STATE OF MICHIGAN

IN THE SUPREME COURT

On Review of
the Judicial Tenure Commission

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
Brighton, MI 48116

Respondent.

S Ct Docket No. 157930
JTC Formal Complaint No. 99

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BRIEF IN SUPPORT OF RESPONDENT'S PETITION TO REJECT OR MODIFY TENURE COMMISSION'S RECOMMENDATION

Oral Argument Requested

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On April 8, 2019, the Judicial Tenure Commission (the "Commission" or the "JTC") made written findings of fact and conclusions of law in this matter and, based on those findings and conclusions, recommended that the Honorable Theresa Brennan be removed from office. On April 11, 2019, the JTC complied with MCR 9.223. On even date herewith, Judge Brennan filed with this Court a Petition to Reject the JTC's recommendation. This is the brief in support of that petition required by MCR 9.224(A)(1)(d).

I. BASIS FOR JURISDICTION

Subject to one condition, Art VI, § 30(2) of the Michigan Constitution confers on this Court jurisdiction to discipline the State's judges. That condition is that the Court act "[o]n recommendation" of the JTC. Section 30(2) also directs this Court to promulgate implementing rules. As just noted, the JTC has made a recommendation to the Court to discipline Judge Brennan and, in accordance with MCR 9.223, has filed and served that recommendation. As a result, this Court has jurisdiction over this matter.

II. INTRODUCTION TO THE FACTS[1]

In July 2005, Theresa M. Brennan, then a lawyer residing and practicing in Brighton, Michigan, was appointed by then-Michigan Governor Jennifer Granholm to the 53rd District Court, which serves Livingston County, to fill a vacancy created by the resignation due ill health of longtime Judge Michael Hegarty. Judge Brennan ran successfully in 2006 for the unexpired portion of Judge Hegarty's term, and she was elected to full terms in 2008 and 2014. Despite vigorous opposition each time, Judge Brennan handily prevailed all three times. She campaigned

[1] This brief will not contain an omnibus statement of facts and proceedings of the kind typically found at the beginning of briefs to this Court. Because claims and findings of judicial conduct are so fact-specific and intensive, any distance between the analysis of such findings and their underlying facts would compromise that analysis. Therefore, the facts must stated with the analysis.

hard and was endorsed each time by the local newspaper, the Sheriff, the then-Prosecuting Attorneys and, in 2014, by her Chief Judge.

In 2007, the Supreme Court named Judge Brennan Chief Judge of the 53rd District Court (p 1221, lines 21-23). She had not sought the job. She was re-appointed twice. The first time was without controversy. Not the second time. Early in her second term as Chief Judge, Thomas J. Kizer, Jr., Esq., became, for reasons never revealed, Judge Brennan's nemesis. He sued her twice over how a fellow judge was running the County's drug court; he demanded that the State Court Administrative Office (SCAO) remove her as Chief Judge; and he pressed this Court to remove or not reappoint her. The lawsuits were dismissed; SCAO refused to remove her, finding that Judge Brennan "takes the job as Chief Judge seriously and has performed well;" and this Court appointed her to another term as Chief Judge.

Thereupon, Mr. Kizer turned to filing so-called "grievances" with the JTC and to instigating others to do the same. The first thirty grievances, yes, thirty, which Mr. Kizer filed were dismissed by the JTC, as were all the grievances filed at his prompting. Those dismissals all recited that they were "pursuant to MCR 9.207(B)(1)," which means that the dismissals were "outright," without any caution, imposition of conditions, admonition, or private censure. The JTC "deem[ed] [them all to be] without arguable merit." JTC IOP 9.207(b-5).[2] One letter of dismissal did, however, encourage Judge Brennan to be more generous with adjournments. (Such parsimony is not remotely misconduct.)

Mr. Kizer's thirty-first grievance led to this case. That grievance repeated allegations made in a letter he had had hand-delivered four years earlier to the new Livingston County Prosecuting Attorney. The grievance also contained allegations of supposed misconduct by Judge Brennan

[2] The JTC's Internal Operating Procedures (IOPs) are available online at jtc.courts.mi.gov.IOPs.

unearthed during her divorce case, which had been filed in December 2015. Mr. Kizer, who did not do divorce work, represented Judge Brennan's husband in that divorce and used discovery almost exclusively to build claims of misconduct by her. The Livingston County prosecutor had a few months earlier also filed a grievance against Judge Brennan, but it was based solely on Mr. Kizer's 2013 letter. Curiously, Mr. Kizer and the prosecuting attorney were not called as witnesses by the Examiners -- it does not appear that they were ever interviewed by JTC staff -- and neither attended the public hearing before the Master. Mr. Kizer did, however, sit in the audience at the hearing before the JTC.

Immediately after a Formal Complaint was filed, the Honorable William J. Giovan, a retired judge of the Wayne County Circuit Court, was appointed master. MCR 9.210(B). A public hearing began on October 1, 2018, was adjourned on October 10, resumed on November 19, and concluded that day. A total of 16 witnesses testified, generating over 1,900 pages of transcript, and thousands more pages of exhibits were submitted. On December 5, 2018, the parties submitted written closing arguments, which the Master preferred. He filed a report with the JTC on December 20, 2018. The parties appeared before the Commission on March 4, 2019, and, as noted earlier, on April 8, 2019, the JTC issued its recommendation to this Court.

The JTC agreed with much of what the Master found, but not all. As for the former, the JTC found:

> Judge Brennan had failed to disclose a supposedly "very close, personal relationship" she had with a witness in a murder prosecution being handled by her.
>
> Judge Brennan failed to disclose the specifics of a "close personal relationship" she had with a local lawyer who appeared occasionally before her and whose small law firm also occasionally appeared before her.
>
> Judge Brennan destroyed evidence in her divorce by transferring to another cellphone some data from a cellphone her then-husband

> insisted she return to him. That phone had been provided to her by one of his businesses, and he demanded its return when he filed for divorce.
>
> Judge Brennan made multiple and frequent misrepresentations and false statements in her rulings, to the JTC, and before the Master.
>
> Judge Brennan "was persistently impatient, undignified, and discourteous" to attorneys appearing before her.
>
> Judge Brennan "require[ed] her [judicial] staff members to perform personal tasks [for her] during work hours."
>
> Judge Brennan "allow[ed] her stuff to work on her 2014 judicial campaign during work hours."
>
> Judge Brennan "improperly interrupted two depositions that she attended [in 2016] during her [own] divorce case."

Those findings are all significantly incorrect. Why is explained in detail below.

Although the JTC's decision does not explicitly state that any of its claims of misconduct had not been proven by the Examiners, the JTC effectively dismissed, by not making any recommendation, its Complaint's:

> Count VIII, which asserted that Judge Brennan had not been faithful to the law when she declined, albeit only momentarily, in *Brisson v Terlecky*, 44th Circuit Court Case No. 17-051753-DP, to enforce MRL 722.716(4), and, again only momentarily before reconsidering, held counsel in contempt in that case.
>
> Count XVII(b)(i), which inaccurately asserted a supposed misrepresentation to the JTC of her reason for not signing immediately upon presentation a disqualification order in *Root v Brennan*, 44th Circuit Court Case No 7127-DO;
>
> Count XVII(t), which incorrectly asserted a misrepresentation about making a gift of football tickets to a friend, not from anyone to her; and
>
> Count XVIII(o), which asserted a supposed lie under oath by Judge Brennan to an employee about her job security.

There were additional claims of misconduct which were completely ignored -- no findings or recommendations were stated or made -- by the JTC, so those claims, too, cannot now be pursued. Specifically:

> Although Count I was devoted overwhelmingly to claims that Judge Brennan failed to fully disclose supposedly very close relationship she had had during the pendency before her of *People v Kowalski*, 44th Circuit Court Case No 08-17643-FC, with MSP Det. Sgt. Sean Furlong and failed to recuse herself from that case because of that relationship, that count also accused Judge Brennan of failing to disclose the nature of a relationship she also then supposedly had had with MSP Det. Sgt. Chris Corriveau. The JTC's decision contained not one word, not even and oblique reference, to that relationship.
>
> Count IV accused Judge Brennan of failing to recuse herself fast enough -- she did recuse herself, just not fast enough, claimed the JTC -- from *Root v Brennan*, Livingston County Case No. 16-7127-DO, her own divorce case, when a motion to preserve evidence was filed on behalf of her then-husband. The JTC made no finding or recommendation regarding that claim.
>
> Count X accused Judge Brennan of failing in *Brisson v Terlicki* to treat Mr. Brisson's counsel fairly and with courtesy and respect. While the JTC effectively dismissed Count VIII, which also arose out of *Brisson v Terlicki*, its decision makes no mention anywhere of the claim in Count IX of poor treatment of counsel in *Brisson*.
>
> Count XIII accused Judge Brennan of in-court misrepresentations to counsel in multiple cases occurring in front of her, including a supposed misrepresentation in *Sullivan v Sullivan*, 44th Circuit Court Case No. 14-006162-DO, about the inability of her court to accommodate requests for witnesses to appear by telephone. The JTC's decision did not address that particular allegation.
>
> In Counts IV and XVI, but primarily in Count XVI, Judge Brennan was accused of destroying evidence in violation of a motion to preserve evidence and in violation of MCL 750.483a then (a). While the JTC's decision mentioned the former claim, the JTC's only finding was of the latter.
>
> While not mentioned in the initial formal complaint or in the first amended complaint, at the public hearing the Examiners contended that Judge Brennan had treated her staff badly, and

they offered testimony supposedly supporting that claim. Then, the JTC added to its Second Amended Complaint a claim that Judge Brennan was "unfair and discourteous" to several named court employees (Count XV, ¶ 391). While the Master found that Judge Brennan was "[conspicuously and] continually abusive to her own staff," the JTC made no finding and no recommendation about her treatment of any staff.

Attached to the Examiners' written closing argument to the Master was an appendix (incorrectly labeled "Appendix 2" since there was only one) in which they claimed multiple false statements by Judge Brennan. The Master adopted the appendix "as accurate" (p 18). So did the JTC (p 12). The Master also added a supposed misrepresentation (which he plainly mischaracterized[3]). The JTC's decision does not mention that "addition[]," so it is not before this Court.

III. STANDARD OF REVIEW

Every issue raised by Judge Brennan's petition to reject the JTC's recommendations to this Court is of a kind which is subject to de novo review by the Court. Such review means "anew; afresh; [or] again," *Dept of Civil Rights ex rel Johnson v Civil Dollar Café*, 441 Mich 110, 116; 490 NW2d 333 (1992), "giv[ing] no deference," with just one inapplicable narrow and narrowing exception, to the tribunal being reviewed. *Buchanan v Flint City Council*, 231 Mich App 536, 542 fn 3; 586 NW2d 573 (1978).

While neither our current constitution nor any rule enacted by this Court so specify, this Court has invariably held that any discipline recommended by the JTC and the findings of fact and conclusions of law underlying such recommendations are to be assessed "de novo." See, e.g., *In re Gorcyca*, 500 Mich 588, 613; 902 NW2d 827 (2017). But the Court has also said that, "[a]lthough we review the JTC's recommendations [of discipline] de novo, [the Court] generally will defer to the JTC's recommendations when they are adequately supported," *In re Chrzanowski*,

[3] Presumably that is why the Examiners did not include "the additional example" in their brief to the JTC and why the JTC ignored that example. Judge Brennan and her counsel had thoroughly debunked their example without rejoinder by the Examiners. More need not be said.

Mich 468, 488; 636 NW2d 758 (2001), and *In re Brown*, 461 Mich 1291, 1293; 625 NW2d 744 (1999), which is not de novo review. Such review "give[s] no deference." Not only is deference conceptually incompatible with "de novo" review, this Court has often digressed from such recommendations and also from the JTC's factual conclusions.[4] Presumably, this Court does not regularly do what it cannot do.

Most significant would be is the substantial deleterious effect, so it cannot be an acceptable standard of review, of this Court deferring to a JTC recommendation for discipline rather than deciding the issue for itself. What adequately separates, this Court has held, and thereby saves the constitutionality of, combining in the JTC investigative, prosecutorial and adjudicative functions -- deciding whether a complaint of judicial misconduct merits investigation, conducting that investigation, determining whether the investigation was productive, charging a judge, prosecuting the charge, and determining whether the charge it considered worthy of prosecution is in fact worthy -- are "three levels of review . . .: (1) the Master's findings and conclusions . . . (2) the JTC's de novo findings and recommendations, and (3) this Court's de novo review." *Chrzanowski*, 465 Mich at 487 fn 17. If this Court defers to the JTC, not only is one level of review eradicated, that one level is the most independent. Therefore, unless the judicial discipline process is restructured along the lines of the attorney discipline process (with separate entities akin to the Attorney Grievance Commission and the Attorney Discipline Board), review by this Court which is deferential jeopardizes the validity of the entire process.

[4] See *In re Iddings*, 500 Mich 1026; ____ NW2d ____ (2017); *Simpson*, 500 Mich at 533; *In re Gibson*, 497 Mich 858; ____ NW2d ____ (____); *In re Morrow*, 496 Mich 291; 854 NW2d 89 (2014); *In re Adams*, 494 Mich 162; ____ NW2d ____ (2013); *In re Morrow*, 493 Mich 878; 821 NW2d 677 (2012); *In re Logan*, 486 Mich 1050; 783 NW2d 705 (2010); *In re Gilbert*, 469 Mich 1224; 668 NW2d 892 (2013); *In re Halloran*, 466 Mich 1219; 647 NW2d 505 (2002); *In re Hathaway*, 464 Mich 67, ____; 630 NW2d 850 (2001); *In re Moore*, 464 Mich at 98; 26 NW2d 374 (2001); *In re Bennet*, 403 Mich 178; 267 NW2d 924 (1978); and *In re Mikesell*, 396 Mich 517; 243 NW2d 86 (1976).

That said, one instance of deference by this Court is different enough to be acceptable. De novo review "does not prevent [this Court] from according proper deference to [a] [M]aster's ability to observe witnesses' demeanor and [based thereon to] comment on their credibility." *In re Loyd*, 424 Mich 514, 535; 384 NW2d 9 (1986). Until relatively recently, all review "had necessarily [to] give considerable weight [i.e., deference] to credibility determinations" based on assessments of demeanor. *Hathaway*, 464 Mich at 687. Except when video-recorded, which is becoming increasingly common, only trial judges and hearing officers, such as masters, experience witness demeanor, so, except when video-recorded, review of such assessments is not possible. ". . . [A] record written in cold type" is not sufficiently revealing. *Roy Constr Co v McCann*, 356 Mich 305, 307; 96 NW2d 757 (1959). See also *Silver Dollar Café*, 441 Mich at 124 (op per Boyle J.). The public hearing in this case was not video-recorded. Therefore, were any of the Master's determinations based on demeanor, "considerable" deference would have to be accorded to them. But no such determinations were made in this case. All credibility determinations were based on matters of record, so there can be no deference "to those determinations."

IV. PRESERVATION OF ISSUES

It is a rule of near-universal applicability that, to be reviewed at all, an issue must have been raised in the tribunal being reviewed and must be fully supported by the record presented there. *Amorella v Mansanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Regular order and judicial economy require, because they often succeed, efforts at resolving an issue ahead of a laborious and time-consuming appeal, and they also require a sufficient record in the tribunal being reviewed, rather than going back to build one.

Review of recommended judicial discipline is different. It does not involve either consideration. As noted, such review must be de novo to preserve the validity of the process, *Chrzanowski*, 465 Mich at 487 fn 17, and de novo requires evaluating a record anew with giving

no deference to what was previously decided. In other words, what the preservation requirement is designed to avoid must occur in discipline cases. As a result, traditional issue preservation is not only pointless, and the pointless should not ever be required, requiring issue preservation is incompatible with the necessary structure of our judicial discipline process. Things would be different if judicial discipline were bifurcated, but this Court refuses to do that. And supplementation here, if need be, of the record as a discipline case progresses is explicitly allowed. See MCR 9.218 and MCR 9.224(E).

V. ARGUMENT

For reasons explained in detail below, each of the JTC's findings of misconduct by Judge Brennan are erroneous. First to be discussed, however, will be why the JTC as currently constituted has forfeited its ability to even make recommendations to this Court. Therefore, that body must be reconstituted, and new findings of fact, conclusions of law and recommendations must be made.

A. The JTC Erred Reversibly by Denying Judge Brennan's Requests that It Disqualify Itself and that It Ask the Supreme Court to Reconstitute It. That Body had Very Publicly Prejudged All the Matters Before It.

MCR 9.204(A) disqualifies the judge members of the JTC from participating in any proceedings before it when required "for any reason set forth in MCR 2.003(C),"[5] and the JTC's own IOP 9.204(A-4) extends the requirement of and the bases for disqualification to its non-judge members. MCR 2.003(C)(1)(a) and IOP 9.204(A-4)d both require disqualification for "bias[] or

[5] MCR 9.204(A) actually cross-references MCR 2.003(B), but that subsection addresses only who may raise the issue of disqualification; the grounds or reasons for disqualification are itemized in MCR 9.204(C). They were originally listed in subsection (B), but some years ago MCR 2.003 was reorganized. To date, however, the cross-reference to MCR 9.204(B) has not been changed to reflect that reorganization. The JTC, first, and, now, this Court may, however, effectively recognize the reorganization. Even the staunchest strict constructionist agree that a statutory or court rule provision may be disregarded or judicially corrected (1) when a correction is textually simple, (2) the particular text at issue "has no semblance of plausibility," and (3) failing to correct it "would result in a disposition that no reasonable person could approve." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, infra, at pp 234-236.

prejudice[].” A pre-de-novo-review very public statement that a respondent is guilty of serious misconduct “amount[s] to a prejudgment,” which is always a bias “requir[ing] disqualification.” Cf., *People v Gibson* (on rem), 90 Mich App 792, 796-797; 282 NW2d 483 (1979), *lv den* 401 Mich 868 (1980). “There is perhaps no more basic precept pertaining to the judiciary [of which the JTC is an adjunct] than the one . . . that judges should be . . . free from predisposition in their decision-making,” Geyh *Judicial Conduct in Ethics* (5th ed), §4.01, p 4-2 which is why a visible expression of prejudgment requires disqualification. *Gibson*.

Each member of the Commission, other than Judge Cortes and Mr. Burdick, who recused themselves from this matter for other reasons, very publicly expressed before reviewing the Master’s opinion that Judge Brennan was guilty of serious misconduct. On November 21, 2018, just two days after the conclusion of the formal hearing, the Examiners filed a motion with the JTC asking for permission to petition the Supreme Court for the immediate suspension of Judge Brennan without pay. Citing to and quoting from the transcript of that hearing[6] -- the Examiners contended that Judge Brennan had tampered with evidence and had perjured herself, conduct which required her removal from the bench pending further action by the JTC and, then, by this Court. Judge Brennan promptly responded. She contended that the JTC petitioning for her interim suspension “will be telling the Master [who would not issue his report for nearly another month] . . . that it considers Judge Brennan guilty of tampering with evidence thereby removing the Master’s independence from the process.”

On December 11, 2018, which was still several days before the Master would issue his report, the JTC denied the Examiners’ motion. The effectuating order did not explain why, but a subsequent order did. The JTC had agreed with Judge Brennan that granting the Examiners’

[6] There had been a month’s hiatus in the hearing before it concluded on November 19, giving the court reporter time to prepare transcripts.

request would risk the Master understanding that he was being told to rule against Judge Brennan or to have his report rejected on review if he did not. On December 20, 2018, the Master issued his report. At its meeting on January 7, 2009, the JTC *sua sponte* reconsidered its denial of the Examiners' motion and, on reconsideration, that motion was granted. An effectuating order was issued on January 9, 2019. Very perceptively, the JTC declined to itself file a motion, so as to not express any opinion on the evidence yet to be reviewed by it. Indeed, the JTC took pains to "express no opinion regarding the Master's report or the substance and/or merits of the Examiners' motion for interim suspension." The Commission expressly acknowledged that doing either was incompatible with its upcoming role "as an adjudicative body that will hear arguments on the Master's report."

A petition was filed with this Court on January 15, 2019, by the Commission's Deputy Executive Director. In large part, that petition tracked what the Examiners' motion to the JTC had asserted about Judge Brennan's supposed tampering with evidence and perjury. But the petition also included claims that the evidence at the public hearing had proven a pattern of lies, misrepresentations and concealment by her regarding her relations with MSP Det. Sgt. Sean Furlong during the pendency before her of *People v Kowalski*, 44th Circuit Court Case No. 08-017643. The Examiners had not asked for permission to include the letter. So, not surprisingly, it had not been given.

The JTC's petition was denied by this Court on January 25, 2019. Its jurisdiction had not been properly invoked, ruled the Court. On February 4, 2019, another petition was filed, really re-filed, with only two changes, but very significant changes. The re-filed petition was signed by the Chairperson of the Commission. Earlier in the day, the Commission, sans Judge Cortes, had "unanimously resolve[d] to file a petition, a copy of which had been attached," so it necessarily

follows that all the other commissioners had concurred with the petition. Although re-numbered, the petition's substantive assertions were identical to those in the prior petition.

The JTC's petition, more precisely, the sequence of events leading up to its filing, its contents and a subsequent admission by the JTC, compel the conclusion that, just as had the trial judge in *Gibson*, the commissioners who would sit in judgment of Judge Brennan a month later prejudged her, requiring their disqualification. *Gibson* was one of two cases brought against the alleged perpetrators of an armed robbery. One was charged first and was convicted after a bench trial. Explaining his verdicts -- that defendant had opted for a bench trial -- the judge stated, "There is no question in the Court's mind that this was done by Mr. Peete and Mr. Gibson, his companion . . ." 90 Mich App at 795. Mr. Gibson was then tried by the same judge and convicted.[7] His just-quoted statement "amounted to a prejudgment" of Mr. Gibson's case, ruled the Court of Appeals, which required that the judge to have *sua sponte* disqualified himself. A new trial in front of a different judge was ordered.

This matter is indistinguishable from *Gibson*. The JTC's petition to this Court began with a declaration that a formal hearing had just concluded. Then, the petition asserted, multiple times, that the evidence at that hearing "established" tampering by Judge Brennan with evidence and perjury. Those words reflect findings of fact which can only be made after de novo review. Using them before de novo review "amount[ed] to a [*Gibson*-style] prejudgment." Because the Commission unanimously resolved to file, not just a petition for interim suspension, but a petition read and approved by all the Commissioners, the words of prejudgment are theirs.

Two things about this matter are unique and appear to distinguish it from *Gibson*. Both are just apparent, however, not real, so neither is a significant distinction. First, this Court ordered

[7] The cases were pursued separately because the other defendant had confessed. Stricter severance requirements applied back then.

the Commission, if it wished to proceed, not only to refile its petition, but to alter the petition to express an opinion on the merits, which had not been done originally. This Court did not, however, require the JTC to prejudge the claims of misconduct by Judge Brennan. To refile, the Commission had to express an opinion regarding "the substance and/or the merits," but it was not required to file another petition doing so. The JTC chose to file again, so it chose to prejudge what it would have to later adjudicate.

Second, replacing the JTC will be more cumbersome than would have been replacing the trial judge in *Gibson*. Assigning a visiting judge would have been inconvenient, but not very. Requiring the Commissioners to resign and be replaced would be far more cumbersome, admittedly but only mechanically, not substantively, and is specifically authorized by MCR 9.202(C)(2). Therefore, the Rule of Necessity does not apply. That rule allows a tribunal to hear a matter from which it would otherwise be disqualified when, but only when, the necessity is "imperative" because "there are no other means or tribunal to hear and determine the matter." *Higer v Hansen*, 67 Idaho 45; 170 P2d 411, 413 (1946). See also *United States v Will*, 449 U.S. at 213-215. There is no such imperative necessity in this case. MCR 9.202(C) provides a work-around, so-called.

Nor, finally, does MCR 9.219 authorizing the JTC to petition this Court for an interim suspension mean that doing so cannot ever be a disqualifying prejudgment because every such petition entails a pre-review assessment of the evidence. Petitions for interim suspension are typically filed and interim suspensions are ordered, when they are ordered, at the very beginning of cases, well before a formal hearing, not afterwards. Filing a petition then cannot be deemed a pre-judgment of de novo review by the JTC because there is not yet anything to review. In that situation, it cannot be contended in support of a petition, as the JTC did in this case, that

"misconduct [has been] established." At most, misconduct is only alleged, far from even arguably proven, which is much different.

Furthermore, in the usual situation of an early petition for interim suspension, it is realistic, not just a legal fiction, to believe that, after an elaborate formal hearing, the JTC might conclude that things developed differently than had been anticipated early on, so that what was said might be misconduct did not turn out to be or was not as serious as thought. In other words, it is realistic to believe that an early petition for interim suspension is not a prejudgment, but just a preliminary call, not unlike a preliminary injunction which does not pan out on further development. Such an outcome does not appear realistic, however, when an interim suspension is sought after proofs have been presented and just weeks before de novo review by the JTC, such an appearance is the essence of prejudgment.

Something else unique about this particular case should preclude invocation of the Rule of Necessity. When that rule is triggered, the disqualifying circumstance was not of the judge's or tribunal's creation. It was a status which the judge(s) happened to hold, _____ any of them did. For example, in *Higer* the Supreme Court was asked to determine the validity of a restriction on implementing a pay raise of State's Judge's, including them. They just happened to find themselves, by no doing of theirs, affected because they happened to be in office. In this matter, however, the situation which disqualifies the JTC was created by the JTC during this very case. It is an axiomatic principle that a problem cannot be created and then itself be used to sidestep that problem.

B. The JTC Erred by Refusing to Even Consider the Very Real Prospect That Some or All of Its Charges and Testimony Against Judge Brennan Were the Product of Sexism.

In her brief in support of her objections to the Master's report, Judge Brennan asked the JTC to consider the prospect that its claims of misconduct and the supporting evidence were

infected by various manifestations of sexism yet prevailing in our customs and institutions, including, regrettably, even the courts and the practice of law:

a. What is accepted, and even complimented, as zealous advocacy by male attorneys is regularly seen as abrasive and is criticized in women attorneys. ABA Commission on Women in the Profession, *The Unfinished Agenda* (2001), pp 6, 15, 16.[8] And, regrettably, it follows that women judges tend to be criticized for strong and decisive actions for which male judges garner praise. *ABA*, at p 27. Does that help explain the complaints about Judge Brennan's demeanor?

b. The performance of female judges is also commonly held to higher standards, with the result that their competence is "weighted consistently lower than their male counterparts." *ABA*, at pp 15, 27. Does that explain the complaint that she didn't care enough to do her job as well as other judges?

c. The credibility of female judges "is often discounted," and what they say is ignored or is trivialized. *ABA*, at pp 9, 21. Does that explain why so much of what she said was found to be untrue?

d. Because the women justices of the United States Supreme Court have long been and are consistently interrupted during argument because of their gender "far more often" than are the men, Jacobi, "Justice Interrupted: The Effect Of Gender, Ideology, and Seniority at Supreme Court Oral Arguments," 103 L Va Rev 1379, 1390, 1462-1463 (October 2017), female trial judges are more likely interrupted even more often. If gender bias is strong enough, which it is, to persist in the most august setting at the highest level of power achieved by women judges, *Id.*, at pp 1391, 1405, it is more likely to manifest itself at the lowest level, like Judge Brennan's court room. Frequent interruptions are likely to prompt assertions of control by the court per MRE 611(a) and

[8] See also Elsesser "Female Lawyers Face Widespread Gender Bias, According To New Study," *Forbes* (Oct 1, 2018); and "Female Lawyers Still See Sexism in the Courtroom." *The Atlantic* (Sept 2018).

"fixations and irritations," *Mahlen Land Co v Kurtz*, 355 Mich 340, 350; 94 NW2d 888 (1959), which are likely to themselves provoke disapproving reactions and complaints about the judge's demeanor.

e. Care must also be taken to avoid maintaining any vestige of the medieval notion which once precluded women from even practicing law because they had no legal existence separate from their husbands, *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141; 21 L Ed 442 (1873), quoted in *Adair v Dept of Education*, 474 Mich 1027, ____; 709 NW2d 567, 588-589 (op per Corrigan, J.). Specifically, care must be taken to avoid saddling married judges with a disqualifying disability arising out of their spouses' business activities. Cf. *Adair*, *supra*.

f. Finally, the courts of this State have rejected in other contexts the long-enduring belief that sexual assaults and sexual advances were either invited or not unwanted if the recipient did not fight back, maintained contact afterwards, or stayed on good terms with the transgressor. That belief is, we now know, a demeaning excuse, not a manifestation of fact. *People v Christel*, 449 Mich 508; 537 NW2d 857 (1995); and *People v Peterson*, 450 Mich 349, 373-374; 537 NW2d 857 (1995). See also Dewan, "Why Women Can Take Years To Come Forward With Sexual Assault Allegations," *The New York Times* (09/18/2018).

The JTC not only gave short shrift to the prospect of sexism in this case, the JTC appears to have deliberately minimized Judge Brennan's arguments about it. She had pointed out how the Master had treated an unwanted advance as proof of a disqualifying sexual relationship, and she noted the real prospect of the multiple examples of sexism discussed above. The JTC's first response was to characterize as an "unfortunate" choice, the Master's use of one word in describing what he found, not why he made that choice, which was the complaint, and, then, it sidestepped as inconsequential his key, misogynistic, conclusion. The JTC might as well have said

Judge Brennan and her counsel are being "too sensitive." Hence, the JTC committed plain, as well as obnoxious, error. Supposedly, the Michigan judiciary is "committed to eradicating sexual stereotypes," *In re Hocking*, 451 Mich 1, 12; 546 NW2d 234 (1996), so that any and all possible manifestations must be assessed and roundly rejected. As a result, this matter must be remanded to the JTC for reconsideration of its recommendation accompanied by an honest explanation of why, if that is the case, gender bias did not occur in the case. Until that is done, the JTC's recommendation is too tainted to be considered, and without an untainted recommendation this Court has nothing to review.

C. Judge Brennan Did Not Have a Relationship With a Police Detective Involved With a Case Pending and Tried Before Her Which She Failed to Adequately Disclose.

The JTC's first finding of misconduct by Judge Brennan is that, when assigned the case of *People v Kowalski*, 44th Circuit Court Case No. 08-17643-SC (hereinafter "*Kowalski*"), which occurred in early March 2009, Judge Brennan failed to inform counsel in the case that, before then, she "had [been] persuaded" by one of the police detectives involved in the case "of Mr. Kowalski's guilt" (p 6). The JTC also found that, during *Kowalski*, Judge Brennan had "a very close, personal relationship" -- with that same detective which she did not adequately disclose. She disclosed it, the JTC concedes, but not adequately, it found (pp 7-8) -- intimated by the JTC to be sexual, although its Examiners had stipulated that was not the nature of the relationship --

1. What Really Happened.

It is worse than regrettable, it is demeaning of the judicial discipline process that the JTC refuses to let go of its initial, unfounded belief that Judge Brennan and MSP Det. Sgt. Furlong (Mr. Furlong) had a long, lasting throughout *Kowalski* sexual affair which they kept secret. All three of the JTC's complaints, including the one filed after the public hearing, asserts that Judge Brennan denied on January 4, 2013, the day the issue was first raised and just a few days before trial began

in *Kowalski*, an allegation in a letter delivered to the prosecutor, in the various interactions of the formal complaint **[where does this go?]** "ever [having] had a sexual relationship" with Mr. Furlong (¶ 17[c]). Since all 500-plus other allegations were critical of her, why include that denial if the JTC thought it to be true, which the Examiners would eventually concede it was, except to allege that it was untrue? Why make multiple references in its decision on the Master's finding of a romantic relationship, which he labeled a "hot[]" romance proceeding the assignment of *Kowalski* to Judge Brennan and lasting through the trial? Why find that Mr. Furlong had "kissed" Judge Brennan, which was a gross mischaracterization of what had happened according to even its key witness?

The JTC appears to want to taint review of this case with innuendo of what it cannot prove. Yes, Mr. Furlong kissed Judge Brennan back in 2007, but that encounter not only "startled" her, it "freak [her] out" to the extent that she did not talk to Mr. Furlong for weeks (pp 495, lines 11-20; 496, line 1). Obviously, therefore, the kiss "didn't [reflect or] mean ... a start of a relationship, or anything of the sort" (p 495, lines 21-25). It was an unwanted advance. Why did the JTC ignore the rest of what its witness said? Likewise, how could the JTC ignore that a month before the public hearing its Examiners acknowledged "not claiming that we will offer evidence of a sexual relationship between Judge Brennan and Mr. Furlong before the time that matters," (Hrg Tr 9/19/2018, p 52, lines 22-25)?

Judge Brennan and Mr. Furlong did not have a sexual relationship until well after her involvement with *Kowalski* had ended, which was in early March 2013. Judge Brennan and Mr. Furlong had their first romantic kiss in 2014. Nor did they have sex until that year (Ex 1-4, pp 30, lines 5-13; 32, lines 5-6). The Examiners did not dispute that testimony. In fact, the testimony was in a deposition that they submitted at the public hearing. Therefore, if "clearly a very close,

personal relationship with [Mr.] Furlong" is code for a sexual relationship, the Commission is not only dead wrong, it is deliberately so. Tough words, to be sure, but that is what it looks like.

Even if "clearly very close, personal relationship" was not meant by the JTC to insinuate a sexual relationship, that finding is still plainly incorrect. In 2007 and 2008, well before *Kowalski* was assigned to Judge Brennan, and in 2009, when she was tasked with determining the admissibility of Mr. Mr. Kowalski's multiple confessions and the admissibility of his proposed evidence challenging the veracity of those confessions, Mr. Furlong was in a sexual relationship with Ms. Shawn Ryan (pp 523, lines 24-25; 524, lines 1-3; 1809, lines 8-12). (Ms. Ryan admitted the sex, but denied it was a sexual relationship. She bizarrely insisted that to qualify as a sexual relationship, sex must be open and notorious, not secret, as was her two years of sex with Mr. Furlong. Unless he was a two-timing lothario, of which there has never been a claim, let alone evidence, that relationship likely precludes finding a simultaneous very close, personal relationship, albeit platonic, between Judge Brennan and Mr. Furlong when she made her most consequential rulings in *Kowalski*.

Further undermining, if not outright rebutting, the JTC's finding of a very close, personal relationship between Judge Brennan and Mr. Furlong before her ruling on Mr. Kowalski's confessions is Ms. Ryan's testimony that, toward the end of 2019, the Judge was trying to set Mr. Mr. Furlong up with her sister, first, and then, with Ms. Ryan herself (pp 1764, lines 19-25; 1765, lines 1-11, 18-20; 1803, lines 12-19; 1804, lines 17-19). Obviously, Judge Brennan was not aware of the Ryan-Furlong then-relationship. Those efforts are far from indicative of a very close Brennan-Furlong relationship. Those efforts bespoke lack of an interest by Judge Brennan in Mr. Furlong. Furthermore, as late as May 2011, Ms. Ryan still harbored a significant sexual interest in Mr. Furlong. That was revealed when she exposed herself to him, she belatedly admitted (p 561,

lines 12-23) and danced naked "for his benefit" (pp 1430, lines 19-22; 1431, lines 23-24). First, Ms. Ryan adamantly denied any such behavior (p 519, lines 13-22), but, later, in the morning, she "clarifi[ed]" her testimony by splitting hairs when and where precisely the shimmying incident had occurred, not what it had occurred (p 561, line 15). Whether Ms. Ryan had lied or had been confusingly imprecise, the question remains, who was then close with whom, or still wanted to be? So, it is hard to satisfactorily conclude that even in 2011, Judge Brennan and Mr. Furlong were in very close, personal relationship.

What relationship, then, was proven during the time, which was the summer of 2009, Judge Brennan presided over and decided pre-trial motions in *Kowalski*? A purely professional relationship at first; then, an ordinary social friendship, not more. Early in her tenure, Mr. Furlong came to Judge Brennan's chambers to apply for warrants. So did officers from several departments near Brighton. She was the only judge in Brighton. In 2007, Judge Brennan got invited by Ms. Ryan, an assistant prosecutor, to with her and others after work. A fluid group got together on an ad hoc basis (p 480, lines 9-11). The group might be sizeable, consisting of Ms. Ryan, other prosecutors and multiple police officers, both state and federal. The attendees might be fewer, just Ms. Ryan, other times the group included Ms. Ryan, the judge, Mr. Furlong and Chris Corriveau, another NSP detective. So, periodically, Judge Brennan had encounters with Mr. Furlong, but never with him alone.

In time, venues other than nearby taverns were added. As the Master found, Mr. Furlong was "a dinner guest at Judge Brennan's home" and went Christmas shopping with Judge Brennan and Ms. Ryan. Both findings were not inaccurate, but neither were they completely accurate. Prior to 2013, which was after *Kowalski*, Mr. Furlong had never been, as intimated, alone in the Judge's home. Judge Brennan liked to cook and entertain. Occasionally, with the assistance of Ms. Kim

Morrison, a law clerk, who had been a professional chef, the judge would host dinner parties for several. Mr. Furlong tended to be included, as did Mr. Corriveau, Ms. Ryan and several others. Mr. Furlong was never at the judge's home alone with her until well after *Kowalski*. The shopping trips were to Somsert Mall with Ms. Ryan. The first shopping trip was planned by Ms. Ryan. She, not Judge Brennan, invited Mr. Furlong. When the trio had a good time, their trips became annual events for the next couple of years. Also, beginning in 2009, Judge Brennan and her husband allowed Mr. Furlong to use their cottage for a week each year with his sons. Judge Brennan was not present. Mr. Furlong did visit the cottage once when the Judge was there, but so were several others, including the judge's husband.

None of the above establishes, or even suggests, a uniquely close personal relationship, let alone a romance or even a budding romance. Only private one-on-one encounters can do that. It was not until late 2012, that Ms. Ryan saw "for the first time" what she carefully characterized as "a [n] look of affection" after a few drinks by Judge Brennan toward Mr. Furlong (pp 497, lines 18-25; 498, lines 1-18). Although Ms. Ryan remained a close friend of the judge's until May 2013, she offered no other testimony about the judge's feelings for Mr. Furlong until May 2013 (pp 498, lines 21-25; 499; 500, lines 1-14). That was well after Judge Brennan's involvement with *Kowalski*.

Although after her involvement with *Kowalski* -- three months after trial began, 2.5 months after verdict, and six weeks after sentencing -- Judge Brennan got emotional in her office when told by her husband that "he didn't want her to talk with [Mr.] Furlong anymore" (pp 595, lines 24-25; 596, lines 1-10) or by Mr. Furlong that "he had decided that they can't be friends anymore" (pp 1401, lines 23-25; 1402, line 1). Memories differed. According to her secretary, the judge "was curled up in a ball on the floor of her office ... very, very upset" (p 593, lines 18-21).

According to a local lawyer who was a friend of the Judge's, she was "tearful," but had not "[lost] her composure" (p 1401, lines 16-22). The JTC found that Judge Brennan was "so severely [distressed] that she was unable to take the bench ..." (p 7), even though the testimony about her being "very, very upset" had been withdrawn. She just looked like she had been "crying" (p 1852, lines 15-21).

Neither of the just-described occurrences -- the first-noticed look of affection, or Judge Brennan's and Mr. Furlong's tears -- do more than slightly suggest, hence, proving nothing by a preponderance, about a close, personal relationship during a relevant time period. Unless modified by "deep," "intense," or some like adjective, "affection" is "a gentle feeling of fondness or liking." *The Oxford English Dictionary* (2d ed), p ___. That is not a relationship which can be characterized as very close. Maybe, Ms. Ryan meant something else, but it is unprincipled speculation to contend, let alone conclude, that she spoke in idiosyncratic English. And it is even more unprincipled speculation to conclude from that the first-time look of fondness blossomed into very close relationship in just a matter of days by January 4, 2013, when Judge Brennan declined to recuse herself or the next week when trial began.

Nor does whatever happened on April 22, 2013 prove "severe[] distress" as described by Ms. Cox -- which will be discussed below, Ms. Cox admitted having lied to Judge Brennan for years, so why should she be believed in 2018? -- or moist eyes as seen by Ms. Pollesh clearly prove "a very close personal relationship with [Mr.] Furlong during the relevant time period" (March 2009 into March 2013). The incident proves some kind of a relationship on April 22, 2013, but what kind and when? The incident was likely probative of her relationship before then, but when did it begin? Again, we must speculate, which we cannot do. Judge Brennan testified that she fell in love with Mr. Furlong months later. So did he. No one contradicted either. Ms. Ryan who was

then still very close with Judge Brennan, but she said nothing about an intense relationship. Ms. Ryan would have been anxious to so report had she been told anything. She had come back to the public hearing twice to add to her testimony (pp 560-66, 1758-1809). The JTC concluded, nonetheless, that Judge Brennan and Mr. Furlong were in love on April 22, 2013, and for months beforehand. The JTC did say so in so many words, but such an insinuation is the most likely conclusion. The JTC knew better, however than to say so. That was speculative as is April 22, 2013; it was no better during *Kowalski*.

That leaves to be discussed and analyzed -- the JTC, its examiners and the Masters did only the former, not the latter -- Judge Brennan's cell phone records. Yes, Judge Brennan and Mr. Furlong exchanged some 1500 phone calls of a social nature, the JTC found (p 6), but that happened between July 2008 and January 2013 (*Id.*), a period of 54 months. What the JTC did not deal with is the frequency of those calls. That number of calls over that length of time works out to just 28 calls per month, or not quite 1 a day. Approximately 400 texts exchanged from 2010 until the start of trial in *Kowalski* in 2013 work out to far fewer per month. No evidence was presented from a cell phone service provider or from a forensic expert that that frequency is at all extraordinary. No evidence is not proof of anything more than nothing.

"[S]everal thousand communications [both phone calls and texts]" were proven in *Simpson*, 500 Mich at ___, to have been exchanged over just five months, many times more than were proven in this case. Yet the JTC did not contend in *Simpson* and this Court did not find that that plethora of communications proved any relationship between Judge Simpson and an intern in his office other than a personal relationship, nothing more precise. *Id.*, at ___ fn 25. The opinion in *Simpson* that this court, and probably the JTC had their suspicions, but neither acted on those suspicions. Suspicions are not proofs, let alone proofs by preponderance. Why should this case

be any different? Because boys will be boys? But for less talkative women or drooling sexpots? Hopefully not.

At the public hearing, the Examiners submitted an exhibit which purported to summarize Judge Brennan's cell phone records and purported to demonstrate that she exchanged far more calls with Mr. Furlong than with anyone else for more time total, establishing, supposedly, a very close, personal (romantic) relationship with him. But when Judge Brennan testified that the summary was misleadingly incomplete (pp 172-173), the Examiners reviewed the underlying records and revised their summary. It turned out that Judge Brennan had exchanged fewer phone calls with Mr. Furlong than she had exchanged with her sister and almost as many as she had exchanged with Ms. Ryan and for comparable durations. Even if Judge Brennan had a very close relationship with her sister, it was not of the kind the JTC claimed she had with Mr. Furlong, diluting, the probity of her traffic with him. Unquestionably, however, Judge Brennan's relationship with Ms. Ryan was much less. The two "were friends," Ms. Ryan agreed who "share[d] a social circle" (p 476, lines 11-13). Therefore, the same frequency and duration of calls between Judge Brennan and Mr. Furlong didn't prove more than just a friendship which shared a social circle.

The frequency of calls between Judge Brennan and her then-husband were also comparable, even though their relationship had long been strained. Mr. Root had asked for a divorce on the honeymoon and repeatedly demanded that Judge Brennan be "a good" and "submissive wife who stayed in her place" (p 1291, lines 13-21). That behavior hardly nurtured a very close relationship, so the large number of calls to Mr. Root by the Judge cannot have indicated such a relationship. So, why must it have indicated such a relationship with Mr. Furlong.

2. Judge Brennan's Relationship With Mr. Furlong Need Not Have Been Disclosed Any More Particularly Than It Was, And She Did Not Improperly Decline To Recuse Herself.

Had Judge Brennan been engaged in a sexual relationship with Det. Sgt. Furlong during the pendency before her of the *Kowalski* case, she might have had to inform counsel, and to have had recused herself on request. *Chrzanowski*, *supra*. No such concession is being made by Judge Brennan, although the contrary is not being argued, because of another concession. The examiners conceded in the run-up to the public hearing that they had no evidence of such a relationship during *Kowalski*, and the Master accepted that concession. Therefore, it was wrong for the JTC to "find[] it unnecessary to determine whether the relationship between Respondent and [Mr.] Furlong was a romantic one: (p 7) and to rule that "regardless of whether the relationship was romantic ... or a close friendship," Judge Brennan was "required at a minimum" to disclose it. Therefore, the former alternative is off the table, conceded the examiners, so Judge Brennan need not deal with it at all.

Despite so much ink keeping alive the non-issue of sex, the JTC didn't bother to explain its finding of a disclosure requirement. All it did was consign to a footnote a ruling that an independent appearance of impropriety standard was added to MCR 2.003(C) in 2009. Presumably, therefore, the JTC is recommending that Judge Brennan be found guilty of creating such an appearance by not disclosing her supposedly clear, but not sexual relationship with Mr. Furlong. By citing to no other provision of MCR 2.003, it is compelling that no other provision was considered to have been violated. This Court can evaluate only findings and recommendations for discipline which the JTC has "adequately articulated." *Simpson*, 500 Mich at ___. Since only the appearance of impropriety standard was even mentioned, only it can be considered to have been articulated, and, frankly, it does not apply.

In the case of *In re Haley*, 476 Mich 180, 194; 720 NW 2d 246 (2006), this Court, relying on *Adair v Michigan*, 474 Mich 1027; 709 NW2d 567 (2006), "decline[d] to create an independent 'appearance of impropriety' standard to judge [a] respondent's behavior when there is an express, controlling a judicial canon [or court rule]" which there is in this case. It is MCR 2.003. That amorphous standard applies only "where there are no specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct." MCR 2.003 unquestionably pertains to the subject of disqualification. It delineates a host of situation where disqualification is required; and, by necessary inference when disqualification is not required. *People v Kimble*, 470 Mich ___, ___; ___ NW2d ___ (___). By not saying otherwise, the JTC acknowledged that no provision of MCR 2.003 applies, so that silence has meaning, and it is not to be "countermanded by the vagaries of an [amorphous] 'appearance of impropriety' standard." *Haley* did not involve disqualification, but *Adair* did, and a majority of this Court found that Justices Taylor's and Markmans' spouses did not satisfy any requirement calling for those Justices to stand aside. So disqualification was not required. No appearance standard supplemented the rule. That is this case.

The JTC sidestepped *Haley* and *Adair* by holding that a 2009 amendment to MCR 2.003(C) added an appearance of impropriety standard, overruling those cases. Judge Brennan respectfully disagrees. In response to the Examiners' brief, she explained why to the JTC, but it ignored her argument (p 8, fn 4). Of course, this Court can and, sometimes, does modify or overrule a prior decision, sometimes, by adding, amending or deleting a court rule. But it does so openly, not surreptitiously hiding from what it is doing. The order adopting MCR 2.003(C)(1)(b)(ii) does not say a word about *Haley* or *Adair*. Judge Brennan cannot believe that the very justices who decided those cases (Justices Taylor, Young, Markman and Corrigan) would have, without a word of

explanation, adopted a rule which they had only shortly before excoriated as setting "an ethical snare," as "draconian," with results against which no [judge or] justice could effectively defend himself or herself," as leading to a "deepening paralysis" of the courts, *Adair*, 474 Mich at _____, and as "standardless and amorphous." *Haley*, 476 Mich at 197.

Were MCR 2.003(C)(1)(b)(ii) utterly incompatible with *Adair* and *Haley*, the contrary would have to be concluded, extraordinarily incongruous and odd though that situation and conclusion would be. But that subrule is not incompatible with those cases. When nothing else in the subrule pertains to potential disqualification, the subrule fills in. But, when some portions of the rule address a subject in general, but not a specific situation, traditional construction says that the situation was excluded, so that looking to MCR 2.003(C)(1)(b)(ii) goes too far by overruling another subpart. When there is complete silence, not silence which in context results in an applicable necessary corollary, looking to MCR 2.003(C)(1)(b)(ii) overturns nothing, so looking to it is acceptable. Multiple subparts of MCR 2.003(C) address judges' relations with others. What the JTC found was that Judge Brennan's relationship with Mr. Furlong is not included. Therefore, it cannot be added by the amorphous appearance-of-impropriety standard. That should be the end of the discussion. Judge Brennan had no duty to recuse herself, so she had no duty to disclose what would not have resulted in recusal.

And even if the standard is available, there was no appearance-of-impropriety. As just noted, the JTC's complaints never claimed, the Examiners never claimed that their proofs established, and, in the end, the JTC did not find that any other provision of MCR 2.003(C) was offended. Had Judge Brennan and Mr. Furlong been having sex during *Kowalski*, maybe there would have been a forbidden appearance. *Chrzanowski*, 465 Mich at 468. But, as noted, it was undisputed that that did not happen, and the undisputed evidence is that their sexual relationship

did not begin in November 2013, nine months after *Kowalski*. At the time of her only significant substantive involvement in the case, which was in July 2009, when she dealt with Mr. Kowalski's confessions, Judge Brennan and Mr. Furlong had just become social friends in a group setting, not individually: principally, drinks after work; sometimes dinner; occasionally dinner parties at the Judge's house; and once or twice, a visit to her cottage -- but always with others, usually with fairly large groups.

While *Kowalski* worked its way through the appellate courts and back to Judge Brennan, which took three-plus years, her relationship with Mr. Furlong remained essentially the same: social, not more. There was talk about Judge Brennan and Mr. Furlong going to lunch together (p 484, lines 11-12), but always with others (p 484, lines 13-17). While the two attended a few sporting events, it again was always with others, not as a couple. The Examiners conceded that no evidence showed them dining together and that the evidence "does not show" that the two of them "were alone at a sporting event before the *Kowalski* trial" (App. at p ___, fn 4). Dinner remained group events (pp 486-487; 491, lines 8-15). Even when phone traffic is considered, Judge Brennan's relationship with Mr. Furlong was not "intensely close" as the Examiners had claimed to the JTC (App. at p ___).

Tellingly, Judge Reader did not consider the former disqualifying. When asked to take Judge Brennan off *Kowalski* because she had acknowledged that she was not just acquainted with, but "in fact was social friends" with Messrs. Furlong and Corriveau (Ex 1-8, p 3, lines 24-25; lines 1-4, lines 1-4), which supposedly created an appearance of impropriety (*Id.* p 5, lines 5-6), Judge Reader declined.

> "I've had people that I've known that are on the witness stand. I have, uh, a Friend of the Court officer, I have probation agents I see all the time that I've been in social settings with. They'll testify regarding probation violations by defendants. That's, judges cannot

> live in a crystal enclosed glass and be totally cloistered. We're not monks. We're not, we're judges. And we, you know, are involved in the community.
>
> . . . The only allegations with respect to Judge Brennan . . . is that she has a social friendship with two officers, two state police officers who will be witnesses . . . She acknowledged that on the record. She freely admitted that . . . She addressed that the heart of the complaint was of her being friends with two of the witnesses . . . I've got to say that *those friendships are really, really not hidden to the community*. I think it is well known by the legal community here in this, in this area. I would indicate that, uh, perhaps myself, *I was personally aware of that and quite frankly, didn't think anything of it*.
>
> . . . Given the fact that it, it is and has been no secret in the legal community here of a friendship . . . with several of the officers -- and there are other officers there are attorneys that, uh, she has socialized with. And again, that is well known within this community. I have to agree with . . . Judge Brennan." [emphasis added]. (Ex 1-8, pp 8, lines 23-24; 9, lines 1-5; 11, lines 23-25; 12, lines 1-2, 25; 13, lines 1-8; 15, lines 5-12).

True, Judge Brennan did not tell counsel in *Kowalski* that she sometimes "grab[bed] a drink" with Detective Furlong and others, had a meal with him along with others, had occasional dinner parties at her house, to which he, along with others, was invited, and went Christmas shopping with him and Ms. Ryan. But not being so specific, did not hide their social relationship. That information would have only confirmed a social friendship, which she had acknowledged and which, said Judge Reader, "was well known." More specifics would have revealed nothing more.

The Examiners will argue, and the JTC appears to have found, that the phone traffic between Judge Brennan and Mr. Furlong was of significance and was unknown to Judge Reader. He did not know the latter, to be sure, but he was unwilling to say that such knowledge would have made a difference. He would say only that information about phone traffic would have been considered and maybe would have persuaded him (pp 386, lines 24-25; 387, lines 1-5). In sum,

the Judge responsible for knowing his legal community, so he could do his duty as a Chief Judge, was not willing to conclude that Judge Brennan's relationship with Mr. Furlong would have been of concern to the community (p 388, lines 12-21).

3. Judge Brennan Did Not Improperly Prejudge the *Kowalski* Case.

If, before *Kowalski* was assigned to her, Judge Brennan had told her secretary, Ms. Cox that Mr. Furlong "had told her about the case" and that "she was sure Mr. Kowalski had done it" (pp 591; 592, lines 1-12) -- which she was not told -- the Judge not informing counsel once the case was assigned to her was not misconduct. So holding would open wide a Pandora's Box. Virtually every judge, who handles criminal cases often comes to the opinion that the defendant is guilty. Police and prosecutors commonly insist defendants are guilty, and that insistence is often brought to judges' attention during in-chambers conferences, pretrial motions, briefing, etc. Guilt is commonly _____. To not come to the conclusion that a particular defendant sure looks guilty, judges would have to be naïve or gullible. And they often comment to their staff, but not publicly. Do such comments in chambers require disclosure and disqualification. If they do, trial Judges have to be saints or liars.

And the JTC finding that Judge Brennan engaged in misconduct because of what she heard from Mr. Furlong was hypocritical, to say the least. Even though it had announced in a written opinion issued before it heard out counsel and ruled that it believed the charges against her had been proven, the JTC denied her motion to recuse itself because it could always change its mind as the case progressed, ruled the JTC. Such a prospect was also very real when Judge Brennan supposedly talked with Mr. Furlong back in 2008 or early 2009, months before the first proceeding in *Kowalski* and years before trial. In this case, the JTC asked for an interim suspension which required a belief that Judge Brennan was guilty, just days before it heard this case, and only a

month before it found her guilty. That was a disqualifying prejudgment. Judge Brennan's comments to her secretary were not, or if they were, the JTC's findings and recommendations as currently constituted are irrevocably tainted and must be rejected. To be credible, disciplinary practice must exhibit intellectual honesty.

D. Judge Brennan Did Not Fail to Properly Disclose or Otherwise Handle Her Friendship with Ms. Shari Pollesch, Esq.

The JTC found that Judge Brennan "failed to disclose her close, personal relationship with Ms. [Shari] Pollesch[, Esq.,] to the parties in the cases [a total of 10] in which Ms. Pollesch or her law firm appeared [before his counsel] as counsel," and that she "[improperly] denied motions for disqualification" in the two cases in which such motions were filed. Neither finding has merit.

1. What Happened?

The JTC correctly found that Judge Brennan and Ms. Pollesch had known each other for some 25 years, becoming close friends during that time. The JTC also found, again correctly, that the two had taken ski trips together, participated in a book club, took walks during their lunch breaks, were occasionally guests at each other's cottages, that Judge Brennan had allowed her home to be used for Ms. Pollesch's wedding, and that Ms. Pollesch had submitted a statement to the JTC on Judge Brennan's behalf in opposition to one of Mr. Kizer's multiple grievances. So what?

None of those findings are incorrect, but some are significantly incomplete. The ski trips occurred only 3-5 times over 20 years which meant Judge Brennan did not go most of the time, hardly indicative of an unusually close personal relationship, and the ski trips never involved just Judge Brennan and Ms. Pollesch. A group from Brighton always went. The book club had 11 members and met all of monthly. The visits to each other's cottages were, with just an exception or two, which included their husbands, summer meetings of the book club, and Ms. Pollesch's

wedding was way back in 2000.[9] Does a very dated act of generosity prove anything unusual other than an act years ago of generosity?

The JTC also found that "Ms. Pollesch 'provided legal services'" to Judge Brennan's husband's business, to him and to one of her sisters, which was not disclosed (¶ 82[b] and [c]). The JTC had alleged that Judge Brennan "had, at times, consulted Ms. Pollesch on an informal basis as to personal legal issues" (¶ 82[d]), but no evidence of any such consultations was presented. More significantly, the JTC did not conclude that Judge Brennan had improperly failed to disclose and had improperly failed to recuse herself because of Judge Brennan's husband's business dealings with Ms. Pollesch. It noted those dealings, but found only a failure "to disclose her close, personal relationship with Ms. Pollesch," which words do not remotely include any reference to Mr. Root's business relationship. The Master gave an incredibly sexist basis for his finding, to which Judge Brennan had objected. The JTC's silence would seem, therefore, to be a deliberate declination to make a comparable finding. If the Examiners contend that the JTC did make a finding, Judge Brennan will respond in her reply brief. Suffice for now to say that the JTC's finding about a "personal relationship" is error as a matter of law.

2. The Law

No provision of MCR 2.003(C) addresses Ms. Pollesch's situation with Judge Brennan. Judge Brennan was never a member of Ms. Pollesch's law firm, let alone within the two years preceding any of the 10 cases at issue. MCR 2.003(C)(1)(e). None of those cases involved have any interest of the Judge or her husband. MCR 2.003(C)(1)(f). Nor did Judge Brennan or Mr. Root satisfy any aspect of MCR 2.003(C)(2). Therefore, for the reasons discussed above at pp ____, the appearance of impropriety standard does not apply. *See Haley* and *Adair*.

[9] The JTC had alleged multiple other contacts (¶ 68[e], [f], [g], [i], [j], [k], [l], [o] and [p]), but offered no supporting evidence, which is, presumably why the JTC's decision does not mention any of them.

And, even if available for consideration, the appearance-of-impropriety standard was not breached. In their seminal treatise, Professor Geyh and his colleagues, based on a survey of court and discipline decisions across the country regarding the potential impact on judges of their social relationships, noted what must be practical limitations on what the appearance-of-impropriety standard can demand:

> "In the real world, judges do not live in ivory towers. They have relatives and friends. They have professional acquaintances who may have been their law school classmates, their professional associates and even their partners. They hold memberships in clubs and other organizations, and they have political affiliations. They own property, make financial investments, and engage in other business activities. Even though judges may be influenced by one of these connections, we cannot expect them to sever their ties with society upon taking the bench, and we would not want them to. Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions." *Geyh, et al*., at § 4.01, p 4-3.
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> * * *
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> Of particular concern is the dilemma introduced when a judge has a social relationship with a party or witness in a proceeding. On the one hand, a judge should not be discouraged from having social or other extrajudicial relationships; in fact, they can enhance a judge's effectiveness. Moreover, in smaller communities, judges cannot avoid being familiar with a substantial percentage of the lawyers and other parties who appear before them. To require that those judges disqualify themselves from every case in which an acquaintance appears in their court would impose an unreasonable burden on the justice system of those communities. *Gehy et al.*, at § 4.07[4], pp 4-25 and 4-26.

Other problems come to mind in jurisdictions like Livingston County with small numbers of lawyers. Not only will visiting judges be regularly necessary, which is administratively cumbersome, the community will be deprived, more significantly, of the judge or judges it has chosen and who is or are familiar with the county. But also very significantly, lawyers will be discouraged from seeking judicial office. Knowing that they will have to walk away from their

associations and friendships, why seek to serve? And there can be malcontents who will argue that abandoned friendships will always linger. Of course, somebody will always seek election or appointment, but only loners, who are likely to be poor judges with idiosyncratic ideas and who are difficult to work with.

How and "[w]here then, should we draw the line?," becomes the obvious question. *Geyh*, at pp 4-3. Cautiously has be how. Where is when a reasonable observer, not an affected party or lawyer, *In re Hocking*, 451 Mich 1, 12; 546 NW2d 234 (1996); and *Haley*, 476 Mich at 192, fn 17. This court can hypothesize about what reasonable people would conclude, but isn't it more likely to be accurate to look at what the community itself did. Actions do usually speak loudly. Ms. Pollesch's friendship with Judge Brennan was "absolutely" common knowledge in the Livingston County legal community (p 433, lines 3-6). Yet no one complained until Mr. Kizer started agitating, and then only a few lawyers did; most didn't. Likewise, other judges were known to be particularly "close" to judges and had "good friends" appear in front of them without any complaint (pp 1433, lines 7-12; 1434, lines 1-10; 1435, lines 6-12).

Nor did anything known or presented about the Brennan-Pollesch relationship trigger MCR 2.003(C)(1)(b)(i). Neither the Examiners nor the JTC have ever cited anywhere that subrule. To the contrary, both the Examiners and the JTC have used only the distinct terminology of MCR 2.003(C)(1)(B)(ii).[10] Presumably, they did not consider that that subrule evenly arguably and satisfied that subrule, which it does not. That subrule requires proof that, objectively assessed, the Brennan-Pollesch relationship was "extreme," "exceptional," or "extraordinary," *Caperton v. AJ Massey Coal Co, Inc.*, 556 US 868, 887, 888; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), such that, "under a realistic appraisal of psychological tendencies and human weakness," *Id.*, 556 U.S.

[10] If the Examiners do cite in MCR 2.003(C)(1)(b)(i), Judge Brennan will deal further, if need be, in her reply with this issue.

at 884, experience teaches that their substantial temptation to even a fair-minded jurist "not to hold the balance nice, clear and true." 558 US at 883, 884.

Nothing of the sort has been established in this case. What is extraordinary, especially here in the Winter-Wonderland, about a handful, a total of 3-5 times over 20 years (p 1388, lines 10-18), of ski weekends with a group of other women? What is extraordinary about belonging to a book club which meets monthly, and in the summer, has a couple of meetings at a couple members' cottages? What is extraordinary about additional trips to each other's cottages with husbands in tow, maybe, once a year if that? Nothing. Why was it extraordinary for Judge Brennan to give Ms. Pollesch use of her home, because it was large with lots of land, as a venue back in 2000 for her wedding (p 1388, lines 6-9; p 1447, lines 12-16), especially, since Ms. Pollesch provided the food and drinks (p 1388, lines 6-9)? It wasn't. Had they been partners in the practice of law, which they never were, the risk of any lingering taint or would have evaporated in two years, well more than a decade earlier than any case over which Judge Brennan presided. MCR 2.003(C)(1)(e).

E. Judge Brennan Did Not Tamper With Evidence in Violation of MCL 750.483a(5)(a).

The JTC's next finding was that "it is more likely than not that Respondent's conduct constituted tampering with evidence, in violation of MCL 750.483a(5)(a)." Judge Brennan did nothing of the sort. Not only did the JTC ignore key, dispositive aspects of what the witness on whom it relied had said, the JTC actually found almost exclusively that Judge Brennan had not "tamper[ed]," as that term is used in MCL 750.483a(5)(a), with any evidence, let alone with any evidence of the kind protected by that statutory subsection.

1. The Undisputed Evidence

Until Judge Brennan's then-husband (Mr. Don Root) filed for divorce, which he did on December 2, 2015, her cell phone and the service contract for that cell phone were provided by one of his two businesses. The company paid for the phone, the service contract was in its name, and the company was billed for and paid for the phone usage. Sprint was the service provider. When he filed for divorce, Mr. Root made it clear to Judge Brennan that he wanted the phone returned to him and that he intended to immediately remove her from the service contract.

With the help of her staff -- because her cell phone and the service contract had always been obtained and handled exclusively by her husband, Judge Brennan was ignorant of all things cell phone except how to use them -- she determined that the best deal for her, specifically, the least expensive, was from AT&T. Unfortunately, the particular phone she wanted was not in stock, so she had to wait a couple of days, which she did. When the phone arrived, she picked it up, and an AT&T employee "*transferred* the data from her original phone to her new phone" [emphasis added] (p 11). The Examiners had stipulated that when a cell phone "is replaced with a new phone," it is "common practice for the contents of the phone being replaced to be copied onto the new phone," what is known "in the trade [as] 'a content transfer.'" Then, with the help of the AT&T employee, Judge Brennan "had her original phone reset to its factory settings," which means wiped of all data. Doing that is also, it was stipulated, common practice when a cell phone is being replaced.

2. The Meaning of MCR 750.483a(5)(a)

With each of its constituent components, commonly known as elements when discussing criminal statutes, designated separately for ease of reference and understanding, but leaving its text otherwise untouched, MCL 750.483a(5)(a) reads as follows:

> A person shall not *** [1] [k]nowingly and intentionally [2] remove, [3] alter, [4] conceal, [5] destroy, or [6] otherwise tamper [8] with evidence [9] to be offered [10] in a present or future official proceeding.

It goes without saying that statutes are to be interpreted and applied whenever used, including in judicial discipline proceedings, according to the principles of statutory construction. *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006). Three of those principles establish and reinforce the conclusion that Judge Brennan's transfer or copying of data from her old phone to her new phone did not violate the cited statute, contrary to the Examiners' argument and to the JTC's finding: (i) statutes are to be interpreted in accordance with their plain meaning, *Chrzanowski*, 465 Mich at 482; (ii) noscitur a sociis, Scalia & Garner, *Reading Law: The Interpretation of Legal Text* (2012 ed), p 95; and (iii) ejusdem generis, *Id.*, p at 99.

The presence in multiple well-regarded dictionaries of similar definitions reveals the common usage and general understanding of the word "tamper," *State v Harlston*, 565 SW2d 773, 778 (Mo App 1978), to be: "to interfere with so as to weaken or change for the worse," *Webster's Third Int'l Dictionary*, p 2336; "to meddle so as to alter a thing, esp., to make corrupt or perverse changes," and "to meddle so as to alter a thing, esp., to make changes that are illegal, corrupting or perverting," *Black's Law Dictionary* (10th ed), p 1683.

Any temptation or inclination to dilute the meaning of "tamper" is barred by the principal of *ejusdem generis*. Because the word "tamper" appears at the end of a list and is itself immediately preceded by the word "other []" ("remove, alter, conceal, destroy, or otherwise tamper"), that word has to be understood as of a kind with the other words in the list. As will be noted momentarily, each of those other words is a variation of to make corrupting or perverting changes, requiring that the word "tamper" be defined as quoted immediately above. Moving data from one phone to another phone is hardly perverting, changing, or corrupting the data. There is

absolutely no evidence that any of Judge Brennan's e-mails and texts were altered in any way. They were moved, that is all. The Examiners never claimed otherwise, and the Commission never found otherwise.

"Remove" can mean "change location," but it also means to "get rid of." *Webster's Third Int'l Dictionary*, at p 1921, and the principles of *noscitur a sociis* and *ejusdem generis* require the latter understanding. The former principle of construction "especially holds that 'words grouped in a list should be given related meanings.'" *Scalia & Garner*, at 195. All the other words in the statute's list involve varying degrees of substantive alteration. Therefore, "remove" must mean the same thing. The latter principle says that the words in the list are to be given complementary meanings, so that ending the list with "otherwise tamper" means that "remove" is some form of tampering, a common meaning and understanding of which centers on making correcting or perverting the changes. Hence, the word in the list "remove" cannot properly be interpreted as simply changing the location of data from one phone to another. Doing that would give the word "remove" a so-called "one-off" meaning which is greatly at odds with the canons of *noscitur sociis* and *ejusdem generis*.

"Alter" means "to cause to become different in some characteristic without changing into something else," *Webster's*, at 63, or "to change or modify." *People v Versaggi*, 83 NY2d 123, 129; 629 NE2d 1034 (1994. Transferring data does not do that. Quite the contrary, a transfer leaves the data the same. In a different place does not make it anything else.

Finally, transferring data from one phone to another is not remotely "destroying" that data. The plain meaning of "destroy" is to ruin something completely and thereby render it beyond restoration or use, *People v Hill*, 58 Cal App 4th 1078, 1089; 68 Cal Rptr 2d 375, 382 (1998), citing *Webster's Third Int'l Dictionary* (1980), p 615, or at least rendering something useless for

the purpose for which it was intended, even if not literally demolishing or annihilating it. *State v Johson*, 14 SD2d 24; 196 ___ 497 (1941). Judge Brennan did not do that. In sum, Judge Brennan did not engage in any of the behavior itemized in the statute.

Nor did Judge Brennan ask anyone else, Ms. Felica Milhouse in particular, to engage in any conduct which would have violated the statute. The Examiners and the Master very much wanted her to say that Judge Brennan had asked her to delete the contents of her old phone, but Ms. Milhouse would not say that. Although she testified that Judge Brennan had asked for assistance deleting her Hotmail account, she unequivocally answered, "Yes," when asked, "[D]o [you] distinctly recall her saying that she wasn't interested in getting rid of the contents? She wanted to remove the account?" (p 554, lines 9-12). Then, Ms. Milhouse unequivocally responded, "I do," when asked if she recalled telling a state trooper that Judge Brennan "was not necessarily [interested in deleting] the contents of the phone . . . just . . . the account" (p 555, lines 4-11). Ms. Milhouse also recounted telling the trooper, when he asked, "Did she want to get rid of the account or the contents?" "The request of me was [to] remove the account" (p 555, lines 16-20). Finally, when the Master brought the entire interrogation to an end by asking, "The account from the phone [,] not the entire contents?" Ms. Milhouse answered twice, "That's correct" (pp 555, line 25; 556, lines 1-6).

Because no one asked her to explain it, we do not know what was the difference Ms. Milhouse was drawing between account and contents. Nor do we know what was the difference between account and contents drawn by the police officer who interviewed Ms. Milhouse and the Master who quizzed her at the public hearing. We do not know because they did not explain, and no one asked them to explain. But we do know that all of them understood there to be a difference. Otherwise, why did each of them distinguish "account" from "contents?"

In sum, therefore, no one, especially Ms. Milhouse, understood Judge Brennan to have wanted to remove the text, e-mails, etc., what were among its contents, from the phone.

Nor was the statute violated by Judge Brennan having an AT&T technician return her old phone, the one she had replaced, to factory settings after she had had that technician transfer to her new phone the contents of the phone being replaced, even if some of the data on the old phone was not transferred, so that that remaining data, if any, was lost when the phone was returned to factory settings. When the parties agreed that that can happen, they also agreed that it can happen "even if the owner of the old phone makes an effort to copy all data from the old phone to the new phone." Data lost in that situation would be lost contrary to the phone owner's intentions, which means unintentionally.

When the Examiners asked the JTC for permission to petition for Judge Brennan's interim suspension, they explicitly acknowledged that resetting the old phone after transferring its data to a new phone can destroy data "deliberately or inadvertently." Which is impossible to tell. Conduct with inadvertent or unexpected consequences is not a violation of the statute. "[R]emov[ing], alter[ing]," etc., must be undertaken, says the statute, "[k]nowingly and intentionally." "Knowingly" means aware or with an understanding that the social harm that a law is designed to prevent is practically certain to occur or result. *Black's*, at p 1003. "Intentionally" means, not just purposefully doing an act which itself causes harm, but undertaking that act for the purpose of causing the prescribed harm. *Id.*, at 932-933. See also *American Alternative Ins Co v York*, 470 Mich 28, 32-33; 679 NW2d 306 (2004); and *Hicks v Vaught*, 162 Mich App 438, 440; 413 NW2d 28 (1987). MCL 750.483a(5)(a) requires that both be proven. Neither was.

There is no evidence whatsoever in the record of this case that Judge Brennan appreciated, or that she should have known that transferring the data off her old phone might have left some

data which could have been recovered had that phone not been returned to factory settings. Doing something with unexpected consequences is necessarily not acting knowingly and intentionally. In sum, even if some of the contents of Judge Brennan's old phone ended up being destroyed one way or another she did not violate MCR 750.483a(5)(a).

At least one other element of MCR 750.483a(5)(a) was also not proven. In the context of evidence, "offered" means to formally present to a judicial officer or presiding magistrate. But the key words in the statute are "to be" offered, as well as the word "[k]nowingly" which introduces the pertinent subsection." Ordinary rules of grammar say that that latter word, although relatively distant from the phrase "evidence to be offered" modifies not only the verbs which come immediately after it: "remove, alter," etc., but also the phrase "to be offered." *United States ex rel Harper v Muskingun Watershed*, 842 F3d 430, 439 (CA6 2016), quoting and citing *Flores-Figueroa v United States*, 556 US 646, 650-651; 129 S.Ct 1886; 173 L Ed 2d 853 (2009). When added to the seemingly very ordinary words "to" which indicate inclusion, *Webster's Third Int'l Dictionary*, at 2401, and "be," which means to exist, happen or occur, *Id.*, at 189, the seemingly past tense "to be offered" becomes not only a statement of the future, but a statement which is not contingent or conditional, not "may be used," "could be used," or something comparable, but a settled plan or intention. *United States ex rel Kasowitz Benson Torres, LLP v BAS Corp,* 285 F Supp 3d 44, 55 (D DC 2017).

In other words, when any data on her old phone was "remove[d], alter[ed]," etc., if any was, somebody had to then and there have had plans, and Judge Brennan needed to know of those plans, to offer that data at an upcoming proceeding the data. Absolutely no such evidence was offered at the formal hearing or even alluded to. The only people in a position to have such a plan were Mr. Kizer and, perhaps, Mr. Root. Mr. Kizer never testified, and Mr. Root was not asked

about the subject. Mr. Kizer's questions of Judge Brennan at her deposition show an interest in the subject likely sufficient to support a conclusion that the data removed from the phone may have been used or could have been used, but that is the contingent or conditional which is not sufficient, *Id.*, and what is patently insufficient cannot be a basis to speculate. Besides, speculation proves nothing. In sum, MCL 750.483a(5)a was not shown to have been violated.

F. Judge Brennan Did Make Some Inaccurate Statements to the JTC, in Various Proceedings, and Before the Master, But None Were Knowingly and Deliberately False.

While it refused to use the Master's description of them as "breathtaking," the JTC did find that Judge Brennan made frequent and intentional misrepresentations and false statements, most under oath (p 12). She vehemently disagrees. Not all of her hundreds of statements in various forms during the JTC's lengthy investigation and prosecution of her were accurate, although most were, but none were knowingly false or intended to deceive as required to be considered misconduct. *In re Gorcya*, 500 Mich 588, 637; 902 NW2d 868 (2017). And finding her to have engaged in such misconduct was constitutionally forbidden.

1. The JTC's Findings of Misrepresentations Are Not Only Incorrect, They Are Irreparably Tainted.

In Part VII of its decision, its final substantive section, and in the final sentence of the conclusion to its decision, the JTC recommends that Judge Brennan be assessed costs, fees and expenses (hereinafter "costs") totaling $35,570.36. That recommendation was made solely "on the basis of" the JTC's findings that Judge Brennan "made intentional misrepresentations and misleading statements." That is the only basis on which costs may be assessed in a judicial discipline proceeding. MCR 9.205(B), which was amended by this Court in 2005.

The 2005 amendment to MCR 9.205(B) is unconstitutional. Justice Weaver took that position back then, but as a matter of the Michigan Constitution. Judge Brennan does not necessarily agree; she is inclined to concur with Judge Corrigan on the point. The amendment does, however, violate the Constitution of the United States. The amendment is not a generalized authority to assess costs in judicial discipline proceedings. It authorizes the assessment of costs "only if," the accused judge engaged in conduct involving fraud, deceit, intentional misrepresentations or made misleading statements to the JTC, its investigators, the Master or this Court.

So conditioning the assessment of costs gives the JTC a direct pecuniary interest in its recommendation, which kind of interest has been recognized since *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 91 L Ed 749 (1927), as so compromising the process as to deny due process. See also *Ward v Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972); *Gibson v Berryhill*, 411 US 564; 93 S Ct 1689; 36 L Ed 2d 488 (1973); and *Caperton*, 556 US at 877-879.

Eschewing any assessment of costs in this case cannot fix the *Tumey-Ward* problem. Judge Brennan was entitled to an uncompromised JTC "in the first instance," which means when a finding of prevarication was initially considered. *Ward*, 409 US at 62-63. Vacating an already-made recommendation of costs, or even reversing and remanding to the JTC for consideration anew of claims of misrepresentation without an assessment of costs can fix the problem only if the JTC is itself fully replaced. This Court must have before it an untainted recommendation, which requires untainted findings. Unless and until then, not only must the assessment of costs be vacated, Counts XIII, XIV and XVII must be put on hold.

2. It Was The JTC Which _____ the Exaggerated the Supposed Misconduct About Which it Complains.

In *Simpson*, this Court rejected the JTC's recommendation of removal from office. What it found to have been false statements were not made under oath. Removal, it noted, is reserved for perjury. None of Judge Brennan's supposedly "[f]alse [s]tatements during [c]ourt proceedings" were under oath. Some were made in the course of rulings, which are never sworn. While others, her responses to the JTC's letters to her were under oath, they should not have been. The JTC inappropriately insisted on that. It should not be allowed to bootstrap those responses into perjury. The JTC and this Court will be allowed to set, let alone spring, a so-called "perjury trap."

Judge Brennan's response to the JTC's first inquiry to her, a very lengthy letter dated August 31, 2017, was sent back to her by the JTC with instructions to be reformatted and answered under oath. She complied. Call that gullible or unfortunately respectful of the JTC's good faith, the JTC had no authority to so order. When, thereafter, the JTC sent so-called 28-day letters making the same _____, Judge Brennan refused to follow the JTC's directives. Her answer to the letter of August 31, 2017, had been answered without counsel. By then, she had retained counsel and counsel informed the JTC of the following, which assessment remains accurate, he respectfully submits:

> ". . . [T]he Supreme Court has chosen to not require her to sign it or notarize it. Nothing in MCR 9.207(D)(1) and (D)(2) requires either. Silence is the withholding of authorization. *Kimble, supra*. A comparison of those subrules with others confirms that conclusion. For example, MCR 9.113(A) requires that an attorney's answer to an RI be "signed by [the] respondent [attorney]." MCR 9.207(A) dictates that an RI pertaining to a judge "must be verified on oath;" and MCR 9.209(B)(1) requires that a judge's answer to a formal complaint be "verified." The lack of comparable requirements in MCR 9.207(D)(1) and (D)(2) must be read as deliberately differing. *Farrington* [*v. Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993)]. But the lack of a verification requirement need not be inferred. MCR 2.114(D)(1) declares that "[e]xcept when otherwise

> specifically provided by rule or statute [which, as just noted, MCR 9.207(D)(1) and (D)(2) do not do], a document [governed by the Michigan Court Rules, which responses per those subrules are, MCR 2.113(A)] need not be verified or accompanied by an affidavit."

3. No Intentional Misrepresentations by Judge Brennan Were Not Proven.

Nearly two years ago, which jurisprudentially-speaking was just yesterday, in *Gorcyca*, 500 Mich at 637, the JTC first and then this Court by quoting the JTC with approval finally accepted Justice Frankfurter's perceptive caution against too simplistically inferring deception. *Dennis v. United States*, 344 US 494, 539; 71 S Ct 857; 95 L Ed (1137) (1951) (separate op per Frankfurter, J.). Specifically, both the JTC and this Court held:

> ". . . [A] false statement requires the speaker's knowledge that the statement is false and intended to deceive. The fact that a statement may be incorrect does not, by itself, render the statement 'false' within the context of a legal proceeding. It may be discredited, or deemed unworthy of belief, but given the limits of human memory and perception, as well as the limitations of language, it would be unfair to impute motives of deception or falsehood to everyone who says something that someone else finds incredible, or that proves to be incorrect.
>
> Selective memory does not equal falsehood; incorrect memory does not equal falsehood; imprecision in expression does not equal falsehood; even an answer that one chooses to disbelieve does not equal a falsehood."

Just a few days later, in *Simpson*, 902 NW2d at 394, 405, this Court also said that, while the burden of proof on all issues in judicial proceedings is by a preponderance, to prove a lie, a statement must "clear[ly]" be shown to have been misleading and intentionally so. The Court did not pronounce such a requirement in so many words, but in *Simpson*, the Court twice applied such a requirement as dispositive. Presumably, the Court does not apply a standard twice in an opinion which it does not consider required.

Also in *Simpson*, 902 NW2d at 405, this Court noted, "We have not yet addressed, . . . whether materiality . . . [is] necessary to prove that a judge testified falsely under oath." Surely the Court was not unaware of *People v Lively*, 470 Mich 248; 680 NW2d 878 (2004), which had held that materiality is not an element in Michigan of the statutory offense of perjury. Necessarily, therefore, it looks like the Court might consider disciplinary proceedings different enough from criminal prosecutions to require consideration of a different rule. They really are significantly different. The question is, Different enough? Yes, Judge Brennan respectfully submits, but the answer is for this Court, obviously.

A key aspect of *Lively* was the seminal doctrine of separation of powers. Because a statute was at issue, its plain words or, more precisely, the lack of words chosen by the Legislature, the Court held, has to be honored. And the courts also have to accept and defer to prosecutorial discretion, also ruled this Court. Prosecutorial discretion is an aspect of the executive function which is hands-off to the judiciary. In matters of judicial discipline, on the other hand, the people through an amendment to our 1963 Constitution assigned exclusive jurisdiction to this Court to utilize its understanding of how judges do and should operate, to be stern or not, in any given case. Requiring a showing of materiality facilitates and fits much better than declaring materiality always of no moment.

In sum, to be disciplinable, any under-oath incorrect statement by a judge must clearly be proven to have been known to be false when uttered and must be clearly proven to have been intended to deceive when uttered. And those elements, including the element of materiality, must be proven clearly. That was not proven with regard to any of the statements said by the Master and the JTC to have been misconduct.

4. Lying Under Oath

Neither the Master nor the JTC bothered to explain how Judge Brennan lied persistently, as they found, or at all for that matter. They both merely yielded without analysis to a grossly oversimplistic and inaccurate misconstruction of the record.

1. Yes, Judge Brennan did testify at her divorce deposition that she first became aware of Mr. Kizer's ex parte motion "[o]nce I spoke with my attorney" (pp 116, lines 17-25; 117, lines 5-13). Yes, Ms. Jeanine Pratt, Judge Reader's secretary had talked to and e-mailed Judge Brennan about it before then (pp 320, lines 8-17; 321, lines 1-8, 25; 322, lines 1-20). The difference was not a lie, however, but a mistake. At her deposition, the Judge had no memory of her phone call with Ms. Pratt, and or of having opened the e-mail from her (p 120, lines 6-9; p 136, lines 15-17; 137, lines 1-10). She still has no memory of either (p 140, lines 22-23). A lack of memory "does not equal falsehood." *Gorcyca*, 500 Mich at 637.

2. Nowhere in her deposition did Judge Brennan testify that she told Ms. Pratt that "she was too busy to sign the disqualification order." She testified at that deposition that she told Ms. Pratt, first, that "I would take care of it when I had time the next day" (Ex 1-13, p 46, lines 7-8). That didn't say that she didn't have time the day she spoke, just that she would deal with the matter the next day at an available time. Then, the Judge testified, "I said I would sign it [the proposed order] the next day" (*Id.*, p 52, lines 9-10). No reason for waiting was given (*Id.*). Her reason was, "I was busy" (*Id.* p 52, lines 19-20), but that reason was not stated to Ms. Pratt. An unstated thought cannot be a lie. Most significantly, Judge Brennan explained at the deposition, "I don't remember exactly what I said, [to Ms. Pratt]. I remember the circumstances" (*Id.*, p 52, lines 24-25). That was not a lie. *Gorcyca*, 500 Mich at 637-638.

3. At her deposition, Judge Brennan did say, "Jokingly, I did," when asked if she had said to her staff, "I need to know how to delete stuff from this phone" (Ex 1-3, p 59, lines 7-13).

The Examiners incorrectly claimed, and the Master erroneously found, that she "admitted at the formal hearing that [what she said] was not a joke." Yes, she testified, "I did seriously want to take [sic] off my phone . . ." (p 1705, lines 11-14), but she said more, too. She told her staff that her husband apparently thought that her old phone would contain "big information," which it would not, and that might find recipes (Ex 1-13, pp 59, lines 23-25; 60, lines 1-6). In other words, because sarcasm is a form of humor, Judge Brennan had been both joking and serious, making her "Yes and no" (p 1704, lines 19-20) truthful.

4. At her deposition, Judge Brennan did deny having "reset" her old phone, the one she had returned to her then-husband (p 151, lines 11-15). She did, however, admit to having "delete[d] messages from that phone" (pp 150, lines 19-24; 151, lines 4-10), so she was not denying that those messages were no longer on that phone. Then, asked by the questioner, "[D]o you know the difference between deleting and resetting the phone?", Judge Brennan answered, "No" (pp 151, lines 12-15). Finally, admitting that, "I wasn't going to make Mr. Kizer's job easy" (p 154, line 16), was not an admission of having lied during her deposition. In context, that was no more than a statement she had not volunteered to Mr. Kizer that he was not asking the correct question.

5. Any discrepancy by Judge Brennan in her "vomit" testimony is insignificant, immaterial, and not a prevarication. Ms. Jessica Sharpe[11] did vomit in a bed the Judge was kind enough to let her use one evening when she did not feel well, ruined expensive sheets (p 745, lines 23-25), and left without cleaning up or telling the Judge (p 709, lines 15-17). Later, Ms. Sharpe sent Judge Brennan an e-mail apologizing and offering to pay for the sheets (Ex 11-1). When

[11] Until the very last day of the formal hearing, Ms. Sharpe responded to Ms. Yakel-Sharpe. That day, for the first time, she said she preferred to be addressed as Ms. "Sharpe" (p 1859, lines 12-16). Hence, that is how she will be shown that courtesy throughout this brief.

asked 18 months later at her deposition about the incident -- of what possible relevance to the divorce was that incident, by the way? – Judge Brennan expressed annoyance that Ms. Sharpe had left without apologizing (pp 263, lines 10-25; 264-266; 267, lines 1-2). When shown Ms. Sharpe's e-mail of later that day, Judge Brennan did not dispute it (pp 262, lines 24-25; 267, line 4-6), but had. She had no memory, however, of Ms. Sharpe's e-mail apology (pp 262, lines 24-25; 267, lines 11-16, 20-21). Failed memory is not a falsehood (¶11 at p 6, above).

6. That Judge Brennan had told Ms. Sharpe to take advantage of favorable weather to stain her deck, as Ms. Sharpe had volunteered to do, on a weekday does not establish that the Judge knew that that work had been done on County time. Ms. Sharpe was a part-time employee who then had 2 ½ days/week available off the clock to work for the Judge, which the Judge expected her to use (pp 1577, lines 5-20). If Ms. Sharpe recorded working for the court those weekdays, she was defrauding the County unbeknownst to Judge Brennan (pp 1577, lines 11-21), who was then out of town and who did not have access to her time records (p 1576, lines 15-25). Ms. Sharpe was recalled as a witness a month later (pp 1859-1873) to take issue with some of what Judge Brennan had testified, but not with what she had said about staining the deck (pp 1862-1863). Why not? Could it be because the Judge was correct? Whatever the reason, her testimony stands uncontradicted.

7. Not disclosing on January 4, 2013, in greater detail her contacts with Mr. Furlong was at worst incomplete. It was not false. She did not deny, which would have been false, phone calls, texts and socializing with him. She did deny, correctly the Examiners conceded (pp 12-13, above), a sexual relationship with Mr. Furlong. Silence is not untruthful. To say she and Mr. Furlong were friends was not a lie, especially as distinct from not being lovers, which had been alleged and was the topic on the table.

8. And how is it either relevant or material that, when acknowledging accurately that Ms. Pollesch was then representing her husband and his businesses, Judge Brennan may have stated incorrectly when she learned of that representation? Significant was her acknowledgment of the representation when asked by counsel in pending cases and when asked by the Commission. She told the truth.

9. Judge Brennan did not mislead, let alone intend to deceive, Bruce Sage, Esq., when she told him, "We don't have a system that would allow" telephonic testimony (¶¶ 236, 311). Judge Brennan's courtroom had two mechanisms for taking testimony by telephone, but neither worked satisfactorily. Putting one of the courtroom phones on speaker, which was tried (pp 651, lines 22-25; 652, lines 1-4), "didn't really work" and "was not terribly effective," acknowledged Ms. Cox (p 652, lines 4-5). There was also a device which was part of the courtroom recording system (p 652, lines 6-8), but, the one time it was tried, its use "was difficult" and "wasn't satisfactory," also per Ms. Cox (pp 652, lines 11-13, 17-19; 689, lines 3-7). Those problems were not fixed until "long after" the statement to Mr. Sage (p 1360, lines 14-20). Therefore, whether the equipment was defective or had not been used properly, what Judge Brennan told Mr. Sage was not a lie; it was reasonably believed by her to be true.

10. How was "overstat[ing], to a large degree, her friendship with [Shawn] Ryan" (App, p 4) a false statement as *Gorcyca*, 500 Mich at 637, explained what is a falsehood? Isn't an "overstate[ment], to a large degree" partially true? If so, it is not a falsehood. More significantly, it was Ms. Ryan who misstated her relationship with Mr. Furlong in order to inflate Judge Brennan's relationship with him. Ms. Ryan testified that she and Mr. Furlong did not have a "relationship," so it was not true that he did not come to social occasions because of her, but to see the Judge, because their sexual encounters were not "a relationship." According to Ms. Ryan, to

reflect a relationship, sex has to be publicly known (pp 1761, lines 3-11; 1783, lines 20-25), which theirs was not. Nonsense. A sexual relationship is having sex, secret or broadcast.

11. Of what possible materiality is a false denial, if there was one, by Judge Brennan of different or preferential treatment by her of Det. Furlong's and Corriveau's warrant requests? Treating preferentially threes MSP troopers -- including a Mr. Singleton (p 585, lines 19-21) -- is showing a preference, if any, to the MSP, which does not support the claim of a romance or a close friendship with Mr. Furlong unless this case involved a menage, a _____ troix or steroids.

Also contrary to what the Master ruled by reference, no witnesses, let alone "a number of witnesses" (App p 5), testified that only those officers' warrant requests were reviewed in chambers behind closed doors. Ms. Bove testified, "I don't know if any other officers went that way [behind closed doors]" (pp 786, lines 22-25; 787, lines 3-7). During the 3-plus years she worked for Judge Brennan (pp 693, lines 24-25; 694, lines 18-19), Ms. Sharpe saw the Judge take officers into chambers only beginning in 2017 (p 721, lines 8-13). Was she oblivious to the practice for 3 years, or was there nothing to be seen until 2017. In sum, the Examiners did not prove that Judge Brennan falsely denied preferential treatment.

12. That Judge Brennan had directed Ms. Sharpe, but only after she had volunteered to do so, to stain her deck right away to take advantage of favorable weather, which would have been on a weekday during normal business hours, does not establish that the Judge knew that Ms. Sharpe had done so "while on the County's clock," rendering false her denial of such knowledge. Ms. Sharpe had a flexible part-time work schedule, which she "billed" daily by recording her worked time, and the Judge was right to assume that she would not bill the County for the time. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 530; 529 NW2d 318 (1995). In addition, since she

did not have access to Ms. Sharpe's online time records, the Judge had no basis to know that she had fraudulently billed the County.

13. The Examiners' Appendix appears correct that neither Ms. Cox or Ms. Sharpe testified at the public hearing that, using those very words, either had "volunteered or insisted" on paying Judge Brennan's bills (not using their money, but using her checks). The Appendix is also likely correct that, although neither witness used that very word, the Judge "directed" them sometimes to pay the bills (App, p 6). Neither can be acknowledged with certainty, however, because the Appendix contains no citations to the record. But what is known is that neither employee was dragooned into helping. Ms. Cox handling of the Judge's bills began with her "ask[ing] me to pay the bills" (p 611, lines 18-20). Likewise, Ms. Sharpe testified, "Initially[,] I want to say she did ask;" then, she would say "these need to be paid" (p 711, lines 15-18), which Ms. Sharpe did without objection.

14. The final claim in the Appendix contains two glaring omissions. Ms. Cox testified that in 2006 and 2008 Judge Brennan "was indeed" "extremely cautious about intertwining office and campaign work" (p 625, lines 11-18) and that in 2014 she again told her staff to stay off the County computer system, to instead use their personal computers and publicly-available WiFi (pp 625, lines 21-25; p 626, line 1). Ms. Cox was of the opinion that in 2014 Judge Brennan "was more cautious about not appearing to intertwine them [office and campaign work]" (p 625, lines 18-19). Ms. Cox offered no basis for that opinion, however, so its accuracy cannot be assessed. At a minimum, she never disputed that the Judge repeated in 2014 her 2006 and 2008 cautions about not mixing office and campaign work. The Appendix also ignored that, when supposedly shown unspecified contrary documents, she acknowledged her error. Having been unquestionably adamant in 2006 and 2008 supports having believed, albeit incorrectly, that she was similarly

consistent in 2014. Remember, a mistake must be "clear[ly]" disproven by the Examiners (¶ 12 at pp 6-7, above).

G. The Examiners Did Not Prove that Judge Brennan Persistently Mistreated Lawyers Who Appeared Before Her

A sizable share of the public hearing was consumed by the Examiners attempting to prove -- with multiple witnesses, videos and transcripts -- claims that Judge Brennan had been "consistently abusive to attorneys, litigants and witnesses." The first two iterations of the formal complaint named two attorneys -- Ms. Carol Lathrop-Roberts, Esq., and Mr. Brug Sage, Esq. Both testified. Several others also testified to supposed mistreatment. The formal complaint was amended post-hearing to add claims that Judge Brennan had been "unfair and discourteous" to Ms. Amy Krieg, Esq., and Ms. Margaret Kurtzweil, Esq., and to others unnamed. They, too, had testified, as had Mr. David Caplan, Esq.

As he had with all other claims, the Master bought everything presented by the Examiners about Judge Brennan's alleged treatment of attorneys. Not the JTC, however. It pointedly refused to adopt his finding that it was "the universal opinion" of those who testified "that Judge Brennan was persistently impatient, undignified, and discourteous to those appearing before her (p 17). It did, instead, find that some attorneys, whom it did not name described her demeanor on the bench as "appalling and abusive." The JTC also quoted, without ever naming her, Ms. Lathrop-Roberts, and it relied on a description by the Court of Appeals of her handling of Mr. Sags and his client, although it did not quote that description. That reliance was legally incorrect, and all the _____ ignored much of the record. As noted in *MERS v Detroit Symphony Orchestra, Inc.*, 393 Mich 116, 112; 223 NW2d 283 (1974), meaningful review, especially when de novo must "consider[] the whole record -- that is, both sides of the record -- not just that portion supporting the findings being reviewed.

1. The Law

Two bodies of law are especially apropos here:

a. Judges have been disciplined for a lack of judicial temperament in their in-court dealings with attorneys, but only for a "gross lack." *In re Matter of Del Rio*, 400 Mich 665, 716; 256 NW2d 727 (1997), and *In the Matter of Bennett*, 403 Mich 178, 192; 267 NW2d 914 (1978). See, e.g., *In the Matter of Mikesell*, 396 Mich 517, 537, 540, 541; 243 NW2d 86 (1976) ("Shut your big mouth"); *Del Rio*, 400 Mich at 719, fn 23, 720, 722 fn 27 ("You're pissed off because a black man got a little white pussy." "Mother-fucking white liberal." "This honkie bitch." "He told me to get my ass out of his court"); *Bennett*, 403 Mich at 189-191 ("[B]ullshit." "Son of a bitch," and ''bastards"); *In the Matter of Probert*, 411 Mich 210, 236; 411 NW2d 210 (1981) ("Fresh meat" and "little bastard"); *In the Matter of Franklel*, 414 Mich 1109, 1110; 323 NW2d 911 (1982) ("You're a despicable son of a bitch"); and *Gorcyca*, 902 NW2d at 615 (telling children that they were "crazy" and "brainwashed"). Judge Brennan is accused of nothing remotely comparable.

b. In the case of *In re Kapeia*, 389 Mich 306, 311, 314, 205 NW2d 436 (1973), this Court held, and has not subsequently held otherwise, that the JTC "is prohibited from relying on, or adopting, another entity's factual findings and conclusions as a basis for recommending that this Court impose a sanction for judicial misconduct; rather, the JTC must make independent factual findings in this regard."

2. What Happened

Ms. Kurtzweil testified that Judge Brennan "was appalling" (p 1076, lines 1-2), so, presumably, she is one of the "unnamed attorneys" mentioned by the JTC, but that appears to have been an angry retort, not a product of analysis. "She thought I was appalling. She's appalling" (*Id.*). Judge Brennan had told Ms. Kurtzweil she was appalled as she appeared to be "best buds"

with a receiver appointed by the Court. She did not shout at Ms. Kurtzweil, or the like (Ex 2-36, p 10, lines 20-23). Watch the video. And Ms. Kurtzweil admitted having no basis to disparage Judge Brennan's comment. She had never worked with a receiver, and "d[id]n't know what laws apply to [a] receiver," not even whether they could take money from estates being managed (pp 1039, lines 3-5; 1074, lines 5-12).

Nor did Ms. Kurtzweil have any basis for characterizing Judge Brennan as "an outlier," by which she meant "outside of the norm" (p 1046, lines 22-25). But the norm for her was a judge with "an exceptional temperament" to who she compared "every [other] judge" (pp 1079, lines 6-8; 1083, lines 4-8, 16-21; 1084, lines 1-4). Ms. Kurtzweil also had other out-of-the-norm standards (p 1060, lines 10-18). Since few judges have an exceptional temperament, that judge is the outlier. Less stellar judges are the norm. And less than norm is not necessarily so bad to be working of discipline. What Ms. Kurtzweil said she saw in the one case she handled before her (p 1050, lines 8-10) was a judge who "was consistently, not necessarily rude but testy," (p 1024, lines 17-19), although, when reminded of having made that distinction, she insisted "rude" and "testy" mean the same thing (pp 1081, lines 22-25; 1082, lines 1-3), even though she had said the latter was "not" the former. Is that evidence of persistent misconduct, or evidence of shortcomings less than perfection?

Although not named in the JTC's decision as having done so, Ms. Lathrop-Roberts testified that Judge Brennan's court-room behavior was "appalling" and "abusive" (p 1128, lines 12-15), "routinely interrupt[ed]," and didn't care enough to have "the information she needed to make her best decision" (p 1132, lines 18-22). Presumably, therefore, Ms. Lathrop-Roberts was the unnamed "attorney []" quoted by the JTC. But neither the Master nor the JTC found her credible on other related matters, so how can she have been worthy of belief on these matters. Her

testimony about "abusive" pertained to Judge Brennan's treatment of her staff (p 1128, lines 14-17). As noted earlier, the JTC did not find that she had abused her staff. Ms. Lathrop-Roberts was also insistent that Judge Brennan would not let her make her argument in *Bresson v Terleeky* (pp 1135, lines 11-21; 1136, lines 1-4; 1139, lines 12-13; 1146, lines 15-17), even though shown transcript of her doing just that (pp 1147, lines 13-23; 1148, lines 21-25). After prolonged evasion, the Master interrupted, in order to save time, "I accept . . . that she had made a record" (p 1150, lines 4-10). She also denied what was unmistakably found of record by the then-Chief Judge, that Ms. Lathrop-Roberts had been contemptuous of him, and she denied having admitted to an MSP investigator that she had defied Judge Brennan.

That leaves the Court of Appeals opinion in *Sullivan*, which after revising one of Judge Brennan's decisions in the case, remanded the case to a different judge because of apparent hostility by her toward Ms. Sullivan and her attorney. As noted above, this Court has held that neither the JTC nor it can rely on that opinion. In addition, and independently, that opinion did not find misconduct by Judge Brennan. And if found that she was biased, all her decisions would have been reversed, not just one of them.

H. Either Judge Brennan Did Not Violate MCL 169.257(1), Or Any Violation Was Not Actionable Misconduct

The Commission found that Judge Brennan had also "engaged in misconduct by allowing her staff to work on her 2014 judicial campaign during work hours" (p 18). Specifically, her secretary and her law clerk assisted Judge Brennan "on one occasion," during work hours "respond[] to questionnaires from news outlets," her secretary "modified [documents] during work hours," and "[o]n another occasion," the staff "conducted online research" into "what kind of swag" to use at an upcoming campaign event (pp 18-19).

1. What Really Happened

The JTC's findings about campaign conduct are not themselves incorrect. Those findings are, however, significantly incomplete, so that JTC's overall findings are misleading at best. Specifically, the JTC's decision does not mention that, according to Ms. Cox herself, much of the document modification she undertook was done at home or on her lunch hour, meaning they were not during work hours. That is obviously true with regard to work done at home, and her lunch hour was her time, not work time. Furthermore, records maintained by Ms. Cox established that most, if not all, of the document modifications were simple, involving just the revision of documents used before, so that they took only moments, no longer than a typical coffee break, and that many of them occurred at times during the day, both in the morning and afternoon, which are typical times for employee breaks.

Admittedly, Ms. Cox testified that Judge Brennan's staff "did not take breaks" (p 1844, lines 5-7), but that is unlikely to the point of being incredible. It is true that staff did not take so-called "coffee breaks" when doing so would have required interrupting an in-court proceeding, but they had breaks otherwise (pp 1882, lines 19-25; 1883; 1884). And it is simply incredible to contend, especially when the Examiners offered no supporting evidence, that clerical staff were not entitled to breaks. In other words, many of the campaign activities recorded by Ms. Cox as having occurred during a typical work day necessarily occurred when the employees were entitled to a few minutes, which they were twice a day, to take a break. At least, there is enough question whether daytime court room activities were done during work hours to preclude a finding that they were performed during work hours.

While the online search for "swag . . . [to] bring to" a campaign event "was done in the court room" (pp 713, lines 20-25; 714, lines 1-5), that could not have been done, as intimated, during any ongoing court proceeding. No one said so, first of all, and everybody would have been

otherwise occupied. There were computer terminals in the court room, so Ms. Yakel could have sat there, rather than going elsewhere, to do the search, but that does not make her search during court activities, but when court was not in session and "on her own time." Or, the search involved a minimal use of work time and there is no reason to believe, just as there was no claim by anyone, that the activity intruded into the court activity and impaired the functioning of the court. Hence, it was not the improper use of court employees aside from any prohibition by the Campaign Finance Act. There was no such prohibition, as to be discussed next.

2. The Meaning of MCL 169.257(1)

The Michigan Campaign Finance Act prohibits "[a]ny public body or a person acting for a public body" from using or authorizing use of public resources, including personnel, office space, computer hardware or software, and the like, to make a campaign contribution, including, of course, in-kind contributions. MCL 169.257(1). Somewhat surprisingly, there is only one appellate decision which interprets and applies the Act, and the provision interpreted by that opinion is of no moment to this case. Fortunately, there is nothing obtuse about the words which do apply to this case. Their meaning is plain and inapplicable here.

Judge Brennan is not "[a] public body." She is not an entity, pure and simple. Judge Brennan is, and was during her 2014 campaign, plainly "a person," but she plainly was not then "acting for a public body." The phrase "acting for" connotes being an agent of . . . [an]other," *Owosso Independent School District No. 1-011 v Falvo*, 534 US 426, 433; 122 S Ct 934; 151 L Ed 2d 896 (2002), being an agent authorized to act in place of another, *Black's, supra* at 75-76; or acting as a representative of or for the benefit of another. VI *The Oxford English Dictionary (2d ed),* pp 23-25. A judge acting on behalf of her own election campaign is acting for herself, not for the benefit of someone else, in particular, not for the benefit of the court to which she is seeking election or re-election.

The Commission is correct that the 53rd District Court is a "public body" as defined by the Campaign Finance Act, MCL 169.211(7) in particular. But that term is necessarily limited to entities, which conclusion follows inexorably from its words, "created by state or local authority or is primarily funded by or through state or local authority." Only entities can satisfy that definition. No individual can. There was absolutely no evidence presented at the public hearing, or thereafter, that the 53rd District Court as an entity authorized, presumably by remaining silent in the face of their campaign activities, Judge Brennan's staff to assist her with her 2014 campaign.

Much as the judges of a court might want the re-election of a colleague, it is unimaginable that they, acting as the court, not as individuals, would authorize assistance with a campaign. Hence, because Judge Brennan is an individual, not an entity, only the prohibition of "a person acting for a public body" using or authorizing public resources, including public employees, is arguably applicable and, again, there is no evidence of such authorization or use because Judge Brennan was acting on her own behalf, not on behalf of her court. Hence, MCL 169.257(1) was not violated by Judge Brennan. Maybe a modification of the statute should be considered, but here cannot be the time or place.

3. Not Misconduct

A violation of MCL 169.257(1) is a misdemeanor. MCL 169.257(4). If they ever were, misdemeanors are not actionable judicial misconduct. Until January 21, 2003, when the rules governing the JTC were revised for the first time in more than 30 years, 467 Mich at cxxxviii, MCR 9.205(3), as had its predecessors: GCR 1963, 932.4(b)(i) provided that a judge "shall be deemed guilty of misconduct in office if: he [or she] is hereafter convicted of conduct which is punishable as a felony . . ." Those words, said this Court in *State Bar v Gillis*, 402 Mich 286, 291-292; 262 NW2d 646 (1978), did "not preclude" finding misdemeanor behavior to justify discipline. Those words mandated treating felonious behavior as misconduct. They did not preclude

discretionary discipline for misdemeanor behavior. The revision of MCR 9.205(B) removed the words "shall be deemed" and replaced them with the words "is subject to" discipline for conviction of a felony.

A necessary corollary of "is subject to" discipline "for conviction of a felony" is that a judge is not subject to discipline for misdemeanors. *In re Kimble,* 470 Mich 305, 311; 684 NW2d 669 (2004). Finally, it is another tenet of construction that amendments using different words are meant to change a court rule or statute, unless the new words plainly convey the same meaning as their predecessors. That cannot be said of the words "is subject to" and "shall be deemed."

I. Judge Brennan Did Not Improperly Obtain or Accept From Her Judicial Staff Assistance With Personal Tasks.

The JTC adopted the Master's finding that Judge Brennan had improperly "require[ed] her staff members [Ms. Cox, her secretary, and Ms. Sharpe, her law clerk, in particular] to perform personal tasks [for her] during work hours . . . such as taking her car to the dealership [for warranty work], refueling her car, paying her utility bills" and the like (p 18). Judge Brennan's staff did undertake some such personal tasks for her, but she never required anyone to do so -- they volunteered or, when asked, agreed to do so -- and none of the tasks which were performed interfered with the staff fulfilling their duties with the court. Hence, Judge Brennan did not engage in misconduct.

1. What Is And Is Not Misconduct In Obtaining Staff Assistance With Personal Tasks?

There are remarkably few discipline decisions which address judges' supposedly misusing their staff to perform personal tasks. See *Geyh*, *et al.* at § 6.06, pp 6-36-39. First of all, most of the decisions discussed or cited in that section relate to judges themselves misusing computers, government credit cards, and the like, not having staff perform personal tasks. While Judge

Brennan does not contend that the treatise includes all decisions on the subject, there is no reason to believe that all sections in the treatise do not address essentially the same proportion of decisions on a subject. If so, the few decisions addressed in § 6.06 relating to use of staff for personal tasks suggests that few judges have been "grieved" and/or disciplined for doing so. Why? Either the discipline authorities turned a blind eye to such behavior if it is misconduct, or helping their judges with personal tasks is commonly understood to be . . . just everyday human courtesies, *Neely*, 364 S.E.2d at ___ (op per Workman, J.).

Fortunately, the pertinent discipline decisions consistently state the same template for evaluating the propriety or impropriety of a judge accepting help from staff with personal tasks. That consistency commends that template. The template was best stated in *Matter of Neely*, 364 SE2d 250, 252-253 (W Va 1987):

> "A judge or justice may, without creating the appearance of impropriety, occasionally ask members of [her or] his personal staff to voluntarily perform personal tasks that interfere only minimally with performance of their other duties, but this court will not condone the actions of a judge who requires extensive personal tasks as a condition of employment."

Justice Neely was admonished -- two partial dissenters would have censured him -- for, when he hired her, telling his personal secretary that her job would include caring for his infant son and that failure to do so when asked could result in dismissal, for requiring her to care for the boy on 11 occasions, once for more than seven days, and for firing her, when she did decline a twelfth such assignment. It would have been acceptable, said the Court, for Justice Neely to have had the secretary do things akin to completing tax forms or to type a teenage child's term papers while in the office during regular working hours, but that requiring the secretary on penalty of discharge to again care for his son for an extended duration was far more than acceptable, but was

akin to having her help operate a judge's ranch or a construction project in which the judge had a commercial interest. Nothing like that behavior or Justice Neely's occurred in this case.

In the case of *In re Gallagher*, 326 Or. 267; 951 P.2d 705 (1998), not only did a judge's judicial assistant type personal documents, book airline flights, and the like, which did not violate *Neely*, she also spent days out of the office assisting with a fundraising golf tournament there. In the case of *In re Decuir*, 654 So.2d 687 (La. 1995), a judge had his secretary provide eight months of secretarial services his former law partner. And in *Matter of Davis*, a judge had court employees accompany him several times a week on excursions outside the courthouse lasting up to two hours to search for antiques, and he sent court employees to his mother's nursery to provide translation services for customers. As will be discussed shortly, nothing Judge Brennan did was remotely akin.

In sum, a judge is guilty of misconduct if he or she ordered or requires a staff member on penalty of discharge for noncompliance to provide any personal, nonjudicial assistance to the judge. Whether any threat of a lesser sanction for non-compliance would be misconduct, too, has never been addressed. A judge is also guilty of misconduct if he or she asks for or accepts from court personnel voluntary personal assistance which significantly interferes with their duties to the court. It is not misconduct, it follows, for a judge to ask for and to accept personal assistance voluntarily given during work hours so long as it does not significantly impair court functions. Nor should it be deemed misconduct for a judge to accept personal assistance, however extensive, voluntarily provided by a staff member on his or her own time. Especially if compensated by the judge, disallowing such services would impose an inappropriate burden on being a public employee: an inability to earn extra income on their own time.

In their brief to the JTC, the Examiners contended, so presumably they will again contend here, that this Court has adopted a different standard. The Examiners contended that in the case of *In re Cooley*, 454 Mich 1215; 563 NW2d 645 (1997), this Court censured a judge for using her staff for non-work-related tasks even though there was no hint that she threatened them with termination or other significant retaliation if they did not. Seemingly, therefore, the Examiners contended that here in Michigan there is an absolute ban on staff assistance with personal tasks. That is the conclusion which follows from their contention.

Putting aside, for the moment, how unrealistic and compromising of the judiciary such a rule would be, *Cooley* did not adopt any such rule. Judge Cooley "appropriated [for over three years] the services of court personnel whom she requested to perform 'non-work-related tasks . . .'" "Appropriat[ed]" is, even when used with the word "requested" a strong hint of compulsion. At least it is far from a statement of purely voluntary assistance. In addition, *Cooley* involved a consent order of discipline, which this court has previously noted, are more sui generis than precedent-setting. They do not entail the analysis underlying the resolution of a contested case. Besides, this court is free to overturn or modify any rule as adopted and, as noted above, if *Cooley* did what the Examiners contend, the holding should be revisited and revised. As also noted earlier herein, a rule prohibiting judges from requesting and/or accepting any voluntary staff assistance with personal tasks would be impractical, would stultify the judicial workplace, and would look silly to the public.

2. What Did Judge Brennan Do.

Not only was no evidence presented at the public hearing that Judge Brennan required any member of her staff to perform tasks for her, there was much evidence to the contrary, that she did not do so. To start, the Examiners never asked Ms. Cox if Judge Brennan had ordered or required her to perform personal tasks. Their questions to her were variations of "Did Judge Brennan *ask*

you to do . . . various personal tasks . . .?" [emphasis added] (pp 606, lines 9-10; 610, lines 24-25; 615, lines 13-15; 617, lines 10-20; 620, lines 18-19; 707, lines 9-10), but consistently used only the highlighted word. The words "ordered," "required," etc. were not used (pp 697, lines 23-24; 702, lines 11-12; 706, lines 24-25; 707, line 4; 711, line 14; 712, lines 10-12; 754, line 22). If Ms. Cox and Ms. Sharpe were required to perform personal tasks, would they not have said so when interviewed ahead of their testimony, and would not the Examiner have used those terms, rather than not mention them and repeatedly use "ask" instead?

But we need not infer what Judge Brennan said. Her staff testified to what she said. For example, Ms. Cox answered, "Yes," to the question, "[D]id [Judge Brennan] ask you to do anything outside of your official duties?" (p 606, lines 9-12). Although Ms. Cox said, "I had to . . . pick up lunch," she immediately added, "I would offer to do that" (p 607, lines 1-4). In the morning, Judge Brennan "sometimes . . . would . . . ask me" to get her coffee and a muffin (p 607, lines 6-9) and "[s]he'd . . . ask me to pay her bills" (p 611, lines 18-20). Finally, Ms. Cox acknowledged having "step[ped] forward and volunteer[ed] to do 'personal things for Judge Brennan,'" "not 100%," but "on occasion" (pp 682, lines 21-25; 683, lines 1-2). And at other times Judge Brennan offered a "$100 finder's fee" to any staff member who could find specified items for her online, which challenges Ms. Cox (and Ms. Sharpe) readily accepted (p 614, lines 21-25; 615, lines 1-12), hoping to earn the $100 (p 661, lines 11-12).

We know also for sure that Ms. Yakel volunteered to stain Judge Brennan's deck. "She asked me if I knew anyone who stained decks . . . I said not off the top of my head, but I can do it, . . . so she asked [me] . . . [and] I said sure," (p 698, lines 12-21), testified Ms. Yakel. That is the antithesis of being dragooned into the task. And as had Ms. Cox, Ms. Yakel also testified with regularity that Judge Brennan "asked me" (p 711, lines 7-8; 754, lines 3-4, 19-20; 1860, lines 21-

25; 1861, line 2), or "request[ed]," or "wanted me to take care of." None of that testimony supports, or even allows, the conclusion that Judge Brennan required her staff to perform personal tasks for her, let alone did so as a condition of employment.

Ms. Cox claimed "always fe[eling] a sense of being compelled" (p 613, lines 19-20). But when asked in the same colloquy with the Master, "[D]id you consider those things done at her direction voluntarily done . . .?," Ms. Cox answered, "[I]t depends what it is, Judge. That's a tough one" (p 683, lines 7-12), which is hardly anything close to "always fe[eling] a sense of being compelled." And, as noted earlier, Ms. Cox testified to having "offer[ed]" to pick up lunch, having "step[ped] forward and volunteer[ed]" to do personal tasks for Judge Brennan and having accepted the offers of a finder's fee to look online for clothes for the judge. Those, too, are not claims of compulsion.

Also, Ms. Sharpe did respond, "[a]bsolutely not" when asked, " . . . [D]id you feel free to say, I don't think so. I'd rather not do that?" (p 707, lines 13-15). Just a few pages earlier she had admitted having volunteered, not even being asked, to stain Judge Brennan's deck (p 698, lines 17-20). And just a few months wrote that "Judge Brennan's treatment of her (p 732, lines 16-19) was 'just awesome' and that the judge was 'for the most part, the perfect boss'" (p 734, lines 7-11), "a good mentor" (pp 731, line 23; 732, lines 6-7), and someone to be emulated (p 733, lines 15-16). Is that how an intimidating boss is described?

All the assistance Judge Brennan requested and obtained from her staff was with truly personal matters: canceling appointments when she was stuck on the bench in the midst of a proceeding, making hairdressing appointments, getting coffee and a muffin, dropping off mail or packages on their way home, making an ATM withdrawal at a nearby bank, purchasing online a parking pass for an upcoming baseball game, getting water samples from her home for testing, and

programming Netflix there, taking her car in for repairs and staining her deck. None were in aid of a business Judge Brennan was or some family member was also operating, as had occurred in *Cooley*, *Davis* and *Gallagher*.

Most of the tasks took only moments. Two did involve more than a few minutes, but neither impaired the functioning of the court for want of attention from staff. One day, Ms. Sharpe spent a couple of hours waiting at a nearby car dealership for warranty work to be done on the judge's vehicle, but the judge's secretary remained at the courthouse to handle phone calls, visitors, etc. Ms. Sharpe was the judge's law clerk. She took drafting work with her, and since the judge was traveling out-of-state to a family wedding, Ms. Sharpe's absence did not interfere with anything which needed to be done at the courthouse. She could do the needed research and drafting online and off-site.

Apparently, for two of the three days Ms. Sharpe worked on staining the deck at Judge Brennan's home she was on the clock at the courthouse, but, obviously, doing nothing there for the court. The third day was a Saturday, Ms. Sharpe's own time and when the court was closed. Unquestionably, accepting the latter cannot have been improper. Ms. Sharpe had volunteered to do the task and she was doing it on her own time. Under other circumstances, but not the circumstances of this case, accepting the former would have been improper. Ms. Sharpe had volunteered to do the work. No question about that. She admitted it.

As for the staining which occurred while Ms. Sharpe was on the clock, Judge Brennan did not know of that and had no reason to know of it. Ms. Sharpe was then a part-time employee who worked 2.5 days/week. In other words, she did not work 2.5 days/week and her schedule was flexible. The two days she worked on the deck could have been off the clock, which is what Judge Brennan expected and which it was reasonable to expect. Yes, she wanted the work done right

away to take advantage of favorable dry weather, but she did not direct Ms. Sharpe to lie to the county. Ms. Yakel could have clocked in truthfully on other days. And the judge being out of town, she did not know what Ms. Sharpe had done. She wasn't there to see what was and was not going on, and she did not have access to Ms. Sharpe's time records, which were computerized and accessible only to Ms. Yakel.

J. Judge Brennan Did Not Engage in Any Misconduct During Any of the Depositions Taken in Her Divorce Case

The JTC's final finding was that Judge Brennan "improperly interrupted two depositions that she attended during her divorce case" (p 21). Curiously, the JTC's decision did not use the word misconduct, but only the word "improper[]." Judge Brennan assumes that the JTC used those words synonymously. If not, this section need not be reviewed.

1. What Happened

During the Root-Brennan divorce case, Mr. Kizer, who was representing Mr. Root, took several depositions. Very little attention was directed during those depositions to matters pertinent to divorce proceedings. Mr. Kizer spent virtually all of his time addressing what would become the allegations in the grievance he filed against Judge Brennan. That, frankly, was misconduct, but Judge Brennan's divorce lawyers did not object, which they should have done. Judge Brennan did not engage in any conduct.

Very early in the divorce case, Mr. Kizer took the deposition of Mr. Furlong. When, in response to a question by Mr. Kizer, Mr. Furlong testified that he and Judge Brennan had not exchanged texts or telephone messages during the *Kowalski* trial, Judge Brennan interjected, "We did once." Six or so weeks later, when Ms. Francine Zysk began to answer a question in her deposition, Judge Brennan interrupted, stating "Okay, okay, you need to stop for a minute. You

are lying. You are such a liar." Those were the totality of the "interrupt[ions]" by her, twenty words.

Neither witness was the least bit affected by Judge Brennan's comments. Neither lost their train of thought, was the least bit flummoxed or confused, or altered in the least their testimony. Nor did either complain about the interruptions. Nor did Mr. Kizer seek from the court any sanction which he was authorized to do if he thought Judge Brennan's interruptions had "impede[d], delay[ed], or frustrate[d] the fair examination of the Department[s] or otherwise violate[d] the th[e] [pertinent] rule.

2. What Misconduct?

The JTC's decision does not explain in any fashion why Judge Brennan's interruptions were improper. Nor does its decision cite to any authority whatsoever which she supposedly violated. Instead, the JTC's decision merely makes the bald assertion that she had acted "improperly." That lack of specificity should be enough to absolve Judge Brennan of any obligation to even attempt to rebut the assertion. JTC findings and recommendations must be "adequately supported," *In re Servaas*, 484 Mich 634, 678; 774 NW2d 46 (2009), and what is "not part of the [JTC's] recommendation . . . will not be considered by this Court." See also *Simpson*, 500 Mich at ____ fn 22 (deference to recommendations "is a function of the JTC [having] adequately articulated the basis for its findings . . ."). Unexplained decisions are not remotely acceptable. *Haley,* 476 Mich at 197-198.

In each iteration of the formal complaint it filed, the JTC asserted that Judge Brennan had engaged in "[i]mproper conduct during deposition[s] contrary to MCR 2.306(C)" (Complaint dated 6/12/2018, ¶318[t], p 63; First Amended Complaint, ¶390[u] p 86; Second Amended Complaint, ¶390[u], p 75). In her brief to the JTC (at pp 49-50), Judge Brennan and her counsel discussed explicitly why MCR 2.306(C) did not apply, nor why MCR 2.306(D), which more likely

was applicable, was not violated. Hence, it simply is not credible to conclude that the JTC's silence on the issue was sloppy or inadvertent. Almost surely, is silence resulted from it having no basis to articulate in support of its finding of improper conduct at other's depositions.

MCR 2.306(C) is very long, addressing many subjects. Unfortunately, the Complaint does not specify which part of the rule is at issue. Presumably, the JTC relied on MCR 2.206(C)(5) because that is the only place where anything is said about interactions with deponents. Only two types of interactions are mentioned, and neither kind remotely happened in this case. Specifically, except to assert a privilege or some other legal protection, "a person" may not instruct a deponent to not answer a question, MCR 2.206(C)(5)a, and a "deponent may not confer with another person while a question is pending." MCR 2.306(C)(5)b. Neither happened.

MCR 2.306(D)(2), which has never been asserted, authorizes sanctions "on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates this rule." There is no claim, nor was there any proof, that the examination of either Mr. Furlong or Ms. Zysk was adversely affected, and it was apparent that neither examination was. As noted earlier, neither witness balked at answering, changed an answer, lost their train of thought, complained, or asked for a break before continuing (Exhibit 1-4, p 56; Exhibit 3-2, pp 27-28). In sum, Judge Brennan did not violate MCR 2.306(D)(2) either.

VI. PRAYER FOR RELIEF

WHEREFORE, for the above reasons, Judge Brennan prays this Honorable Court reject and/or modify the Tenure Commission's recommendation.

Respectfully submitted,

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