STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Hon. Bruce Morrow
3rd Circuit Court
Wayne County, MI

Docket No. 161839
Formal Complaint No. 102

Respondent Hon. Bruce Morrow's Proposed Findings of Fact and Conclusions of Law

Introduction

1. Disciplinary Counsel accuse Respondent Hon. Bruce Morrow of using inappropriate words. In Count One, they fault Judge Morrow for analogizing a direct examination to a romantic relationship that leads to sexual intercourse. In Count Two, they accuse Judge Morrow of using the word "fucked" when referring to sexual intercourse while in chambers and discussing testimony about sexual intercourse. They add—incorrectly—that Judge Morrow used the word "dick." And they fault him for ultimately using another analogy concerning dating and sex during the same in-chambers discussion to make a point about voir dire. In Count Three, they blame Judge Morrow for guessing first the height and then the weight of two attorneys, and then saying his guess for weight did not include "muscle mass."

2. Apart from the false accusation regarding the word "dick," Judge Morrow does not dispute that he made those analogies, asked those questions, and used those words.

3. Why did this case require a five-day hearing? The parties had to take testimony because, ever since prosecutor Anna Bickerstaff first raised Judge Morrow's comments, the Wayne County Prosecutor's Office and the Judicial Tenure Commission have tried to twist the facts to turn Judge Morrow into a sexual predator.

4. This effort began with Anna Bickerstaff. Judge Morrow compared a direct examination to a romantic relationship in a discussion with Ms. Bickerstaff—a conversation during which a police officer was sitting right next to Ms. Bickerstaff and well within earshot. When Ms. Bickerstaff reported the conversation, she either falsely accused Judge Morrow of "hitting on" her (according to Chief James Bivens), or she failed to correct a statement to that effect that was attributed to her (according to Ms. Bickerstaff). It really doesn't matter which. Whether she lied or allowed a lie to fester, she was dishonest. And she drew on vile, racist stereotypes about Black men. She did so to increase the likelihood that Judge Morrow—a judge whom the Wayne County Prosecutor's Office has long disfavored—would face judicial discipline. Ms. Bickerstaff proved her dishonesty not only through her false allegations about Judge Morrow but also by violating the Master's sequestration order *in this very case*. She cannot be trusted.

5. Judge Morrow did draw a parallel between a direct examination and a relationship that leads to sex. He also used an analogy relating to dating and sex while discussing *voir dire* with prosecution and defense attorneys in chambers. Neither reference was misconduct. His only intent when using these analogies was a didactic one. Attorneys should be mature enough to handle an analogy involving

romantic relationships and sex. These appear in judicial opinions and bar journals. Even a now-former chief justice of the Michigan Supreme Court used a vividly lewd analogy in a law-review article, and the Court cited that article with approval in an opinion (over the protests of the late Justice Weaver, who found the imagery objectionable).

6. Judge Morrow did use the word "fucked" during an in-chambers conversation. He used the word in its proper sense—as a synonym for intercourse. It is not misconduct for a judge to use the word "fucked" to refer to intercourse in a private conversation with attorneys. The language may be considered coarse but, for better or worse, coarse language is often part of conversations among adults.

7. Judge Morrow did *not* use the word "dick." He did express skepticism about a criminal defendant's tendency to exaggerate—an issue that arose because the defendant testified that he could not have "normal" sex with the victim because she was pregnant. Judge Morrow's expression of disbelief during in-chambers discussions about the defendant's use of exaggeration is not misconduct.

8. Judge Morrow did ask two prosecuting attorneys about their height and weight. He did so in the context of a discussion about one attorney's ability to handle criticism. His innocuous questions had no sexual content. The allegation that he was "overtly eyeing" the prosecuting attorneys—an allegation for which there is no supporting evidence—draws on the some of the worst and most dangerous stereotypes about Black men. Spinning Judge Morrow's questions as sexual or predatory is simply abhorrent.

9. Above all, Disciplinary Counsel have failed to prove any malicious or improper intent. There is no credible evidence that Judge Morrow was trying to "hit on," insult, and belittle anyone. Nor is there any evidence that his comments had a discriminatory intent. Judge Morrow was trying to teach—and, during the in-chambers discussion, he was engaged in a frank conversation about the substance of the prosecution's case. Other judges might choose different words or analogies, but that does not mean that Judge Morrow violated the Code of Judicial Conduct. The Master should find that Disciplinary Counsel failed to prove misconduct.[1]

Proposed Findings of Fact

Background on Judge Morrow

10. Judge Morrow has been a judge at the Wayne County Circuit Court since his election in 1998. (*Answer,* ¶1). Before that, Judge Morrow served as a judge at the Recorder's Court. (*Id.*)

11. When performing his judicial duties, Judge Morrow tries to demystify and humanize the judicial process, particularly for jurors. (Edison testimony, Vol. III, p. 669; Fishman testimony, Vol. III, p. 794). For example, he discourages attorneys from referring to those accused of crimes as "defendants," and insists that attorneys use each defendant's name. (Ciaffone testimony, Vol. I, p. 302). Attorney Gabi Silver

[1] As Judge Morrow previously acknowledged, the Master cannot rule on the constitutionality of Michigan's Judicial Tenure Commission. But Judge Morrow preserves his argument that, because the Judicial Tenure Commission rules on charges that the Commission itself authorized, Michigan's judicial-discipline system violates the Due Process Clause of the United States Constitution. See *Williams v Pennsylvania,* 136 S Ct 1899 (2016).

testified that Judge Morrow "treated [her] clients with respect like they were real people, as he did their families, as he did families of the victims." (Silver testimony, Vol. IV, p. 969). Judge Morrow also takes great care in instructing jurors about bias. (Fishman testimony, Vol. III, p. 795).

12. Judge Morrow tries to demonstrate humility and to ensure equality and fairness. (Ciaffone testimony, Vol. I, p. 670). He also fosters among jurors the sense that the court belongs to the people. (*Id.,* p. 671). This kind of solicitude for everyone involved in a criminal trial is rare. (Silver, Vol. IV, p. 969).

13. Judge Morrow has also tried to make the criminal-justice system more humane by mentoring inmates in the correctional system. (Edison testimony, Vol. III, p. 688). As attorney Jeffrey Edison testified, Judge Morrow "encourage[s] those who have been caged for many years, sometimes caged for life, and tr[ies] to uplift their spirits and enhance their quality of life." (*Id.*) Judge Morrow's former judicial assistant, Joan Kennedy-Hughes, described Judge Morrow's "inspirational speeches to help the young men that were in prison to know that there is hope once they get on the other side." (Kennedy-Hughes testimony, Vol. IV, p. 1028).

14. Judge Morrow has a reputation for integrity and for being one of the best trial judges in the criminal division. (Edison testimony, Vol. III, p. 674; Fishman testimony, Vol. III, p. 811). As Judge Edward Sosnick wrote in a previous disciplinary proceeding, witnesses described Judge Morrow as "hardworking and punctual," "fair," and "as someone who reaches out to defendants and tries to encourage them to change

their ways"). See Attachment A, Master's Report re: Formal Complaint No. 92 at 4 [2]

15. As part of his effort to enhance the quality of advocacy in his courtroom, Judge Morrow often offers advice and criticism to attorneys. (Edison testimony, Vol. III, p. 676-77).

16. The Wayne County Prosecutor's Office has a long history of animosity toward Judge Morrow. (Edison testimony, Vol. III, p. 691; James testimony, Vol. IV, p. 1005). Attorney Nicole James recalled being told around 2007, when she worked in the prosecutor's office, that Judge Morrow was a "bad judge." (James testimony, Vol. IV, p. 1005). (That was well before *In re Morrow,* 496 Mich 291; 854 NW2d 89 (2014)). Ms. James also knew that the Wayne County Prosecutor's Office kept a "book" on Judge Morrow's supposed errors—but she had never heard of the prosecutor's office keeping similar books for other judges. (James testimony, Vol. IV, p. 1009). This history arises in part from Judge Morrow's willingness to hold prosecutors to their burden of proof and to dismiss cases or suppress evidence when the law requires it. (Edison testimony, Vol. III, p. 691).

17. After Ms. Kennedy-Hughes resigned as Judge Morrow's assistant, she received a call from someone with Wayne County offering to help her find another job "[i]f [she] left because of anything Judge Morrow said or did[.]" (Kennedy-Hughes testimony, Vol. IV, p. 1031). Ms. Kennedy-Hughes explained, "They asked me if I resigned as a result of anything Judge Morrow did, and, *if so,* they would help me

[2] The Master may take judicial notice of public records. *Johnson v Dep't of Natural Resources,* 310 Mich App 635, 649; 873 NW2d 842 (2015); MRE 201.

find another job." (Kennedy-Hughes testimony, Vol. IV, p. 1030) (emphasis added). The caller's question made it clear that providing negative information about Judge Morrow was a condition for obtaining the caller's assistance in finding a job.

The Matthews case and its voir dire

18. Judge Morrow presided over the June 2019 homicide trial of James Edward Matthews. (*Answer,* ¶3). The case was styled as *People v Matthews,* Case No. 18-7023-01-FC. (*Id.*) It lasted from June 10, 2019 to June 13, 2019. (Griffin testimony, Vol. III, p. 746).

19. Mr. Matthews was accused of the 2003 murder of Camille Robinson. (Ciaffone testimony, Vol. I, p. 31; Bickerstaff testimony, Vol. II, p. 544). Mr. Matthews was not charged with any crimes relating to sexual activity but he acknowledged to the police in 2003 that he had a sexual encounter with the victim before her death. (Ciaffone testimony, Vol. I, p. 31). The prosecution would make this sexual encounter a key part of its case.

20. The prosecutors in the *Matthews* case were Ashley Ciaffone and Anna Bickerstaff. (Ciaffone testimony, Vol. I, p. 31; Bickerstaff testimony, Vol. II, p. 376). William Noakes was the defense attorney. (Ciaffone testimony, Vol. I, p. 32).

21. Ms. Ciaffone has a reputation for being quick to anger and take offense. (Noakes, Vol. III, p. 878). But she was more experienced with criminal trials than Ms. Bickerstaff. (Ciaffone testimony, Vol. I, p. 31). She saw herself as a mentor to Ms. Bickerstaff, who had been a prosecutor for only about a year and a half at the time of the *Matthews* trial. (Ciaffone testimony, Vol. I, p. 103; Bickerstaff testimony, Vol. II, p. 375).

22. During voir dire, Judge Morrow used the example of his height to illustrate bias for the jury. (Bickerstaff testimony, Vol. II, p. 415). He said, "I'm gonna say: The man was tall. I can almost guarantee everybody has a different height for tall. Because mine is 6'7". And why is it 6'7"? Because I'm 6'4". And our definitions are always personal. Nobody knows. But if I said the man was 6'7", now you have the information. Now you can make your own conclusion." (Bickerstaff testimony, Vol. II, p. 482).

23. Attorney Steven Fishman recounted another example in which Judge Morrow used height to demonstrate bias. (Fishman testimony, Vol. III, pp. 796-98). Judge Morrow is 6'4" and Mr. Fishman is just shy of 5'10". (*Id.,* pp. 796-97). During voir dire in a homicide trial, Judge Morrow asked a juror to guess whether Judge Morrow or Mr. Fishman played basketball at the University of Michigan. (*Id.,* p. 796). The juror picked Judge Morrow—and that was wrong. (*Id.,* p. 797). Judge Morrow brought out the fact that the juror was making presumptions based on height and perhaps race, too. (*Id.,* p. 798).

24. In the *Matthews* trial, Judge Morrow encouraged Ms. Ciaffone to be more direct by asking her, "What one thing do you really want to know?" toward the end of her *voir dire*. (Bickerstaff testimony, Vol. II, p. 487). Ms. Bickerstaff saw this statement as helpful advice for the prosecution. (*Id.,* pp. 487-88). And it proved helpful. Ms. Ciaffone asked the jury pool, "Does anyone here believe that they would be a bad fit based on the very limited information you have heard about what the charges are in this case for this trial for any reason?" (Bickerstaff testimony, Vol. II,

p. 489-90). One juror raised his hand. (*Id.*) A direct question yielded better information.

The prosecution's 404(b) error

25. *Matthews* proved to be a difficult case for the prosecution. The homicide occurred sixteen years before trial. (Bickerstaff testimony, Vol. II, p. 462). One of the key witnesses had a checkered background. (*Id.*) And the press was very critical of the Wayne County Prosecutor's Office's handling of the case. (*Id.,* p. 463). According to one article, the prosecutor's office and the Detroit Police Department were trying to shift blame to each other. (*Id.,* p. 463).

26. One significant issue at the trial involved "other acts" evidence under MRE 404(b). The prosecution wanted to introduce evidence that Mr. Matthews committed a 1999 homicide in addition to the 2003 homicide at issue in the case. (Griffin testimony, Vol. III, p. 757).[3] Judge Morrow excluded that evidence under MRE 404(b) at a pretrial hearing (*Id.;* Ciaffone testimony, Vol. I, p. 106). The Court of Appeals issued an interlocutory ruling that allowed the prosecution to renew its attempt to admit this evidence. (Griffin testimony, Vol. III, p. 757). But Ms. Ciaffone and Ms. Bickerstaff never renewed their Rule 404(b) motion during their case-in-chief. (Ciaffone testimony, Vol. I, p. 279). They couldn't do so through rebuttal witnesses because there was no testimony about those homicides to rebut. (*Id.,* p. 283). With no other option, Ms. Ciaffone renewed the Rule 404(b) issue on the last

[3] The prosecution originally wanted to use multiple previous incidents but, by the time of their appeal, they had narrowed their request to the 1999 homicide. (Bickerstaff testimony, Vol. II, p. 505).

day of trial—a futile gesture—and Judge Morrow denied the motion. (*Id.,* p. 283).

27. This development would take on added significance when the jury deadlocked on a verdict (Ciaffone testimony, Vol. I, p. 80). The hung jury meant that the case would be re-tried before Judge Morrow – unless the prosecution could come up with a basis to have him removed.

The prosecution's reliance on disputed statements

28. Another major issue concerned alleged statements from the defendant's siblings. Emory Matthews, the defendant's brother, supposedly told a police officer in 2005 that his brother, the defendant, confessed to multiple homicides. (Ciaffone testimony, Vol. I, p. 190; Bickerstaff testimony, Vol. II, p. 498-99). By the time of trial in 2019, he refused to confirm his alleged 2005 statement. (Griffin testimony, Vol. III, p. 760). He was adamant that the 2005 report was inaccurate and he made the officer in charge, Lieutenant Derrick Griffin, aware of that fact before trial. (*Id.*) The defendant's sister also notified Lieutenant Griffin that she would not testify in a manner consistent with statements attributed to her in police reports. (Griffin testimony, Vol. III, p. 761-62).

29. Lieutenant Griffin told Ms. Ciaffone or Ms. Bickerstaff that the defendant's siblings would not provide favorable testimony. (Griffin testimony, Vol. III, p. 763). The prosecution also had a chance to speak to Emory Matthews before trial. (Bickerstaff testimony, Vol. II, p. 465; Bickerstaff testimony, Vol. II, p. 501-02). Ms. Bickerstaff acknowledged learning that the defendant's siblings denied their previous statements, but she could not recall when. (Bickerstaff testimony, Vol. II, p. 502). Indeed, she testified that, when Emory Matthews recanted on the stand, "we

[the prosecution] had some expectation that this was coming…" (Bickerstaff testimony, Vol. II, p. 526).

30. Nevertheless, Ms. Ciaffone told the jury in her opening statement that Emory Matthews would testify that James Matthews admitted to ***<u>two</u>*** homicides. (Ciaffone testimony, Vol. I, p. 190; Bickerstaff testimony, Vol. II, p. 498-99). She admitted that her only basis for making that statement about two more homicides was Emory Matthews's alleged statements—which he denied making and would not confirm. (*Id.*) Moreover, the court had suppressed any reference to the other homicide when it denied the prosecution's motion under MRE 404(b). (*Id.,* p. 190). The prosecution's reliance on testimony that they knew Emory Matthews would not provide was a significant breach of responsibility in a high-profile trial.

The prosecution's struggles with basic trial mechanics

31. Throughout the trial, the prosecution violated basic procedures and needed reminders from Judge Morrow about how to form proper arguments and questions. During her opening statement, for example, Ms. Ciaffone warned the jury against "red herrings." (Ciaffone testimony, Vol. I, p. 176). As Ms. Ciaffone's co-counsel testified, that kind of argument is improper in an opening statement. (Bickerstaff testimony, Vol. II, p. 507). Judge Morrow had to stop Ms. Ciaffone and remind her not to do that. (*Id.,* p. 178). Judge Morrow said, "Excuse me. I love you for that. But as to what the evidence will show, not anticipating what might be used,

trying to rebut that, as to what your case will show, please." (*Id.,* p. 178-79).[4] Ms. Ciaffone acknowledged that Judge Morrow was correct to stop her from being argumentative in her opening statement. (Ciaffone testimony, Vol. I, p. 182).

32. The prosecution ran into trouble again when Ms. Ciaffone examined the first witness: the defendant's neighbor, Mr. Masterson. This witness—who was supposed to perform the key task of identifying the defendant—only identified the defendant by saying, "I think that's him." (Ciaffone testimony, Vol. I, p. 184).

33. Then came another prosecution misstep. As Ms. Ciaffone put it when testifying in this proceeding, she "confront[ed]" Mr. Masterson with a transcript of his previous testimony. (Ciaffone testimony, Vol. I, p. 200-201). Judge Morrow intervened to explain that Ms. Ciaffone was not refreshing the witness's recollection properly. (*Id.,* pp. 202-03). Judge Morrow was right: even Ms. Bickerstaff acknowledged that Ms. Ciaffone's attempt to "refresh" Mr. Masterson's recollection was improper. (Bickerstaff testimony, Vol. II, p. 510-11).

34. Ms. Ciaffone had repeated problems with leading questions, even after Judge Morrow patiently corrected her. (Bickerstaff testimony, Vol. II, p. 515-16). For example, when Camille Leak testified for the prosecution, Ms. Ciaffone used leading questions. (Ciaffone testimony, Vol. I., pp. 214-215). As a result, Judge Morrow had to remind Ms. Ciaffone of the proper way to question a witness. (*Id.*)

35. Ms. Leak's t-shirt said something like, "I don't give a fuck." (Noakes

[4] Judge Morrow used the phrase "I love you for that" often, including with male attorneys. (Bickerstaff testimony, Vol. II, p. 508).

testimony, Vol. III, p. 873). Mr. Noakes sought to highlight that language during his examination. (*Id.*) Judge Morrow intervened and said, "That's not relevant." (*Id.*) (Exhibit 5, June 11, 2019 transcript from *Matthews* trial, p. 39).

36. Ms. Bickerstaff had difficulties during the trial, too. She conducted the direct examination of Officer Deborah Stinson. (Ciaffone testimony, Vol. I, p. 257). Ms. Bickerstaff began most of her questions with the word "and." (Ciaffone testimony, Vol. I, p. 257; Bickerstaff testimony, Vol. II, p. 542). She had similar issues in other examinations. (*Id.,* p. 259, 261; Bickerstaff testimony, Vol. II, p. 379-80). Judge Morrow told Ms. Bickerstaff that she should "keep an eye on" that. (Bickerstaff testimony, Vol. II, p. 380). The jury was not present when he made that comment. (*Id.,* p. 381). Ms. Bickerstaff thought Judge Morrow's comment was professional, helpful, and appropriate. (Bickerstaff testimony, Vol. II, p. 550).

37. At some point during the trial—Ms. Bickerstaff could not remember when—Judge Morrow advised her to seek a mentor other than Ms. Ciaffone. (Bickerstaff testimony, Vol. II, p. 434).

38. Judge Morrow's criticism and critiques were not one-sided. (Noakes testimony, Vol. III, p. 872). As Ms. Ciaffone admitted, he was critical of both the prosecution and defense attorneys. (Ciaffone testimony, Vol. I, pp. 46, 221). He warned both sides about focusing on irrelevant issues: "So, if you all don't all tighten it up, you know, I seriously would not like to be as involved as you all are making me be involved. So focus and act more like lawyers." (*Id.*, p. 221). He also warned the attorneys to stop asking witnesses to repeat their testimony. (Bickerstaff testimony,

Vol. II, p. 523-24). And Judge Morrow had to intervene when the defendant's behavior proved disruptive. (*Id.,* p. 219).

The prosecution's unnecessary DNA evidence

39. On top of these issues, the prosecution unnecessarily introduced a complicated issue involving DNA evidence. Kirk DeLeeuw, a forensic biologist with the Michigan State Police, was not present when it was time to take the stand. (Ciaffone testimony, Vol. I, pp. 239, 241). When he showed up, Mr. DeLeeluw had to testify about Wayne County's fifteen-year backlog in processing DNA evidence. (Ciaffone testimony, Vol. I, p. 244).

40. Yet there was no need to complicate the prosecution's case with this troubling evidence. The defendant acknowledged that he had sexual intercourse with the victim. (Ciaffone testimony, Vol. I, p. 299). He said, "She was pregnant. She couldn't have sex like we normally do because we didn't want her to abort the baby, which is why she had the miscarriage the other time." (*Id.,* p. 300).

41. During Mr. DeLeeuw's testimony, Ms. Ciaffone raised the issue of a "rape kit," although there was no allegation of rape in the case. (Ciaffone testimony, Vol. I, p. 242).

The prosecution's mischaracterization of evidence

42. The prosecution's problems continued during closing arguments. Ms. Ciaffone had tried to impeach Mr. Matthews with his alleged 2005 statement. (Ciaffone testimony, Vol. I, p. 226). Because that statement was offered only for impeachment, it was not substantive evidence. Yet Ms. Ciaffone treated this

impeachment evidence as substantive evidence in her closing argument. (Ciaffone testimony, Vol. I, pp. 228-229; Bickerstaff testimony, Vol. II, p. 415). She acknowledged that it is improper to use impeachment evidence as substantive evidence. (Ciaffone testimony, Vol. I, pp. 230-231).

43. During Ms. Ciaffone's closing argument, Mr. Noakes objected that she was pointing at the defendant "like he was a thing." (Ciaffone testimony, Vol. I, p. 302). Judge Morrow told Ms. Ciaffone to be cautious about doing that. (*Id.*)

The hung verdict and case reassignment

44. On June 13, 2019, the jury returned with a hung verdict and the court declared a mistrial. (Ciaffone testimony, Vol. I, p. 80).

45. The prosecutor's office filed a motion to disqualify Judge Morrow from the retrial. (Ciaffone testimony, Vol. I, p. 288). The prosecutors did not serve Mr. Noakes, the defense counsel, with a copy of the motion. (Noakes, Vol. III, p. 893). Nor was Mr. Noakes aware of the court ever holding a hearing on that motion. (Noakes testimony, Vol. III, p. 893).

46. The case was reassigned to Judge Michael Hathaway, a visiting judge in Wayne County. (Ciaffone testimony, Vol. I, p. 284-85).

47. Attorney Gabi Silver also testified that one of her clients' cases was abruptly transferred from Judge Morrow to Judge Michael Hathaway—without a hearing. (Silver testimony, Vol. IV, p. 960, 976). She was notified of the transfer through an email from Anna Bickerstaff. (*Id.*) It appeared that the prosecutor's office was using the allegations about Judge Morrow to re-assign cases from Judge

Morrow's docket. In other words, they were "forum shopping." (Silver testimony, Vol. IV, p. 963).

48. After the transfer in the *Matthews* case, Judge Hathaway granted the prosecution's Rule 404(b) motion in part. (Ciaffone testimony, Vol. I, p. 289, 350).

49. Judge Hathaway asked Ms. Ciaffone if Emory Matthews recanted his earlier statement. (Ciaffone testimony, Vol. I, p. 292). Ms. Ciaffone said that Emory Matthews "backed away from" but did not "entirely discredit[ ]" his earlier statement. (*Id.,* p. 292). In fact, Emory Matthews did discredit his earlier statement about James Matthews's supposed confession. (Griffin testimony, Vol. III, pp. 764). He made this point as plainly as possible: "And then it says right here: 'Matthews stated that his brother confessed to him and other family members that he killed both the females.' That's not true." (Exhibit 5, June 11, 2019 transcript, p. 51).

Judge Morrow's conversation with Ms. Bickerstaff on June 11, 2019

50. Ms. Ciaffone asked Judge Morrow for feedback early in the trial. (*Answer,* ¶5; Ciaffone testimony, Vol. I, p. 35). Ms. Ciaffone testified that she asks judges for feedback in most of her cases. (Ciaffone testimony, Vol. I, p. 36). Ms. Bickerstaff asked Judge Morrow for feedback during a break on June 11, 2019. (Bickerstaff testimony, Vol. II, p. 560). According to Ms. Bickerstaff's June 14, 2019 memo, Ms. Ciaffone decided to ask Judge Morrow for advice again after Ms. Bickerstaff told Ms. Ciaffone that "[Judge Morrow] had given [her] advice twice…" (Exhibit 6, Bickerstaff memo).

51. When Ms. Ciaffone asked Judge Morrow for feedback, he expressed doubt about her ability to accept feedback. (Bickerstaff testimony, Vol. II, p. 470).

Judge Morrow asked Ms. Bickerstaff if she thought Ms. Ciaffone could handle criticism, and Ms. Bickerstaff said yes. (*Id.,* pp. 471-72).

52. On the second day of trial, June 11, 2019, Mr. Noakes asked for a break to speak to his client. (Ciaffone testimony, Vol. I, p. 41-40). Ms. Ciaffone left the courtroom to use the restroom. (*Id.,* p. 42).

53. Ms. Bickerstaff asked Judge Morrow for feedback about her direct examination of the medical examiner. (*Answer,* ¶5; Griffin testimony, Vol. III, p. 748). She said something like, "Was that line of questioning any better?" (Kurily testimony, Vol. III, p. 700; Bickerstaff testimony, Vol. II, p. 383-84).

54. Judge Morrow said Ms. Bickerstaff's examination was better, but he had another critique for her. (Bickerstaff testimony, Vol. II, p. 385). He stood up from the bench and said he would talk to Ms. Bickerstaff at counsel's table because giving the critique from the bench might make her blush. (*Answer,* ¶6; Kurily testimony, Vol. III, p. 700).

55. Judge Morrow has a deep, booming voice. (Noakes testimony, Vol. III, p. 895). So his decision to sit next to Ms. Bickerstaff was a courtesy designed to avoid airing criticism in public. He also spoke to the prosecutors and Mr. Noakes in chambers on June 12, 2019 to avoid embarrassing Ms. Ciaffone with criticism. (Ciaffone testimony, Vol. I, p. 53).

56. Judge Morrow believed that providing criticism in a manner that the entire courtroom could hear might be embarrassing for Ms. Bickerstaff. (*Answer,* ¶6). That was a reasonable assumption; being critiqued in front of other people can be

embarrassing. (Kurily testimony, Vol. III, p. 721).

57. Judge Morrow sat at counsel's table next to Ms. Bickerstaff, who was in the middle of three seats. (*Answer,* ¶7; Bickerstaff testimony, Vol. II, p. 383). Lieutenant Derrick Griffin of the Detroit Police Department sat to Ms. Bickerstaff's left and Judge Morrow took the only vacant seat—the one to Ms. Bickerstaff's right. (*Answer,* ¶7; Ciaffone testimony, Vol. I, p. 38). Lieutenant Griffin was the officer in charge of the *Matthew* case. (Griffin testimony, Vol. III, p. 756).[5]

58. Prosecutors decide how to position chairs around their table. (Kurily testimony, Vol. III, p. 719). In this instance, the three chairs were all on one side of the table. (*Id.,* p. 721; Griffin testimony, Vol. III, p. 749). There wasn't much room in the courtroom. As Ms. Ciaffone put it, "We were jam-packed." (Ciaffone testimony, Vol. I, p. 38). The arms of the chairs were touching; that was the only way for all three chairs to fit behind the table. (*Id.*)

59. Judge Morrow sat and remained at an appropriate distance from Ms. Bickerstaff. (*Answer,* ¶8; (Kurily testimony, Vol. III, p. 724). He did not touch Ms. Bickerstaff. (Kurily testimony, Vol. III, p. 721).

60. Judge Morrow then illustrated the problem with Ms. Bickerstaff's direct examination by using the development of intimate relationships as an analogy. (*Answer,* ¶9; Bickerstaff testimony, Vol. II, p. 386). He said something like, "When a man and a woman start to get close, what does that lead to?" (Bickerstaff testimony,

[5] Lieutenant Griffin's rank was sergeant at the time of the underlying events. (Griffin testimony, Vol. III, p. 747).

Vol. II, p. 386). Ms. Bickerstaff said she didn't understand. (*Id.*) After Judge Morrow repeated his question, Ms. Bickerstaff said, "Do you mean sex?" (*Id.*) Judge Morrow said that foreplay leads to sex, and asked Ms. Bickerstaff, "[W]ould you want foreplay before or after sex?" (*Id.*) Ms. Bickerstaff didn't say anything in response. (*Id.*) When he asked the question again, Ms. Bickerstaff answered, "Before." (*Id.*)

61. Ms. Bickerstaff testified that it was unclear whether the "you" in Judge Morrow's question was Ms. Bickerstaff herself or people in general. (Bickerstaff testimony, Vol. II, p. 387). Judge Morrow meant the question as a general one. (*Answer,* ¶10).

62. Judge Morrow stated that the climax of the medical examiner's testimony is stating the cause and manner of death. (*Answer,* ¶12; Ciaffone testimony, Vol. I, p. 45). He did not use the word "climax" in its sexual sense. (*Answer,* ¶¶12-13). He said something like, "You start with all the information from the report, all the testimony crescendos to the cause and manner of death, which is the sex of the testimony." (*Id.,* ¶13). Judge Morrow said a lawyer should "tease the jury with the details of the examination." (*Id.,* ¶14).

63. This conversation lasted a few minutes. (Kurily testimony, Vol. III, p. 704). Ms. Bickerstaff maintained eye contact with Judge Morrow and he did the same with her. (*Id.*; Bickerstaff testimony, Vol. II, p. 591-592).

64. Lieutenant Griffin could easily hear the conversation. (Griffin Testimony, Vol. III, p. 751; Bickerstaff testimony, Vol. II, p. 577).

65. Joe Kurily is an attorney with the Wayne County Prosecutor's Office

who was assigned to Judge Morrow's courtroom from roughly August 2018 to the courtroom's closure during the 2020 pandemic. (Kurily testimony, Vol. III, p. 698). Mr. Kurily watched some of the *Matthews* trial. (*Id.,* p. 698-699).

66. During Ms. Bickerstaff's conversation with Judge Morrow, Mr. Kurily was about 10 feet away. (Kurily testimony, Vol. III, p. 703). The courtroom staff was also present. (Kurily testimony, Vol. III, p. 707).

67. It was not unusual for Judge Morrow to talk to attorneys at counsel's table. (Kurily testimony, Vol. III, p. 718). Mr. Kurily testified that Judge Morrow has had conversations at the prosecutor's table with him as well: "I mean, he has, yes, sat at the table and talked to me about a case before or after." (Kurily testimony, Vol. III, p. 706). Ms. Ciaffone testified that she had seen Judge Morrow leave the bench, and that he could be "[a]nywhere in the courtroom." (Ciaffone testimony, Vol. I, p. 109).

68. Mr. Kurily did not overhear the conversation but he saw nothing unusual in Judge Morrow or Ms. Bickerstaff's conduct. (Kurily testimony, Vol. III, p. 709).

69. Ms. Bickerstaff related some of the conversation to Ms. Ciaffone when she returned and then trial resumed. (Bickerstaff testimony, Vol. II, p. 391).

70. After trial ended for the day, Ms. Bickerstaff related parts of the conversation to her officemate, Patrina Bergamo. (Bickerstaff testimony, Vol. II, p. 392). She also told a supervisor, Pat Muscat, on the phone during her drive home. (*Id.*, p. 393).

The in-chambers discussion on June 12, 2019.

71. When the jury was deliberating on June 12, 2019, Judge Morrow invited

counsel—Ms. Ciaffone, Ms. Bickerstaff, and Mr. Noakes—into his chambers. (*Answer,* ¶19; Ciaffone testimony, Vol. I, p. 50).

72. As Mr. Noakes testified, they were free to decline Judge Morrow's invitation. (Noakes testimony, Vol. III, p. 882).

73. Judge Morrow invited counsel into chambers by saying, "Come with me, little ones." (Ciaffone testimony, Vol. I, p. 51). He often refers to attorneys as "young lady, young man," or the like. (Kurily testimony, Vol. III, p. 721). He would also refer to jurors as "young ladies and young men." (Ciaffone testimony, Vol. I, p. 180).

74. Judge Morrow often spoke to attorneys about their performance at trial. Mr. Kurily testified that Judge Morrow spoke to him in chambers a few times, offering critiques that might have been embarrassing had Judge Morrow offered them on the record. (Kurily testimony, Vol. III, p. 719-720).

75. Ms. Ciaffone, Mr. Noakes, and Ms. Bickerstaff met with Judge Morrow in his chambers. (Ciaffone testimony, Vol. I, p. 51).

76. At the time, Mr. Noakes had a motion for directed verdict still pending. (Ciaffone testimony, Vol. I, p. 52). Judge Morrow believed that Ms. Ciaffone had cited the wrong standard when responding to Mr. Noakes's motion. (Ciaffone testimony, Vol. I, p. 52). When the attorneys walked into his chambers, he had a copy of the Michigan Court Rules for both Ms. Ciaffone and Mr. Noakes opened to the relevant rule (MCR 6.419). (Ciaffone testimony, Vol. I, pp. 53, 327-28). He explained that Ms. Ciaffone had misstated the standard but that he didn't want to embarrass her in court. (Ciaffone testimony, Vol. I, p. 53). Ms. Ciaffone admitted in these proceedings

that she was unfamiliar with the directed-verdict rule. (Ciaffone testimony, Vol. I, p. 54). She also learned, for the first time during the chambers discussion, that a judge can grant a directed verdict at any time. (See MCR 6.419 and Ciaffone testimony, Vol. I, p. 331).[6]

77. Judge Morrow asked Ms. Ciaffone about admitting evidence that the defendant's DNA was on the deceased victim's vaginal swab. (*Answer,* ¶20; Ciaffone testimony, Vol. I, p. 55-56). He pointed out that the prosecution had not charged Mr. Matthews with criminal sexual conduct, which made the evidence irrelevant. (*Id.*) He also indicated that testimony on DNA wasn't helpful to the homicide case. (*Id.*) Ms. Ciaffone tried to convince him that the DNA evidence was relevant "because it showed that they had close, recent contact near in time to the homicide," but Judge Morrow disagreed. (*Id.* at 56). Ms. Ciaffone testified that the conversation "went back and forth." (*Id.* at 57, 334). According to Ms. Ciaffone, Judge Morrow said, "All it shows is that they fucked. Like, that's all it shows, that they fucked." (Ciaffone testimony, Vol. I, p. 57). Judge Morrow does not recall making this statement but did not contest that he did. (*Answer*, ¶21).

78. During this discussion, Ms. Ciaffone raised the defendant's statement that he had "non-traditional sex" or "not normal sex" with the victim. (Ciaffone

[6] The relevant portion of MCR 6.419 states: "The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." MCR 6.419(B).

testimony, Vol. I, p. 59, 296-97). That led to a conversation about what "non-traditional sex" means. (*Id.*) Ms. Ciaffone said that "non-traditional sex" means something other than intercourse. (*Id.*) This distinction mattered to the legal issues at hand because Ms. Ciaffone thought that Mr. Matthews's statement was inconsistent with the DNA evidence in the victim's vagina. (*Id.,* p. 58-59). Judge Morrow felt that Mr. Matthews's statement was actually consistent with that evidence because, in his view, Mr. Matthews meant that they had what Judge Morrow called "doggy style" intercourse. (*Id.,* p. 60; Noakes testimony, Vol. III, p. 885). Judge Morrow stated that Ms. Ciaffone's view was the product of her own bias. (Ciaffone testimony, Vol. I, p. 59-60).

79. Ms. Ciaffone stated that Judge Morrow's view was incorrect because Mr. Matthews stated that he "couldn't penetrate [the victim] because she could have a miscarriage." (Ciaffone testimony, Vol. I, p. 62). According to Ms. Ciaffone, Judge Morrow laughed and said, "Oh, so like what—like, he [is] saying that, like, what he's working with … was so big that it would cause a miscarriage[?]" ((Ciaffone testimony, Vol. I, p. 63).

80. Ms. Ciaffone testified that she took "what he's working with" as a reference to the defendant's genitals. (Ciaffone testimony, Vol. I, p. 63). She didn't remember Judge Morrow using the word "dick." (*Id.,* p. 64). Ms. Bickerstaff is the only person who testified that he said "dick." (Bickerstaff testimony, Vol. II, pp. 401-402).

81. During the in-chambers conversation, Judge Morrow criticized Ms.

Ciaffone's voir dire as being too indirect. (*Answer,* ¶26; Ciaffone testimony, Vol. I, p. 66). He had originally raised the issue during Ms. Ciaffone's *voir dire*, asking her, "What is it that you really want to ask?" (Bickerstaff testimony, Vol. II, p. 488). In chambers, he said something like, "If I want to have sex with someone on the first date, what do I ask them?" (*Answer,* ¶26; Ciaffone testimony, Vol. I, p. 66). When no one responded, Judge Morrow said, "I would ask them, 'Have you ever had sex on a first date?'" (Ciaffone testimony, Vol. I, p. 66-67). Then he asked, "What's the second question I would ask them?" (*Id.,* p. 67). Again, no one answered. Judge Morrow said, "I'd ask, 'Would you have sex with me on a first date?'" (Ciaffone testimony, Vol. I, p. 67). He added, "You don't ask questions like, 'Do you want to get married?' or 'Do you want to have kids?' Like, those things would come later. Right? So just ask the question you want to know." (*Id.*)

82. Judge Morrow was also critical of Mr. Noakes during this conference. (Noakes testimony, Vol. III, p. 882).

83. The conversation ended when the court dismissed the jury for the day. (Ciaffone testimony, Vol. I, p. 68).

The post-conference discussion on June 12, 2019

84. After the June 12, 2019 conversation in chambers, Ms. Ciaffone and Ms. Bickerstaff walked to counsel's table to pack their things. (Ciaffone testimony, Vol. I, p. 69).

85. According to Ms. Ciaffone, she was standing in front of the prosecutor's table and Ms. Bickerstaff was standing behind a chair when Judge Morrow spoke to them. (Ciaffone testimony, Vol. I, p. 321). Ms. Bickerstaff testified that both

attorneys were standing behind the table. (Bickerstaff testimony, Vol. II, p. 406). Judge Morrow asked Ms. Ciaffone how tall she was: "What are you, like, five-one or five-two?" (Ciaffone testimony, Vol. I, p. 70). Ms. Ciaffone said something like, "No, but I accept that, Judge." (*Id.*) Ms. Bickerstaff volunteered, "Judge, I'm five-three for context." (*Id.*) In response to this invitation to guess again, Judge Morrow then estimated Ms. Ciaffone's height as four feet, ten inches. (*Id.*) Ms. Ciaffone said that she's "four-eleven and a half." (*Id.*) Judge Morrow then asked if Ms. Ciaffone weighed around 105 pounds. (*Id.*) Ms. Ciaffone said, "Judge, you're not supposed to ask a girl her weight." (*Id.*) Then Judge Morrow asked Ms. Bickerstaff if she was 117 pounds. (*Id.*) Ms. Bickerstaff said, "That's very generous but, no, Judge." (*Id.*) Judge Morrow responded, "Well, I haven't assessed you for muscle mass yet." (*Id.*)

86. Ms. Bickerstaff testified that, during this conversation, Judge Morrow "looked [Ciaffone] down and up once, and then he looked at [Bickerstaff] down and up once." (Bickerstaff testimony, Vol. II, p. 408). When asked about how Judge Morrow looked at her, Ms. Ciaffone testified, "I think that the whole encounter with regards to the height and the weight situation was entirely improper, and you can toss in how he looked with his eyes as part of that whole thing." (Ciaffone testimony, Vol. I, p. 322).

Ms. Bickerstaff and Ms. Ciaffone's reports about Judge Morrow

87. After the conversation on June 12, 2019, Ms. Bickerstaff and Ms. Ciaffone left the courtroom, and talked about Ms. Bickerstaff's conversation with Judge Morrow during the elevator ride to their offices. (Ciaffone testimony, Vol. I, p. 77). Ms. Ciaffone told Ms. Bickerstaff not to tell anyone. (*Id.*)

88. In the hallway, Ms. Bickerstaff and Ms. Ciaffone ran into David Champine and Mr. Kurily, two other prosecutors, and they discussed their interactions with Judge Morrow. (Kurily testimony, Vol. III, p. 731; Ciaffone testimony, Vol. I, p. 77). Ms. Bickerstaff testified that prosecutors Brad Cobb and Lara Nercessian were involved in the conversation as well. (Bickerstaff testimony, Vol. II, p. 411). Mr. Champine told them to report the conversation but Ms. Ciaffone resisted. (Ciaffone testimony, Vol. I, p. 80).

89. Bob Donaldson, a senior prosecutor, walked by and heard Ms. Bickerstaff and Ms. Ciaffone talking about the conversation with Judge Morrow. (Ciaffone testimony, Vol. I, p. 80).[7] Mr. Donaldson stated that someone needed to report it. (Kurily testimony, Vol. III, p. 713; Ciaffone testimony, Vol. I, p. 70).

90. Mr. Donaldson took Ms. Ciaffone and Ms. Bickerstaff to see Jason Williams, the head of appeals in the prosecutor's office. (Ciaffone testimony, Vol. I, p. 70, 412; Bickerstaff testimony, Vol. II, p. 380).

91. Ms. Bickerstaff also told Pat Muscat, Ms. Ciaffone's boss. Ciaffone testimony, Vol. I, p. 81-82). Mr. Muscat told Athina Siringas, the chief of special prosecution and Mr. Muscat's boss. (*Id.,* p. 82).

92. After the trial, Ms. Siringas asked Ms. Ciaffone and Ms. Bickerstaff to

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[7] Ms. Bickerstaff's testimony contradicts testimony from Ms. Ciaffone and Chief James Bivens. Ms. Bickerstaff now claims that she got Mr. Donaldson's attention, and that he didn't join the conversation because he overheard it. (Ciaffone testimony, Vol. I, p. 620). Mr. Donaldson told Chief Bivens that he became interested as he walked near a group of young prosecutors and overheard someone mention something about sex. (Bivens testimony, Vol. V, p. 1176).

write a memo on their interactions with Judge Morrow during the trial. (Ciaffone testimony, Vol. I, p. 83).[8] Both Ms. Ciaffone and Ms. Bickerstaff wrote memos. (Exhibit 6, Bickerstaff memo, Exhibit 7, Ciaffone memo).

93. Ms. Siringas asked Ms. Bickerstaff and Ms. Ciaffone to draft affidavits. (Bickerstaff testimony, Vol. II, p. 415). Ms. Ciaffone executed an affidavit on June 27, 2019. (Ciaffone testimony, Vol. I, 86; Exhibit 9). Ms. Bickerstaff executed hers on the same date. (Bickerstaff testimony, Vol. II, p. 416-17; Exhibit 8). She had the affidavit re-notarized on November 27, 2019. (Bickerstaff testimony, Vol. II, p. 417).

Chief Bivens and Detective Kinney's investigation

94. At Prosecutor Kym Worthy's direction, Chief James Bivens began to investigate the matter. (Bivens testimony, Vol. V, p. 1189). After doing some of his own interviews, Chief Bivens assigned JoAnn Kinney, a retired homicide investigator, to interview witnesses and prepare a report. (Ciaffone testimony, Vol. I, p. 88; Kinney testimony, Vol. III, p. 829).

95. Detective Kinney interviewed Ms. Ciaffone and Ms. Bickerstaff separately. (Ciaffone testimony, Vol. I, p. 304).

96. At the conclusion of her investigation, Detective Kinney called Ms. Ciaffone and Ms. Bickerstaff into her office and asked them to review "Q&A" summaries that she drafted based on their interviews. (Ciaffone testimony, Vol. I, p. 90; Kinney testimony, Vol. III, p. 831). Detective Kinney "wanted [them] to check the

[8] Ms. Bickerstaff stated that Pat Muscat asked them for memos. (Bickerstaff testimony, Vol. II, p. 414).

accuracy of [the summaries]." (Ciaffone testimony, Vol. I, p. 90; Exhibit 12). Chief Bivens explained that drafting a "Q&A" statement and asking a witness to review and to attest to its accuracy by signing it was Detective Kinney's usual practice. (Bivens testimony, Vol. V, p. 1178).

97. When Ms. Bickerstaff and Ms. Ciaffone walked out of Detective Kinney's office, Ms. Bickerstaff told Ms. Ciaffone "that there was a mistake in hers." (Ciaffone testimony, Vol. I, p. 91). Ms. Bickerstaff appeared to be concerned. (*Id.,* p. 307). Ms. Ciaffone told Ms. Bickerstaff to go back and tell Detective Kinney. (*Id.*) But Ms. Bickerstaff said she was "nervous" and didn't want to go back into Detective Kinney's office. (*Id.*) Ms. Ciaffone told her, "[Y]ou've got to go back in there[.]" (*Id.*)

98. Ms. Bickerstaff didn't tell Ms. Ciaffone what the mistake was. Detective Kinney testified that, when she asked what Ms. Bickerstaff thought Judge Morrow was trying to do, Ms. Bickerstaff said, "I know what he was trying to do." (Kinney testimony, Vol. III, p. 833). Ms. Bickerstaff later confessed that she "does not know why Judge Morrow said the things he said to her." (Vol. IV, p. 945-46; Exhibit L (letter); Exhibit M (stipulation)).

99. Detective Kinney could not locate the signed Q&A statements at the time of her testimony. (*Id.,* p. 850). When asked about her recollection, Detective Kinney testified "But as far as [Ms Bickerstaff saying] him hitting on her, I'm not sure about that." (Kinney testimony, Vol. III, p. 833).

100. Chief Bivens found some handwritten notes from Detective Kinney. (Bivens testimony, Vol. V, p. 1180). Those notes indicate that Ms. Bickerstaff said, "I

know what he was trying to do." (Exhibit N). Her Q&A sheet has never been produced. (Bivens testimony, Vol. V, p. 1179).

101. Although Ms. Bickerstaff told Detective Kinney, "I know what he was trying to do," she told Disciplinary Counsel the opposite in September 2020. She told Disciplinary Counsel that she "does not know why Judge Morrow said the things he said to her." (Vol. IV, p. 945-46; Exhibit L (letter); Exhibit M (stipulation)).

102. Ms. Bickerstaff did not go back into Detective Kinney's office and did not point out the error. In fact, she never notified her superiors of any error in the statement she signed. (Bickerstaff testimony, Vol. II, p. 424). Ms. Ciaffone felt no obligation to address the error either. (Ciaffone testimony, Vol. I, p. 315).

103. Detective Kinney has seen Ms. Bickerstaff "a lot of times, about maybe 20 times, 20 or 30 times" since interviewing her. (Kinney deposition, Vol. III, p. 856). But Ms. Bickerstaff never notified Detective Kinney of the error in her statement. (*Id.,* pp. 857, 859)

104. Detective Kinney gave her Q&A statements and her notes to Chief Bivens. (Kinney testimony, Vol. III, p. 832).

Ms. Bickerstaff's knowingly false allegation

105. James Bivens is the chief of investigations at the Wayne County Prosecutor's Office. (Ciaffone testimony, Vol. I, p. 89). Chief Bivens submitted a report about Ms. Bickerstaff and Ms. Ciaffone's conversations with Judge Morrow to Kym Worthy, the elected prosecutor. (Bickerstaff testimony, Vol. II, p. 421; Exhibit 12). Chief Bivens's report repeated Ms. Bickerstaff's false statement that she "felt Judge

Morrow was trying to hit on her…" (*Id.,* p. 422).[9] It said: "She [Ms. Bickerstaff] added that she felt Judge Morrow was trying to hit on her because of what he stated regarding sex and foreplay." (Bivens testimony, Vol. V, p. 1174).

106. Detective Kinney produced to the Judicial Tenure Commission notes written in part by Det. Kinney and in part by Chief Bivens. Chief Bivens had written, "She felt that he was trying to hit on her in an around about way, felt it was improper for a judge to be discussing sex with her regarding a homicide trial." (Bivens testimony, Vol. V, p. 1184, 1198; Exhibit N).

107. Chief Bivens testified that Ms. Bickerstaff told him that she felt Judge Morrow was trying to hit on her. (Bivens testimony, Vol. V, p. 1174-75). Ms. Bickerstaff lied under oath when she testified that she never told anyone that Judge Morrow hit on her. (Bickerstaff testimony, Vol. II, pp. 599-600, 607). She also lied to Disciplinary Counsel.

108. Ms. Bickerstaff also lied to Disciplinary Counsel by stating that she had not seen Chief Bivens's report before—an attempt to excuse her lie about Judge Morrow "hitting on" her. (Exhibit M, Stipulation, pp. 1-2). When placed under oath, Ms. Bickerstaff admitted that she did, in fact, review Chief Bivens's report. (Bickerstaff testimony, Vol. II, pp. 421-22). She also testified that she noticed the false statement about Judge Morrow "trying to hit on her." (*Id.*)

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[9] Ms. Bickerstaff testified that she did not read a report with the false statement about Judge Morrow "hitting on" her until her meeting with Chief Bivens. (Bickerstaff testimony, Vol. II, p. 608-09). But Ms. Ciaffone testified that Bickerstaff noted an error after their meeting with Detective Kinney. (Ciaffone testimony, Vol. I, pp. 90-91).

109. Ms. Bickerstaff testified that she only told Ms. Ciaffone that there was an error in the report. (Bickerstaff testimony, Vol. II, p. 423-24, 595). Ms. Ciaffone testified that she could not recall what the error was or what Ms. Bickerstaff told her. (Ciaffone testimony, Vol. I, p. 307). Ms. Bickerstaff never told Chief Bivens that there was an error in his report. (Bivens testimony, Vol. V, p. 1199).

110. Chief Bivens told Ms. Bickerstaff and Ms. Ciaffone that he would forward the report to Prosecutor Worthy. (Bickerstaff testimony, Vol. II, p. 596). Ms. Bickerstaff knew that Prosecutor Worthy would rely on the report. (*Id.*) Still, she did not correct the misstatement. (*Id.,* p. 612). In fact, she testified that she gave the matter no more thought. (*Id.,* p. 631).

111. Ms. Bickerstaff completed and signed a request for investigation with the Judicial Tenure Commission. (Bickerstaff testimony, Vol. II, p. 425). (Ciaffone testimony, Vol. I, p. 93). Ms. Ciaffone said the form was largely completed when she received it, and she only filled in a few blanks and signed it. (Ciaffone testimony, Vol. I, pp. 92-93).

112. Ms. Bickerstaff violated the sequestration order during these proceedings by discussing her testimony with Pat Muscat. (Muscat testimony, Vol. V, p. 1235-36, 1238). Specifically, she told Mr. Muscat that she may have testified incorrectly about second-chairing a trial. (*Id.,* pp. 1239-40).

Standard of Review

113. Disciplinary Counsel must establish misconduct by a preponderance of the evidence. *In re Haley,* 476 Mich 180, 189; 720 NW2d 246 (2006). "Preponderance of the evidence" means "the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force…." Black's Law Dictionary (11th ed. 2019), *preponderance of the evidence.*

114. When assessing alleged judicial misconduct, the Judicial Tenure Commission "shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter." MCR 9.205(3).

Proposed Conclusions of Law

Theories that Disciplinary Counsel failed to prove

115. The Master should rule as a matter of law that Disciplinary Counsel failed to prove a number of its allegations:

a. There is no evidence that Judge Morrow was "hitting on" Ms. Bickerstaff or Ms. Ciaffone. Ms. Bickerstaff falsely made that allegation when speaking to Chief Bivens but she disowned that statement in her sworn testimony. (Bickerstaff testimony, Vol. II, p. 422). Notably, Ms. Bickerstaff denied ever saying that Judge Morrow was "hitting on" her. (*Id.,* p. 594). Yet Chief Bivens testified that she *did* say that. (Bivens testimony, Vol. V, p. 1174). Chief Bivens is far more credible than Ms. Bickerstaff. The truth is that Ms. Bickerstaff falsely insinuated to Detective Kinney that Judge Morrow was

hitting on her ("I know what he was trying to do") and then made her false allegation even more explicit when talking to Chief Bivens. (*Id.,* Kinney testimony, Vol. III, p. 833).

b. There is no credible evidence that Judge Morrow used the word "dick" in his in-chambers conversation with the attorneys. Ms. Bickerstaff is the only one to make that allegation, and she has no credibility. She falsely accused Judge Morrow of hitting on her (Bivens testimony, Vol. V, p. 1174) and then falsely denied making that statement. (Bickerstaff testimony, Vol. II, p. 594). Even the witness called to rehabilitate Ms. Bickerstaff's credibility only established that Ms. Bickerstaff violated the Master's sequestration order. (Bivens testimony, Vol. V, p. 1235-36, 1238-40). She has no credibility.

c. There is no credible evidence that Judge Morrow "overtly eyed" or behaved in a sexual manner with Ms. Bickerstaff or Ms. Ciaffone when discussing their height and weight. Even taking Ms. Bickerstaff at her word (a difficult proposition, given her credibility problems), her testimony established only that Judge Morrow looked at them *once* when making his guess about their height. (Bickerstaff testimony, Vol. II, p. 408). Ms. Ciaffone's testimony on this point was so vague that it was meaningless. (Ciaffone testimony, Vol. I, p. 322) (" … and you can toss in how he looked with his eyes as part of that whole thing.")).[10] The allegation that Judge Morrow's innocuous questions

[10] Ms. Bickerstaff and Ms. Ciaffone's actual testimony differs from Disciplinary Counsel's spin on that testimony. Ms. Bickerstaff testified that Judge Morrow looked once at each attorney. (Bickerstaff testimony, Vol. II, p. 408). Ms. Ciaffone vaguely

about height and weight were sexual plays into some of the most vile, racist stereotypes about Black men.[11] It should be rejected, and forcefully so.

d. There is no credible evidence that Judge Morrow acted improperly in where he sat and how he conducted himself with Ms. Bickerstaff on June 11, 2019during their conversation. Mr. Kurily testified that he witnessed Judge Morrow speak to Ms. Bickerstaff and that he saw nothing unusual in Judge Morrow or Ms. Bickerstaff's conduct. (Kurily testimony, Vol. III, p. 709). He also testified that Ms. Bickerstaff and Judge Morrow sat at an appropriate distance from each other. (Kurily testimony, Vol. III, pp. 721, 724). Disciplinary Counsel's take—that there was something inappropriate about "how intimately they were seated, how close their heads were to one another's, and the eye contact they had"—is belied by Joe Kurily's eyewitness testimony. (Closing argument, Vol. V, p. 1257). Mr. Kurily had no reason to lie. The allegations concerning Judge Morrow's proximity to Ms. Bickerstaff are the

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said that how Judge Morrow looked was "part of that whole thing," (Ciaffone testimony, Vol. I, p. 322). Yet Disciplinary Counsel falsely claimed that Judge Morrow was "[l]ooking two women, who he barely knew, up and down while talking about their height and weight, announcing his plans to assess Ms. Bickerstaff's muscle mass[.]" (Closing argument, Vol. V, p. 1263). Disciplinary Counsel relies on speculation, not evidence. (*Id.,* p. 1262 ("A woman knows when she's been overtly eyed")). This kind of speculation about the motives of Black men who simply *look* at white women has disturbing echoes in American history, and it is grossly improper.

[11] See, e.g., Charles B. Adams, *The Impact of Race on Sexual Harassment: The Disturbing Confirmation of Thomas/Hill*, 2 Howard Scroll 1, 9-10 (1993) (describing history of sexual stereotypes about Black men); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence,* 8 Col. J. Gen. Law 1, 18 (1998) (quoting Prof. Cornel West on the history of racist stereotypes about Black men).

product of the vicious, racial stereotypes underlying Ms. Bickerstaff's fabricated allegations.

e. Disciplinary Counsel did not establish by a preponderance of the evidence that Judge Morrow used the word "climax" in its sexual sense when talking to Ms. Bickerstaff. (See Amended Formal Complaint, ¶12). Even Ms. Bickerstaff, who falsely suggested that Judge Morrow was "hitting on" her, testified that Judge Morrow said, "You want to tease the jury with the details of the report and that leads to the climax which is the cause and manner of death." (Bickerstaff testimony, Vol. II, p. 389). She later testified that the word "climax" "was used in a sexual nature" and could not have referred to anything other than sex. (*Id.,* p. 437). But that doesn't mean that Judge Morrow was using "climax" to mean a sexual release. Rather, Ms. Bickerstaff's testimony establishes that Judge Morrow was referring to *sexual intercourse* as the climax of a *romantic relationship*. That is very different from the lewd comment that Ms. Bickerstaff falsely attributed to Judge Morrow.

f. Disciplinary Counsel failed to establish by a preponderance of the evidence that Judge Morrow had any kind of discriminatory intent, or that his actions were motivated by the attorneys' gender. Indeed, he made many of the comments at issue during an in-chambers conference where William Noakes was also present. And he was critical of Mr. Noakes, just as he was critical of the prosecution. (Noakes testimony, Vol. III, p. 882). There is no evidence of gender bias in this case.

Hocking and the rule that not every tasteless comment is misconduct.

116. With these allegations eliminated, all that's left are the uncontested facts—the statements that Judge Morrow acknowledged in his answer.

117. The Michigan Supreme Court's opinion in *Matter of Hocking,* 451 Mich 1; 546 NW2d 234 (1996), provides important context for analyzing the allegations that Judge Morrow acknowledged.

118. *Hocking* addressed a judge's interactions with two female attorneys and his comments during sentencing in a criminal-sexual-conduct case. Judge Hocking presided over a case in which an attorney was accused of sexually assaulting a client during a 2 a.m. visit to her apartment. While justifying a downward deviation from sentencing guidelines, Judge Hocking made a series of crude and insensitive comments. *Id.* at 10. He found mitigating factors such as the fact that the defendant "helped the victim up off the floor after the occurrence," that the defendant wore the victim down through persistence rather than force, that the "victim asked for it," and that the victim allowed the defendant to visit her home at 2:00 a.m. *Id.* The judge's boorish and inappropriate comments on the bench included this one:

> This is not a perfect world, but as common sense tells me that when a man calls a woman at 2:00 a.m. and says he wants to come over and talk and he's—that's accepted, a reasonable person, whether you want to shake your head or not Ms. Maas [the prosecutor], I haven't been living in a shell. A reasonable person understands that means certain things. They may be wrong.

Id. at 11. Judge Hocking lost his temper with the prosecutor after she objected to his downward departure. *Id.* at 15. In another instance, he had a "caustic and abusive exchange" with an attorney who objected to his imposition of sanctions. *Id.* at 22-23.

He was accused of abusing his contempt power, too.[12]

119. The Michigan Supreme Court held that Judge Hocking's inappropriate comments during sentencing were not judicial misconduct. They were "tasteless and undoubtedly offensive to the sensibilities of many citizens." *Id.* at 14. But they were "not explicitly abusive" and did not "evidence persistent misconduct." *Id.* The Court explained that "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline." *Id.* at 12. The Court said it was "committed to eradicating sexual stereotypes" but could not "ignore the cost of censoring inept expressions of opinion." *Id.* at 12.

120. Likewise, the Court concluded that Judge Hocking did not commit misconduct in his interactions with the prosecutor who objected to the downward departure. *Id.* at 16. Although "courtesy was lost and rudeness took over," his conduct was not "clearly prejudicial to the administration of justice." *Id.* at 16. Judge Hocking's interactions with the other attorney crossed a line: Judge Hocking showed "a total lack of self-control and an antagonistic mind-set predisposed to unfavorable disposition." *Id.* at 23. As for the suggestion that Judge Hocking showed gender bias because both attorneys who drew his ire were women, the Michigan Supreme Court held: "The fact that attorneys Mass and Sharp are both women and both happen to have been the object to the respondent's anger does not evidence a discriminatory

[12] There was also an allegation about misuse of the grievance process. Judge Hocking filed a request for investigation against an attorney based on comments she made to the press. The Michigan Supreme Court found nothing improper about his request. *Hocking,* 451 Mich at 20.

pattern." *Id.* at 24.

Judge Morrow's analogies were not judicial misconduct.

121. Under *Hocking,* the statements at issue in this case were not misconduct.

122. Judge Morrow did compare a direct examination to a romantic relationship that leads to sex when talking with Ms. Bickerstaff on June 11, 2019. He was not "hitting on" her, and there is no evidence that he had any intent other than a pedagogical one. He also used the analogy of asking a date about having sex when talking to Ms. Ciaffone, Ms. Bickerstaff, and Mr. Noakes on June 12, 2019. So the question is whether these analogies—comparing an examination to a romantic relationship that leads to sex and comparing voir dire questions to inquiries about sex—are judicial misconduct. They are not.

123. Sex is a common metaphor, even in judicial writing and bar journals. See, e.g., *Ledet v Seasafe, Inc,* 783 So.2d 611 (La. Ct. App. 2011) ("Similarly, Noel Coward is quoted in *The Art of the Footnote* as having stated: 'Encountering [a footnote] is like going downstairs to answer the doorbell while making love.'") (Woodward, J., concurring). See also *Silva v Univ of New Hampshire,* 888 F Supp 293 (D.N.H. 1994) (holding that university had no legitimate pedagogical reason to prohibit writing instructor from using sexual analogies in lectures); *Hayes v Luckey,* 33 F Supp 2d 987 (ND Ala 1997) ("Adopting the metaphor, the work of the Alabama Legislature in the area of medical liability is a mule—the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity."); *Smith v. J.I. Case Corp.,* 163 F.R.D. 229, 232 (E.D. Pa. 1995)

("Procedural foreplay has become a cottage industry."). Gerald Lebovits, *Do's Don'ts, and Maybes: Usage Controversies—Part II,* 80-Aug NYSTBJ 64 (2008) (using the footnote analogy from Noel Coward);[13] Michael L. Perlin, *"Everybody is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia,* 83 Wash. L. Rev. 481, 487 (2008) ("Dylan's lyric 'Everybody is making love/Or else expecting rain' serves as the perfect metaphor for the topic that I am discussing here."). Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 Wis. Women's L.J. 225, 240–41 (1995) ("One continuing education speaker for the State Bar of Texas often describes the subject of his speech as 'real sex' while whatever insignificant processes come before are merely 'foreplay.'"); Peter Siviglia, *Contractual Foreplay: Letters of Intent vs. Term Sheets,* 87-May N.Y. St. B.J. 49 (2015);

124. These metaphors are so common because they are vivid and memorable. See, e.g., Beverly Ray Burlingame, *Book Notices,* 5 Scribes 171, 188 (1996) (describing the Noel Coward quote about footnotes as a "lively quotation"). Michigan's former Chief Justice demonstrated that fact in a speech he delivered at a Joint Federalist Society/Ave Maria Law School Symposium and later published as an article—all

[13] There are many law-review articles that use the Coward footnote quote. See, e.g., Seth P. Waxman, *Rebuilding Bridge: The Bar, the Bench, and the Academy,* 150 U. Pa. La. Rev. 1905, 1908 (2002); Andrey Spektor and Michael Zuckerman, *Legal Writing as Good Writing: Tips from the Trenches,* 14 J. App. Prac. & Process 303, 312 n 30 (2013); Jack L. Ladau, *Footnote Folly,* 67-Nov Or. St. B. Bull. 19, 22 (2006); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure,* 103 Harv. L. Rev. 926, 940 (1990).

while he was a member of Michigan's Supreme Court. See Hon. Robert P. Young, Jr., *A Judicial Traditionalist Confronts the Common Law,* 8 Tex. Rev. L. & Pol. 299 (2004). There, he compared the common law to "a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party." *Id.* at 302. He later asserted that "some jurists like Justice Cardozo actually celebrate Grandpa and his condition and enthusiastically urge all of us to relax, undress, and join Grandpa in his inebriated communion with nature." *Id.* at 302. The image of a naked old man inviting others to disrobe is undeniably lewd—yet Justice Young concluded that it served a pedagogical purpose. The Michigan Supreme Court evidently agreed. It cited his article in *Henry v Dow Chemical Co,* 473 Mich 63, 103; 701 NW2d 684 (2005).

125. Some—like late Michigan Supreme Court Justice Elizabeth Weaver—found the imagine of a naked old man encouraging others to disrobe to be so inappropriate that she refused to join an opinion that cited the article. *Henry,* 473 Mich at 103 (Weaver, J., concurring) (refusing to join the majority because it cited Justice Young's article, which used "a clumsy and crude analogy"). This debate at the state's highest court teaches two important lessons. First, sometimes adults—including judges—use somewhat crude analogies to make a point. Second, reasonable minds can disagree about the line between a vivid, albeit off-color, metaphor (a la Noel Coward's oft-repeated statement about footnotes) and an analogy that is truly unfit for adult conversation. Judge Morrow's metaphor—which focused more on a romantic relationship than the act of sexual intercourse—is on the "vivid, albeit off-

color" side of that line. It was not judicial misconduct.

Using the word "fucked" during an in-chambers conference to refer to sexual intercourse is not misconduct.

126. Judge Morrow doesn't remember using the word "fucked" during his in-chambers conversation with Ms. Ciaffone, Ms. Bickerstaff, and Mr. Noakes, but he admitted since the outset that he probably said something along those lines. (Answer, ¶21). Certainly, inappropriate use of vulgarity on the bench may be judicial misconduct in some cases. In *Matter of Frankel,* 414 Mich 1109; 323 NW2d 911 (1982), the Michigan Supreme Court censured a judge for cursing in a crowded courtroom. The judge didn't just curse; he insulted one of the attorneys: "Now, the question is, am I still dispassionate in the case? And I'm not sure that I am, now, Mr. Henry. I'm not sure that I haven't come to a conclusion that whether your client is guilty or innocent, *you're a despicable son-of-a-bitch.*" *Id.* at 1110 (emphasis in original).

127. Unlike the respondent in *Frankel,* Judge Morrow was not on the bench when he said "fucked." He didn't use the word improperly or out of context: whether the defendant had intercourse with the victim and how they had intercourse were, in fact, issues in the *Matthews* trial. (Ciaffone testimony, Vol. I, p. 299-300). Using "fucked" in this context is like using "damn" when talking about Goethe's *Faust* or "bitch" at the American Kennel Club. Those words can be offensive in the wrong context. But there is a context in which they are appropriate, even if off-color. Judge Morrow used the word "fucked" in the right context to refer to intercourse. It is a coarse word, to be sure. But using a tasteless and offensive word is not misconduct. *Hocking,* 451 Mich at 14.

Judge Morrow's offhand expression of skepticism at the defendant's statement about intercourse was not misconduct.

128. Judge Morrow does not remember saying anything like "how big does this guy think he is?" when Ms. Ciaffone raised James Matthews's testimony about not having "normal" sex. (Answer, ¶23). But William Noakes credibly testified about this comment, noting that Judge Morrow was just making the point that the defendant was exaggerating. (Noakes testimony, Vol. III, p. 920). As noted above, Judge Morrow did *not* use the word "dick." Only Ms. Bickerstaff, whose lies are well-documented, attested to that fact. Again, Mr. Noakes provided credible testimony on this point: "I don't remember him using the word 'dick.' And I think the conversation was how big does he think he is, and I think that was the extent of it." (*Id.*) When Disciplinary Counsel tried to twist Mr. Noakes's testimony into evidence of something more malicious, Mr. Noakes was firm and confident that Judge Morrow "was saying that the defendant exaggerated."

129. Judge Morrow's offhand expression of skepticism at Mr. Matthews's testimony was not judicial misconduct. It was, at worst, the kind of "graceless, distasteful, or bungled" statement that, according to *Hocking,* "cannot serve as the basis for judicial discipline. *Hocking,* 451 Mich at 12.

Judge Morrow's inquiries to Ms. Ciaffone and Ms. Bickerstaff were not misconduct.

130. Finally, there are Judge Morrow's inquiries to Ms. Ciaffone and Ms. Bickerstaff about how tall they are and how much they weigh. Judge Morrow admitted from the outset that he asked those questions. (Answer, ¶¶30-32). Asking someone their height or weight is not judicial misconduct. It may be impolite. But

Hocking makes it clear that the Code of Judicial Conduct is not about policing good manners. *Hocking,* 451 Mich at 14 ("The comments were tasteless and undoubtedly offensive to the sensibilities of many citizens. They do not display a mindset unable to render a fair judgment.").

131. Judge Morrow had an innocuous reason to ask about the prosecutors' height: he often uses height to illustrate bias and challenge assumptions. (Bickerstaff testimony, Vol. II, p. 415; Fishman testimony, Vol. III, pp. 796-98).

132. The attempt to sexualize Judge Morrow's questions—particularly the unfounded allegation about "overtly eyeing"—should be rejected. There was no evidence that Judge Morrow had any sort of illicit motive in asking these questions. Judge Morrow's innocuous questions became sexualized only when Ms. Bickerstaff began lying about them. Again, the specter of racism rears its head here. America has a long, shameful history of making racist presumptions about Black men being hypersexual. See N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man,* 25 Cardozo L Rev 1315, 1320 (2004) (analyzing the "myth, deeply imbedded in American culture, that black men are animalistic, sexually unrestrained, inherently, criminal, and ultimately bent on rape").

133. The absence of evidence to support this "overtly eyeing" narrative—and the significant role that Ms. Bickerstaff's lie played in shaping it—proves that bias is indeed present. This bias is not merely unconscious; it is not just the product of institutional forces and human fallibility. No, Disciplinary Counsel continued to cast Judge Morrow as a sexual predator even when it was clear that Ms. Bickerstaff had

lied. That narrative and its "overtly eyeing" language are the products of an odious bias.

134. Every time he takes the bench, Judge Morrow encourages others to challenge their biases. Recognizing those biases—acknowledging them, no matter how painful the confrontation—is necessary for a fair and equal justice system. Likewise, any fair assessment of the complaints against Judge Morrow must include a clear-eyed examination of bias.

135. Why was Judge Morrow supposedly too close to Ms. Bickerstaff when he was sitting in the very same chair and in the very same place that Ms. Ciaffone had been sitting? Why is it acceptable for Ms. Ciaffone to use the word "fuck" twice in her closing argument in open court (Exhibit 5, June 12, 2019 transcript from *Matthews* trial, p. 57) but supposedly unacceptable for Judge Morrow to use the very same word in his chambers? Why would Disciplinary Counsel try to dismiss Mr. Noakes as "pompous," a disturbing echo of the hateful "uppity" label that once justified racist violence? (Closing, Vol. V, p. 1305 ("You saw his pompous attitude.")).[14] Most of all, how could Disciplinary Counsel bring these charges against Judge Morrow when *Hocking* largely absolved another judge of saying much, much worse—while on the bench? *Hocking*, 451 Mich. at 12 ("It is clear, however, that every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision

[14] See Jennifer Lisa Vest, *What Doesn't Kill You: Existential Luck, Postracial Racism, and the Subtle and Not So Subtle Ways the Academy Keeps Women of Color Out*, 12 Seattle J. for Soc. Justice. 471, 510 (2013) (describing the use of the term "uppity" to describe "Blacks who dare to be articulate, well educated, or otherwise gifted").

cannot serve as the basis for judicial discipline.").

136. The answer is the same for each question: bias is at work. That bias should be removed, root and stem. And then all that's left of this case are a couple analogies about a romantic relationship leading to sex, a "naughty word," and some innocuous questions about the prosecutors' height and weight. With this record, the Master should reject Disciplinary Counsel's allegations and hold that Judge Morrow did not commit misconduct.

Application of Judicial Canons and Michigan Court Rules

137. The final question is whether Disciplinary Counsel proved any violations of the canons and rules cited in their compliant.

138. Canon 1 of the Code of Judicial Conduct concerns independence and integrity:

> An independent and honor able judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

There is no evidence in this case that Judge Morrow lacked integrity or independence. At worst, he used poorly chosen analogies and a word that, through the accidents of history, many Americans view as taboo. Those actions do not suggest a lack of integrity or independence. The Michigan Supreme Court's holding in *Hocking* is relevant here: "It is clear … that every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial

discipline." *Hocking,* 451 Mich at 12. A distasteful analogy is very different from a lack of independence and integrity. Disciplinary Counsel failed to prove a violation of Canon 1.

139. Disciplinary Counsel also charge Judge Morrow with a violation of Canon 2(B). This canon requires judges to treat everyone with courtesy and respect, and to avoid any bias related to race, gender, or other similar traits:

> A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected characteristic, a judge should treat every person fairly, with courtesy and respect.

Again, Disciplinary Counsel's allegations do not fit Canon 2(B). Judge Morrow did nothing to impair public confidence in the judiciary. Nor did he demonstrate gender bias. Although some find Judge Morrow's analogies or his use of the word "fucked" offensive, Justice Young's article demonstrates that an off-color or lewd comment is not evidence of a lack of respect. And it may be unusual to ask about another person's height or weight, but Judge Morrow did not display a lack of courtesy or respect. That fact is obvious from Ms. Bickerstaff's reaction to his question: "Judge, I'm five-three for context." (Ciaffone testimony, Vol. I, p. 70). Disciplinary Counsel did not establish a violation of Canon 2(B).

140. Disciplinary Counsel charged Judge Morrow with a violation of Canon 3(A)(3). Like Canon 2(B), this canon requires judges to act with courtesy and dignity:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and

> others subject to the judge's direction and control.

Under *Hocking,* this canon cannot mean that every "graceless, distasteful, or bungled" communication is judicial misconduct. *Hocking,* 451 Mich at 12. At worst, that's all Disciplinary Counsel proved: that Judge Morrow made distasteful comments. They did not affect the *Matthews* proceedings or the overall appearance of justice. More importantly, Disciplinary Counsel has not shown that Judge Morrow had any intent but a pedagogical one. Whatever one thinks about the analogies Judge Morrow used, he took the time to educate a young lawyer. That shows dignity and courtesy. Disciplinary Counsel failed to prove misconduct.

141. Next, Disciplinary Counsel assert that Judge Morrow violated Canon 3(A)(14). This canon requires judges to act with courtesy and without bias about any protected personal trait:

> Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's discretion and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court.

Again, there is no evidence of any kind of bias. Judge Morrow did not discriminate based on race, gender, or any other protected characteristic. Nor did he fail to treat anyone with courtesy and respect. He used analogies and words that some regard as taboo. The judicial-discipline does not exist to police distasteful or graceless words. *Hocking,* 451 Mich at 12. Disciplinary Counsel failed to prove misconduct.

142. Finally, Disciplinary Counsel allege that Judge Morrow violated MCR 9.202(B)(1)(D). This rule prohibits "treatment of a person unfairly or discourteously

because of the person's race, gender, or other protected personal characteristic." There is no evidence at all that Judge Morrow treated anyone differently because of their race, gender, or other protected personal characteristic.[15] Even if one questions the words that Judge Morrow chose, there is no evidence that he chose those words *because* of anyone's race, gender, or other personal characteristic. The only bias proven in this case is the prejudice inherent in Ms. Bickerstaff's false allegations about Judge Morrow "hitting on" her. Disciplinary Counsel failed to prove misconduct.

[15] Disciplinary Counsel argued that Judge Morrow showed gender bias because he supposedly doesn't use sex-related analogies with male attorneys. (Closing Argument, Vol. V, p. 1305). The evidence belies this argument. Mr. Noakes was sitting in Judge Morrow's chambers with Ms. Bickerstaff and Ms. Ciaffone when Judge Morrow used his dating analogies for voir dire. (Noakes testimony, Vol. III, p. 922). Plainly, the listener's gender is not relevant.

Conclusion

143. In the final analysis, Disciplinary Counsel has only proven that Judge Morrow used words that some might consider "graceless, distasteful, or bungled." *Hocking,* 451 Mich at 12. The Michigan Supreme Court has made it clear through *Hocking* that judicial discipline is not a means for policing words or politeness. The Master should therefore hold that Disciplinary Counsel failed to establish judicial misconduct.

Respectfully Submitted.

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