established that respondent was excessively abusive to the Oysters, as charged in Count VI.[46]

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[45] There is reason to doubt respondent's credibility with respect to his interaction with the Oysters, in addition to the doubts that exist due to his many false statements that are discussed in this brief. Mrs. Oyster and her son both testified that respondent told them Judge Holowka had been a "pain [or a thorn] in his ass for the past 30 years" (pp 1138, 1171). When first asked by the Commission about that statement, he categorically denied having made any part of it (p 3363). He changed his story once the complaint was filed, to admit the comment and deny only his use of the word "ass" (pp 3360-64; R's Ans. ¶444).

[46] The evidence supporting Count VI showed that respondent committed: a) misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205; b) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); c) improper conduct that erodes public confidence in the judiciary, in violation of MCJC Canon 2(A); and d) failure to treat others with courtesy and respect, contrary to MCJC Canon 2(B).

COUNT VII – FAILURE TO DISCLOSE OR DISQUALIFY

The master correctly determined that respondent improperly failed to disclose his relationships with Michael Sharkey, Dave Richardson, and Tim Turkelson when he presided over cases in which those attorneys appeared, or to disqualify himself from those cases, as charged by Count VII. Although the report reaches the correct conclusion, it does not cite to the parts of the record that support that conclusion. The support can be found in Examiner's Proposed Findings of Fact & Conclusions of Law, at pp 36-42.[47]

MISREPRESENTATIONS

Misrespresentations Charged in Count VIII

Count VIII alleges that respondent made misrepresentations in connection with his criminal, civil, and disciplinary cases. The master dismisses all of them in four conclusory paragraphs, not finding a preponderance of evidence that respondent made any deliberately false statements. In fact, the evidence proved that respondent made deliberate misrepresentations to the MSP, to the Judicial Tenure Commission, in his civil case, and to Judge Neithercut.[48]

As discussed at pp 22-25 above, respondent deposited a money order from a bad check case, and gave $15 less than the total to his staff to be distributed to the victim. As alleged in ¶¶ 520 – 27 of the complaint, in his July 2016 and February 2017 statements to the Commission,

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[47] The evidence supporting Count VII showed that respondent committed: a) misconduct in office and conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution Article 6, Section 30 and MCR 9.205; b) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); c) failure to establish, maintain, enforce and personally observe high standards of conduct so the integrity and independence of the judiciary may be preserved, contrary to Canon 1; d) conduct involving impropriety and the appearance of impropriety, in violation of Canon 2(A); e) failure to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, contrary to Canon 2(B); and f) failure to disclose possible grounds for disqualification, contrary to Canon 3(C) and MCR 2.003.

[48] Respondent's boldest false statements were his denials that he pled to a crime in his criminal case. These false statements are charged in Count VIII, but were also charged in Count I. They were fully explored under Count I of this brief. In addition to his false statements to that effect, he said essentially the same in his answer to the January 14, 2019, 28-Day letter when he claimed he understood he was only pleading "no contest… to an interpretation MCL 21.44." (R's Ans., ¶508 - ¶511; p. 3332-33)

respondent denied keeping that $15; denied that he failed to forward the $15 to the treasurer's office; denied failing to send $35 to Hartland, which was entitled to that fee; and claimed that he forwarded the entire amount of the money order to the treasurer's office to voucher to the appropriate parties. (p 718-19; R's Ans. ¶73). The evidence shows that respondent's denials and claims about this money were false.

Respondent's actions with respect to the Bounce Back contract, from his entering into it secretly to his secretly keeping its proceeds, violated Lapeer County policy that was in effect at the time he did these things. Respondent's attempts to portray his actions with respect to that money take a serious hit if he knowingly violated the county's policy. He was aware of the policy. He tried to excuse his noncompliance with the policy by telling the Commission the Bounce Back contract was not a county contract. (R's Ans. ¶[85 a; p. 226; 237-38; 248-50) His denial was false. (See full discussion above on pp. 27-38)

When Det/Sgt Pendergraff was investigating respondent for embezzling money from his office, he could not deny taking the money. The bank records were clear. Instead, from the beginning he has tried to excuse his taking on the basis that he was entitled to it, as compensation for money he spent on his office. He did that with Det/Sgt Pendergraff as alleged in ¶¶ 486 – 487 of the complaint, by telling him that he spent his money on lunches for crime victims, flowers, cards, water, cakes for staff, and plaques for staff and police officers. (E's Exh. 90d p 2-3; p 6; p 7; E's Exh. 90f p 7) These statements were false, in that crime victims' meals were paid by victims' services (pp 1782-83), flowers and cakes were paid for by staff (p 1800-1802), and plaques were paid for with office contributions. (p. 1474).

Respondent repeatedly claimed to the Commission, Judge Dignan, Judge Neithercut, and the master that he had spent over $7,700 out of his own pocket on his former office (E's Exhs. 1p,

126, 95 p 158; p. 711; p 714; p 3146-47; p. 3150; p 3318; p 3321-22; p. 3229) As discussed in greater detail above, respondent made false statements about many of the items on that list.[49]

- Respondent claimed to the Commission that *he* paid for the 2003 through 2011 Secretaries Day luncheons (E's Exh. 95 p 158). However, when first interviewed by Det/Sgt. Pendergraff, respondent stated that he "…always made the attorneys pitch in to buy the lunch[es]…" (E's Exh. 95, E's Exh. 126; E's Exh. 90d, p. 13).
- Respondent falsely told Det/Sgt. Pendergraff he had spent $1800 for office water out of his own pocket (pp 709, 3102; E's Exh. 90f, p 5). He later misled the Commission by giving it receipts for a little over $1800 in water purchases he had purportedly made, in response to the Commission's inquiries about his out-of-pocket office expenses (E's Exh. 95 pp 81-109). As discussed above at pp 40, respondent did not pay for the water for his office.
- Respondent falsely claimed that the 2011 and 2012 office luncheons included training for his staff, as discussed above at pp 51-53 (p 1788; E's Exhs. 97aa, 97bb, 97hh; R's Ans. ¶¶536-539; p. 743-44). He also falsely claimed that he could be reimbursed for the 2003 through 2011 luncheons, on the basis that they were for training (p 3043) In his January 14, 2019, answer to the 28-day letter he told the Commission that the 2011 Christmas luncheon was a "Legal Update/training," the 2012 Secretaries Day lunch was a "staff development" lunch, and the 2012 Christmas lunch was for training (R's Ans. ¶¶571; 583; 597). As discussed in more detail at pp 51-53 of this brief, these luncheons were all social, not training – and especially not "legal update" – events (pp 640-42, 1265, 1479, 1562-64, 1717-18, 1788-95, 2037).

[49] Respondent provided his receipts to Det/Sgt. Pendergraff over the course of four separate meetings. (E's Exh. 90c; 90d; 90e; 90f)

- Respondent misled the Commission by providing a receipt from a bar among the receipts he claimed were his reimbursable office-related expenses (E's Exh. 95 pp 1, 158). The receipt is dated for a Friday evening at 9:21 pm (pp 521-23; E's Exhs. 95 p 1, 126; p. 521-523) Clearly, a Friday night at a bar is not an office-related expense.

Respondent also provided the Commission a list of items, totaling $3050.73, which he claimed were his reimbursable out of pocket expenditures on other office-related items (E's Exhs. 95 p 159, E's Exh. 126; p. 3152). In support of that list, respondent provided receipts which are clearly false and/or plainly not subject to reimbursement as a public purpose.

- Respondent listed a $665 Zone Productions expenditure without explaining what it was (E's Exhs. 95 p 159, 126). On cross examination, he admitted it was for a child's slide that was damaged while he was at a child's birthday party at the home of one of his APAs (p 3331). He had to know that paying for a child's slide under this circumstance was not a "public purpose" expense.
- Respondent listed an expenditure dated September 11, 2003, which he claimed was for a Bar Association lunch he had sponsored (p 529; E's Exhs. 126, 95 p 159). In support of that claim, in Tab C, he included a receipt for $113.75 (E's Exh. 95 p 170). However, that receipt is preprinted by the restaurant as "training check – do not pay."
- Respondent listed as reimbursable out-of-pocket expenses $40 he incurred on December 14, 2012; $33 he incurred on April 25, 2012; and $49.45 he incurred on December 16, 2011, without explaining what they were (E's Exh. 95 p 159). These were actually for tips and alcohol spent at the Christmas and Secretaries Day lunches discussed in earlier in this brief (pp 408, 409-10, 434-35, 3329, 3330). Respondent admitted knowing that tips and alcohol were not proper public purpose expenses subject to reimbursement (pp 363, 408-

09, 3328). His including them as reimbursable was another part of his attempt to mislead the Commission regarding his "offset" theory.

Respondent also represented to the Commission, through his Tab C, that he had contributed approximately $400 per year from 2001 until 2008 to the office "Flower/Cake/Card" fund (E's Exh. 95 p 163). That was false, as discussed in more detail under Count V of this brief above. Respondent contributed *no* money to the fund from 2006 through 2008, and there is no evidence that he contributed anything to it before 2006, other than his own testimony to that effect. Leigh Hauxwell explained that she took over the fund from her predecessor at the beginning of 2006, and continued her predecessor's collection practices, which did not include collecting from respondent. That respondent never contributed to the fund is supported by the facts that:

1) In the entire history of the fund under Hauxwell's control, from 2006 through 2012, respondent contributed nothing (pp 1803, 1805, 1831). There is nothing to indicate that things were any different prior to 2006.

2) During the period covered by Ms. Hauxwell's ledger, 2009-2012, the staff contributions to the fund were always more than enough to cover its expenses, and those total expenses were in the neighborhood of $400 per year. Staff have always contributed to that fund. [cite] There is no reason to think the staff contributions were so much lower, or the fund expenses so much higher, in the years 2001-2005, that respondent needed to add $400 of his own money in each of those years.

Just as respondent could not have accidentally claimed he paid for water to which he never contributed, he cannot have accidentally forgotten that he never contributed to the fund on which he relies to establish his reimbursable expenses.

Respondent testified falsely that he was unaware of Lapeer County's "Grants, Contracts, and Agreements" policy (p. 172-76). He needed to deny knowledge of the policy to help excuse his secrecy with the money he took. To the contrary, though, he was well aware of the policy, as discussed at p 32 above. (E's Exh 89 p 70).

Respondent's answer to the 28-Day letter falsely told the Commission that he did not use a confrontational and angry tone of voice during his conversation with Mrs. Oyster, which is discussed under Count VI above. (pp 3360-61). That was false.

The evidence discussed in this section shows that respondent made knowing misrepresentations to the MSP, to the Commission, and in his deposition.[50]

Misrepresentations at the Formal Hearing

In addition to the misrepresentations he made as charged in Count VIII, respondent also made materially and deliberately false statements during the hearing before the master. A few are summarized here for the Commission's consideration under MCR 9.202(B) (which makes it misconduct to make false statements to the master) and MCR 9.235 (which permits the Commission to amend the complaint at any time before the Commission's determination of the case). Whether or not the Commission directs that the complaint be amended, the misrepresentations discussed below are highly probative of respondent's credibility.

[50] Respondent's knowingly false statements were: a) misconduct in office and conduct clearly prejudicial to the administration of justice, as defined by Michigan Constitution Article 6, Section 30, MCR 9.104(1) and MCR 9.205; b) conduct in violation of the standards imposed on members of the bar as a condition of the privilege to practice law, contrary to MCR 9.103(A); c) conduct that exposes the legal profession and the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); d) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3); e) conduct in violation of MRPC 8.4, 8.4(c) and MCR 9.104(4); f) knowingly making misleading statements to an officer of the MSP during a criminal investigation Obstruction of Justice, MCL 750.478a; g) conduct involving fraud, deceit, or intentional misrepresentations, including intentional misrepresentations and misleading statements to the Judicial Tenure Commission, contrary to MCR 9.205(B); h) failure to establish, maintain, enforce and personally observe high standards of conduct so the integrity of the judiciary may be preserved, contrary to Canon 1; i) irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of Canon 2(A); j) impropriety and the appearance of impropriety, in violation of Canon 2(A); and k) failure to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, contrary to Canon 2(B).

Respondent testified before the master that Judge Neithercut did not accept his plea to MCL 750.485. This testimony, and its falseness, is described above at fn 27.

Respondent testified that he spent over $7700 out of his pocket, on his office, during his tenure as Prosecuting Attorney (pp 709-11, 714; E's Exhs. 1p, 126, 95 p 158). For the reasons discussed at pp 49-54 above, this testimony was false.

Respondent falsely told the master that he only purchased gift cards for staff members who had missed the Secretaries Day lunches, not the Christmas lunches (p 399). His purpose in drawing this distinction was to help his claim that the Christmas lunches were for "training." However, the evidence showed that respondent also provided gift cards for staff members who did not attend at least two Christmas lunches. When he was first interviewed by Det/Sgt. Pendergraff, he explained that a Christmas lunch receipt from E.G. Nicks Steakhouse, dated December 14, 2009, included gift cards for the individuals who had missed the lunch (E's Exh. 90d p 2; p 442). In his July 6, 2016, answers to the Commission's request for comments, in Tab C, respondent included another Christmas receipt from another restaurant, Blind Fish/Lucky's, dated December 17, 2010, which included a charge for gift cards (E's Exh. 95 p 2; p 3325).

As noted in the Count VIII discussion above, respondent falsely told the Commission that the office luncheons for which he claimed reimbursement included training for his staff. He made this same false claim in his testimony to the master (p 1788). He also told the master, as he had told the Commission, that he could properly be reimbursed for the 2003 through 2011 lunches because they also were for training (p 3043). For the reasons discussed above, respondent's testimony to the master was as false as his statements to the Commission.

Respondent also falsely told the master he was unaware of Lapeer County's "Grants, Contracts, and Agreements" policy (pp 172-176; p. 204). As discussed above under Count III and IV, he was well aware of the policy. (E's Exh 89 p 70).

Respondent falsely testified at the formal hearing that his APAs handled trials, including jury trials, on behalf of the City of Lapeer (p 334). Respondent's counsel made this representation in his opening statement and respondent mirrored it when he testified on July 2, 2019, that his APAs had "occasionally" conducted jury trials on behalf of the City of Lapeer (pp 333-34). That statement was false.

Current court administrator Michael Delling testified that between 1996 and 2013, only two City of Lapeer cases went to a jury (p 3393; E's Exhs. 153 - 155). Neither was handled by APAs (pp 3392-96, 3405).[51] District Court Judge Laura Barnard, who has been on the bench of the 71-A District Court in Lapeer since 1990, testified that in all those years, she did not have any county APAs conduct any trials on behalf of the City of Lapeer (pp. 3403-3404). Tim Turkelson, who had been a Lapeer County APA from 1995 until 2005, confirmed that during that time frame the LCPO APAs did not conduct any trials, jury or otherwise, on behalf of the City of Lapeer (p. 1247).

[51] Respondent further demonstrated the unreliability of his testimony with respect to including charitable contributions among the purported expenditures for which he could properly claim reimbursement that he sent to the Commission in July 2016. He testified to the master that he only included those contributions in Tab C by mistake; that he realized the mistake as soon as Tab C was transmitted to the Commission's office; and that he left it up to his attorney to correct it (pp 401-02). However, he later changed his testimony, claiming that although he had reviewed his July 2016 answers "right up to the day or the same day" they were transmitted to the Commission's office, he did not realize the Tab C mistake until some unknown time thereafter (p 503). In fact, he did not clarify the Tab C "mistake" in his three statements to the Commission during the two years after he provided the charitable contributions – not in his February and May 2017, or his April 2018, answers to the Commission's additional questions [is there a cite in the record for this?]. In the April 23 answer, in response to the Commission's request that he confirm the correctness and accuracy of his prior answers, he refused on the basis that the request was "unreasonable" (p 507). The first time respondent corrected the Tab C mistake was in his January 14, 2019, answers to the Commission's 28-Day Letter.

The evidence discussed in this section shows that respondent made knowing misrepresentations in his testimony before the master.

SANCTIONS

The clear preponderance of evidence establishes that respondent committed misconduct as alleged in each count of the complaint. That misconduct included false statements and violations of criminal statutes, in addition to violations of the canons. The misconduct encompassed nearly two decades, including both before and after he became a judge. For the reasons stated below, disciplinary counsel believe the appropriate sanction is to remove respondent from the bench.

The Supreme Court's "primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public." *In re Ferrara*, 458 Mich 350, 372 (1998). The Court established guideposts for the appropriate sanction in *In re Brown*, 461 Mich 1291, 1292-3(2000).

Brown observed that "[t]he most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." Id. at p 1292. The judicial disciplinary case that is most analagous to the financial misconduct demonstrated in this case is *In re James*, 492 Mich 553 (2012). The Court removed Judge James from the bench because, in large part, she had engaged in financial improprieties involving public funds and made intentional misrepresentations to the master and Commission. The Court stated that Judge James's pervasive treatment of public funds as "her own 'publicly funded private foundation," together with her misrepresentations, made it "necessary and appropriate" to remove her from the bench.

Like Judge James, respondent engaged in a long pattern of financial improprieties from the time he became the elected county prosecutor until he left office more than a decade later. Like Judge James, respondent came into possession of these public funds by virtue of his elected

position. *Unlike* Judge James, who at least opened a bank account for the funds in question and thus allowed SCAO to conduct a proper audit, respondent, with a master's degree in finance and accounting, not only did not open a dedicated account for the funds he took, he deposited those funds into his personal accounts without so much as a personal ledger or other accounting record.

A. The *Brown* Factors

Brown specified seven factors to consider when choosing a sanction:

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

The evidence established that respondent's committed multiple lengthy patterns of misconduct, including:

1) Taking money for work done by his APAs on county time to provide case coverage for the City of Lapeer and to conduct trainings;

2) Contracting with a company to collect on his office's bad check cases, using his APAs to administer that program on county time, and keeping the fees for himself;

3) Fraudulently obtaining reimbursements from his county for social functions and office refreshments;

4) Making misrepresentations, including misrepresentations about funds he supposedly spent on his office and misrepresentations about having entered a plea in a criminal case.

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

As the master found with respect to Count VII:

> records from more than 100 civil and criminal cases…establish that Respondent did not disqualify himself from Richardson's, Sharkey's, or Turkelson's cases. He also did not provide sufficient on the record disclosures of his relationships with these individuals in cases in which they were the attorneys of record, and did not obtain written or on-the-record waivers of any potential conflicts of interest from the parties, as required by MCR 2.003(E) and Canon 3(C) . . . .

At the time respondent was presiding over Mr. Sharkey's cases, he owed Mr. Sharkey over $400,000 for defending his criminal case. He did not disclose that fact to the parties appearing

before him. A judge's conduct must not undermine the public's faith that judges are as subject to the law as those who appear before them. *In re Noecker,* 472 Mich 1, 13 (2005). Respondent's conduct clearly did not instill such belief in those who had any dealings with his court. This factor points to 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.***

Respondent's misconduct was clearly prejudicial to the actual administration of justice. As stated above, he failed to disclose his relationships with Mr. Richardson, Mr. Sharkey, and Mr. Turkelson. By doing so, he deprived litigants in over a hundred cases of their right and the ability to make an informed decision whether they wished to have him preside over their cases. Respondent made misrepresentations in a lawsuit he filed. He made misrepresentations to the MSP during their criminal investigation, to the Commission during their disciplinary investigation, and to the Master during the Formal Hearing. This factor weighs in favor of a harsher sanction.

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

Some of respondent's misconduct, such as his embezzlement from and defrauding of Lapeer County and his mistreatment of the Oysters did not implicate the actual administration of justice. However, as just noted with respect to the third factor, a substantial part his misconduct did. The fact that some did not does not diminish the impact of the misconduct that did impact the actual administration of justice.

In *In re Adams,* 494 Mich 162 (2013) the Supreme Court stated that "there is not much, if anything, that is more prejudicial to the actual administration of justice than testifying falsely under oath." 494 Mich at 182. As noted above, respondent testified falsely under oath during his November 15, 2017, deposition when he claimed that he did not plead to a crime.

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

All of respondent's misconduct was deliberate and premeditated, with the exception of his mistreatment of the Oysters:

1) Taking money for work done by his APAs on county time to provide case coverage for the City of Lapeer and to conduct trainings;

2) Taking fees from the companies that collected on his office's bad check cases;

3) Obtaining fraudulent reimbursement for parties and refreshments for his office;

4) Falsely characterizing his plea in his criminal case; and

5) Concealing his conflicts of interest with Mr. Sharkey and Mr. Turkelson;

This factor again weighs heavily in favor of the imposition of the most extreme 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.***

Respondent's concealment of his conflicts of interest in case over which he presided undermined the ability of the justice system to discover the truth of what happened in those cases. He impeded a criminal investigation by providing false and misleading information to the MSP in its investigation of his embezzlement. He impeded the discovery of truth in his civil lawsuit when he made material misrepresentations under oath during his deposition. He again impeded the discovery of truth by filing a motion to "correct" the record in his criminal case by falsely asserting that he had not pled to a crime. This factor weighs in favor of the most extreme sanction.

(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.***

There is no evidence that respondent's misconduct was based on any consideration of a class of citizenship. This factor is not in issue in this case.

The totality of the *Brown* factors suggests the severest sanction available, which is removal.

B. Other Considerations

The Commission has also considered other factors in past cases, as suggested by the American Judicature Society.[52]

1) The judge's conduct in response to the Commission's inquiry and disciplinary proceedings. Specifically, whether the judge showed remorse and made an effort to change his or her conduct and whether the judge was candid and cooperated with the Commission.

The Supreme Court has endorsed this factor, and has held that misrepresentations, lies, and deceitful testimony are a sufficient basis for removal from office. In *In re Justin,* the Court stated:

> [o]ur judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As the "focal point of the administration of justice," a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. *When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others.*
>
> The Court also noted that;
>
> *[S]ome misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.*
>
> *…Lying under oath, as the respondent has been adjudged to have done, makes him unfit for judicial office.*

Id. at 424 (emphasis original).

As noted above, respondent clearly lied in his November 15, 2017, deposition when he claimed, under oath, that he did not plead to a crime. In addition to this false statement, respondent has persistently refused to acknowledge that he committed any misconduct. At the formal hearing, he repeatedly provided facts and explanations which were discredited by other witnesses and the

[52] "How Judicial Conduct Commissions Work," American Judicature Society 1999, pp 15-16.

great weight of the evidence. Respondent's false statements under oath and his lack of remorse alone are sufficient basis to remove him from office.

2) The effect the misconduct had upon the integrity of and respect for the judiciary.

Respondent's misconduct has been the subject of repeated media coverage in Lapeer County, which casts not only respondent, but the judiciary as a whole, in a negative light. Respondent's misconduct contributes to the public perception that, as testified to at the formal hearing by attorney Carol Ann Jaworski, the Lapeer County judiciary is subject to the workings of an "old boy network" (p 819).

3) Years of judicial experience.

Properly understood, this factor focuses on whether a judge's relevant experience is an aggravating or mitigating factor. Respondent committed his criminal misconduct after many years as a prosecutor. He made his false statements after many years as a prosecutor and, in some instances, after several years as a judge. Respondent's length of relevant service only exacerbates his misconduct.

C. Proportionality

Respondent's misconduct involved not only his court, but the entire Lapeer County government. The clear message of his actions, and the way he has reacted since he was caught, is that those who are in power are free to disregard the laws that govern the less powerful. These were not isolated incidents of bad judgment but a decade-plus pattern of using his prosecutorial and judicial position to benefit himself. His actions eroded public confidence in the judiciary, exposed the court to obloquy, contempt, censure and reproach, and were prejudicial to the proper administration of justice. Embezzling public funds, then lying about it, is so corrosive to the judiciary that only removal from office is proportionate to the misconduct.

D. Costs

MCR 9.202(B) provides in part for the assessment of costs if a respondent engaged in fraud, deceit, or intentional misrepresentation, or made misleading statements to the Commission.

Respondent's fraud, deceit and intentional misrepresentation, including to the Commission, are discussed throughout this brief. He should therefore be ordered to pay the costs incurred by Commission, in an amount disciplinary counsel will identify in an affidavit to be submitted prior to the hearing on these objections.

III. RECOMMENDATION

Respondent's most serious misconduct included embezzlement, fraud, and false statements, including under oath. His misconduct was persistent and premeditated. His misconduct is comparable to, or worse than, the misconduct that caused the Supreme Court to remove judges. *In re James*, 492 Mich 553 (2012); *In re Brennan*, MSC Docket No. 157930. He should be removed as well.

In determining the appropriate sanction the Commission should also take note that respondent's current term expires at the end of this year, and he has expressed his intention to seek reelection. Given his patent unfitness to serve in the judiciary, the appropriate sanction should include removal with a six year suspension, or a just a six year suspension, consistent with *In re McCree*, 495 Mich 51 (2014) and *In re Brennan.*

CONCLUSION

For all the reasons stated in this brief, disciplinary counsel ask that the Commission find that respondent committed misconduct as charged in Counts I-VIII of the complaint. Based on that finding, disciplinary counsel also ask that the Commission recommend that the Supreme Court remove respondent from office and suspend him for a term of years following removal, or in the

alternative, recommend that the Court suspend respondent for six years. Disciplinary counsel also ask that the Commission assess costs, in an amount to be determined by the Commission at or after its hearing on this matter.

Respectfully submitted,

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[objections.PDF]