STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. DEBRA NANCE
46th District Court
Southfield, Michigan

Docket No. 165115
Formal Complaint No. 106

DECISION (1) REJECTING MASTER'S INTERLOCUTORY RECOMMENDATION TO GRANT RESPONDENT'S DISPOSITIVE MOTION; AND (2) DIRECTING THE MASTER TO CONDUCT THE PUBLIC HEARING

At a session of the Michigan Judicial Tenure Commission, Detroit, Michigan, on September 16, 2024,

PRESENT[1]:

Hon. Jon H. Hulsing, Chairperson
Mr. James W. Burdick, Esq, Vice-Chairperson
Hon. Brian R. Sullivan, Secretary
Hon. Monte J. Burmeister
Dr. Maxine Hankins Cain
Hon. Thomas C. Cameron
Siham Awada Jaafar

I. Introduction

A quorum of the Judicial Tenure Commission of the State of Michigan ("Commission" or "JTC"), having reviewed the pleadings, all briefing on Respondent's motion for dismissal and supplemental motion for dismissal, the Master's report, and all briefing following the Master's Report, unanimously rejects the Master's May 20, 2024, interlocutory "Report and Recommendation Pursuant to MCR 9.231(B)." Further, pursuant to MCR 9.231(A), MCR 9.233(A), and MCR 9.243, the Commission directs the Master to conduct the public hearing under MCR 9.233, to commence February 3, 2025, at 9:30 a.m. at Farmington Hills District Court (D47), 31605 W Eleven Mile Rd,

[1] Commissioners Judge Pablo Cortes and Thomas J. Ryan, Esq. are recused and, accordingly, did not

Farmington Hills, MI 48336, and continue thereafter until complete, at which evidence is to be taken in support of the charges set forth in the Amended FC consistent with MCR 9.233(A), and to allow for development of any defenses Respondent may have to the claims made in the Amended FC.

II. Jurisdiction

Respondent Debra Nance ("Respondent") was, at all material times, a judge of the 46th District Court in Southfield, Michigan. This action is taken pursuant to the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, MCR 9.202, MCR 9.231(A)-(B), MCR 9.233(A), and MCR 9.243. As a judge, Respondent is subject to all the duties and responsibilities imposed on her by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.202. As an attorney licensed by the State of Michigan, Respondent was, and still is, subject to the standards of conduct applicable to an attorney under MCR 9.103(A) and the Michigan Rules of Professional Conduct. Under MCR 9.231(B), the Master "refer[red] to the commission on an interlocutory basis" his "recommendation regarding [the] dispositive motion" of Respondent, and the Commission therefore acts upon the Master's interlocutory recommendation.

III. Procedural Background

A. The Formal Complaint.

On December 14, 2022, the Commission filed Formal Complaint 106, as promptly amended to correct typographical errors (the "FC"). The FC is what followed the preliminary investigation (MCR 9.220), evidence (MCR 9.221), any further investigation (MCR 9.222), and the conclusion of the investigation (MCR 9.223). Under MCR 9.224, after the conclusion of the investigation, "[u]pon determining that there is sufficient evidence to believe that the respondent under investigation has engaged in misconduct, the commission may issue a complaint against that respondent." The FC

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participate in this decision.

alleged Respondent committed violations while she was a judge of the 46th District Court. It charged Respondent with two counts of misconduct, including making false statements under oath on July 28, 2020 (Count I) and making false statements under oath on September 10, 2021 (Count II). Respondent filed her answer and affirmative defenses on January 9, 2023, in which she denied having committed the misconduct alleged in the FC.

On March 10, 2023, the Supreme Court entered an order appointing Hon. Alexander Lipsey as the master ("Master") "to hear Formal Complaint No. 106."

On June 16, 2023, by leave granted by the Master, disciplinary counsel amended the FC, filing the Second Amended Formal Complaint ("Amended FC"). The Amended FC did not add counts or factual bases, but corrected certain allegations from the FC and expanded the list of charged violations based on the facts already alleged. On July 7, 2023, Respondent filed her answer and affirmative defenses to the Amended FC, again denying that she committed misconduct.

The underlying events giving rise to this matter, as alleged in the Amended FC, as well as giving rise to related Formal Complaint 105 involving Respondent Hon. Demetria Brue (judge for the 36th District Court in Detroit, Michigan), occurred at a judicial conference being held on Mackinac Island on August 20, 2019. (Amended FC ¶ 4.) Respondents Brue and Nance became involved in a dispute with the proprietor of a bike rental shop, Mr. Ira Green, over Respondents' bike rentals. (*Id.* ¶¶ 5-13.) Judge Brue contended that Mr. Green assaulted her, (*id.* ¶ 8), and Judge Nance contended that police officer(s) who arrived at the scene refused to speak with judges Brue and Nance and told them to stand by the curb or in the street with racially motivated animus. (*Id.* ¶¶ 11-13, 22-23.) There is video surveillance footage of the incident, which has, in part, been published online by the Detroit Free Press.

The Amended FC alleges that Respondent committed misconduct based on multiple alleged violations of the Michigan Court Rules ("MCR"), the Michigan Rules of Professional Conduct

("MRPC"), and the canons of the Michigan Code of Judicial Conduct ("MCJC" and the "Canons"). (Amended FC ¶¶ 24, 29.) The Amended FC alleges Respondent committed these violations while she was a judge of the 46th District Court – Southfield.

Count I charged that Respondent gave knowingly false testimony under oath on July 28, 2020, including testifying that Judge Brue did not say any words to the effect that she was in fear for her safety or her life after allegedly being assaulted by Mr. Green, that Judge Brue did not make any sort of reference to the fact that Mr. Green had attacked an African American female or an African American judge, that neither she nor Judge Brue had the opportunity to talk with Officer Hardy at the scene because he refused to talk to them and disregarded them, including due to their race, and that Officer Hardy told Respondents judges Brue and Nance to wait by the curb. (*Id*. ¶¶ 16-22.)

Count II charged that Respondent provided knowingly false written answers on September 10, 2021, to disciplinary counsel's requests for comment. Paragraph 27 of the Amended FC alleges that "Answers ## 10, 13, 20, 32, and 34 of respondent Nance's answer to the Commission's request for comments claimed that on August 20, 2019 Officer Hardy told respondent Nance and her colleague to wait by the curb while he reviewed the video recording of the interaction between Mr. Green, respondent Nance's colleague, and respondent Nance," which she "characterized" as "demeaning and comparable to the inappropriate way African Americans have been mistreated in the United States." Paragraph 28 of the Amended FC alleges that Respondent's "answers described in paragraph 26 were false and respondent Nance knew they were false, because neither Officer Hardy nor any other person in authority told respondents to wait by the curb on August 20, 2019 while Officer Hardy reviewed the video of the interaction between Mr. Green, respondent [Judge Brue], and respondent Nance."

B. Respondent's Motion for Dismissal.

On August 4, 2023, Respondent, by counsel, filed a "Motion for Dismissal" ("MFD"). In the

motion, Respondent argued that disciplinary counsel deprived her of the full video of the August 20, 2019, incident on Mackinac Island in advance of her July 28, 2020, sworn testimony, which constituted a failure to produce exculpatory evidence, that Respondent did not believe herself to be the target of any investigation when providing the sworn testimony in connection with investigating the matter as to Judge Brue, that Respondent did not intend to make false statements and testified truthfully insofar as she testified to the best of her recollection nearly one year after the incident and without having the opportunity to review the entire video footage prior to the interview, and that the chain of custody of the video was "questionable, at best." (MFD pp. 2-8.) Respondent argued that "incorrect memory does not equal falsehood." (MFD p. 9.) Respondent did not cite a rule or statute or other source under which she brought her Motion for Dismissal.

Disciplinary counsel responded to Respondent's Motion for Dismissal on September 1, 2023 ("Response"). Disciplinary counsel argued that Respondent failed to "cite any authority that gives her a right to see the video before being asked questions, nor any authority that not providing a witness the chance to refresh recollection before testifying is a basis to dismiss a false statements charge." (Response p. 2.) Disciplinary counsel also set forth that initially denying access to the video "is a standard investigative procedure, to prevent the witness from molding their statement to the other evidence," but that it "relented and informed respondent's counsel eleven days before the statement that it *would* provide both the video of the altercation and the police report about the altercation to respondent before she testified – nearly all the evidence the JTC then had." (Response p. 2 (emphasis in original).) Respondent does not dispute that she indeed viewed this video evidence prior to her testimony.

Disciplinary counsel also explained:

> [T]he only video the JTC had as of respondent's testimony was the video it provided her before she testified. It was respondent's provocative testimony that prompted the JTC to see whether there was additional video. There was some, and the JTC obtained it. The JTC provided respondent that video before she answered the written

questions the JTC sent her in 2021.

(*Id*. p. 3.) Disciplinary counsel also explained that it interviewed Respondent as a witness on July 28, 2022, but she "became the focus of her own investigation after she made blatantly false claims that were helpful to the posture [respondent] Judge Brue has maintained during" FC 105. (*Id*. p. 5.)

As to Respondent's arguments regarding her denial of intentionally false statements, disciplinary counsel argued that "the fact that respondent believes the evidence is insufficient to prove the charges is not a basis to dismiss the charges – that is precisely what the hearing is for." (*Id*. p. 5.) "Whether respondent's statements are knowingly false are triable issue of fact, which makes it inappropriate to dismiss these charges," disciplinary counsel argued. (*Id*. p. 6.)

Finally, disciplinary counsel noted that "respondent does not specify the grounds for dismissing the charges, nor provide any authority for dismissing them." (*Id*.) Disciplinary counsel argued that, to the extent MCR 2.116 applies in this proceeding, MCR 2.116(G)(4) provides that, for a motion asserting that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, the motion may not rest upon the mere allegations or denials of his or her pleading, but the moving party must set forth specific facts showing that there is a genuine issue for trial. (*Id*.)

On February 26, 2024, Respondent filed a "Supplemental Motion for Dismissal." This time, Respondent specified that she brought her motion under MCR 2.116(C)(10), MCR 9.231(B) and MCR 9.223(A).[2] The thrust of Respondent's supplemental motion was that, since the Master denied consolidation of this matter with FC 105 as to Judge Brue, disciplinary counsel will not have any

[2] The Commission notes that, while Respondent cited MCR 9.223(A) for the misleading proposition that the Commission can dismiss the matter "***at any time in the investigation***," (Supp. MFD p. 8 (emphasis in original)), she omitted the rest of the sentence of MCR 9.223(A), which importantly provides that the Commission could dismiss the matter if "the commission determines at any time in the investigation that there are insufficient grounds *to warrant filing a complaint*[.]" (emphasis added). FC and Amended FC 106 were already filed by the time of Respondent's Motion for Dismissal and Supplemental Motion for Dismissal, making MCR 9.223(A) inapplicable by its terms.

witnesses who can rebut Respondent's own testimony about what she "**experienced, perceived, heard, saw or recalled when she gave testimony under oath on July 28, 2020** at a law office in Gross Pointe Park about what she experienced, perceived, heard, saw or recalled on August 20, 2019." (Supp. MFD, p. 2 (emphasis in original).) Respondent contends that "[t]his case is about memory." (*Id*. p. 3.) Respondent also alleged that she is being treated disparately in this proceeding, and she continued her argument, as previously set forth in her original Motion for Dismissal, that she did not intend to make any false statement and that an incorrect statement based upon faulty memory is not a false statement. (Supp. MFD, pp. 9-16.)

On April 15, 2024, disciplinary counsel replied to Respondent's Supplemental Motion for Dismissal. Disciplinary counsel set forth the anticipated hearing evidence it intends to introduce and attached as exhibits the transcript and audio of Judge Nance's July 28, 2020, testimony and the video recordings from the August 20, 2019, incident at Mackinac Island. (Reply p. 2 & n.2.) "Disciplinary counsel anticipate calling eleven of the same twelve witnesses regarding Judge Nance as [it] will call to demonstrate misconduct by Judge Brue in FC 105." (*Id*. p. 3. & n.5.) Disciplinary counsel argued that Respondent's denial of misrepresentations will be a question of fact at trial for the fact finder to assess from a credibility standpoint weighed against the other evidence and surrounding circumstances. (*See id*. pp 4-6, 8-9, 17.)

IV. The Master's Recommendation

The Master did not hold a hearing on Respondent's dispositive motion. On May 20, 2024, the Master issued his "Report and Recommendation Pursuant to MCR 9.231(B)" (the "Master's Report"). Under MCR 9.231(B):

> The master shall set a time and a place *for the hearing* and shall notify the respondent and the examiner at least 28 days in advance. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing. *Recommendations on dispositive motions shall not be announced until the conclusion of the hearing, except that the master may refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion.*

(emphasis added). Thus, pursuant to this rule, the Master's Report is an interlocutory recommendation referred to the Commission pre-hearing, which is an exception to the usual procedure of conducting the hearing first and later announcing the Master's decision on a dispositive motion at the conclusion of the hearing.

The Master's interlocutory recommendation to the Commission is to grant Respondent's Motion for Dismissal and either dismiss or withdraw Formal Complaint 106. (Master's Report p. 4.)[3] The Master evaluated Respondent's Motion for Dismissal, as supplemented, under the standards of MCR 2.116(C)(10), and concluded that "Disciplinary Counsel has failed to establish any material issue of fact," and "there is nothing in the record that establishes [Respondent] *intentionally* lied or sought to interfere with this investigation." (Master's Report pp. 3, 4 (emphasis added).) The Master found that disciplinary counsel's proffer of Respondent's testimony of July 28, 2020, was "unique" in his experience and that, "[w]hile there may be contradictions and confrontations in her testimony it falls far short of establishing the fact that a false statement was made at Respondent's deposition much less that any false statement was *intentionally* made." (*Id.* pp. 2-3 (emphasis added).) Thus, the Master found that reliance upon Respondent's testimony did not "satisf[y] MCR 2.116(C)(10)'s requirement." (*Id.*)

The Master did not consider Respondent's testimony in conjunction with the video of the incident on Mackinac Island because, according to the Master, "[a]s presented, the video is inadmissible." (*Id.* p. 3.) The Master continued: "Disciplinary Counsel has presented no authentication or testimony to support its admission at trial. Therefore, the Master finds that to the extent it would serve as basis for establishing a fact issue, it falls short." (*Id.*)

Having deemed Respondent's testimony insufficient by itself to create a material issue of

[3] The Master's Report is unnumbered, but it is four pages in length.

fact, coupled with deeming the video evidence inadmissible, the Master noted that no other evidence was presented at the dispositive motion stage, while also noting that disciplinary counsel stated its intention to call at least eleven witnesses at the public hearing:

> Disciplinary Counsel argues that he is prepared to present numerous witnesses to demonstrate that Respondent's recitation of the facts was inaccurate. However, no affidavit or documentation was presented in response to the Motion. It is not required of Counsel to present all of his evidence; only enough to support his position that a material issue exists. Merely promising to present evidence at trial is not enough to satisfy the requirements of a MCR 2.116(C)(10) hearing.

(*Id.*)

On June 14, 2024, Respondent filed a 27-page brief in support of the Master's Report, much of which reargued positions from Respondent's Motion for Dismissal and Supplemental Motion for Dismissal.[4]

On August 6, 2024, disciplinary counsel objected to the Master's interlocutory recommendation to dismiss the Amended FC. "Disciplinary counsel object[ed] to the Master's recommendation because it rests on fundamental mistakes of fact and law[.]" (Objection p. 2.) Disciplinary counsel's objections include that:

- The Master should not have second-guessed the Commission's determination that there is enough evidence of Judge Nance's intent to hold a hearing.
- It is improper to summarily dismiss a complaint when intent is at issue.
- There is substantial evidence that Judge Nance did intend to mislead, which the Master improperly disregarded.
- The Master's recommendation relied on a purported "fact" that is not true and is not in the record, and created an element of the misconduct that does not exist.

(*Id.*) Disciplinary counsel argued that "[a]ny one of these errors, standing alone, is a compelling reason for the Commission to reject the Master's recommendation to dismiss." (*Id.*) Disciplinary

[4] Notably, Respondent again, for at least the second time in her briefs, misstated the language of Rule 9.223(A) in omitting the fact that it expressly applies pre-complaint, which is therefore inapplicable to this proceeding. (Respondent's Br. in Support of Master's Report, p. 1, n.2.)

counsel also advised the Commission that the Master has both (1) denied consolidation of this matter with FC 105; and (2) stayed both proceedings indefinitely pending the resolution of a separate audit of the Commission. (*Id*. pp. 25-31.)

On August 19, 2024, Respondent filed her Response to Disciplinary Counsel's Objection to the Master's Report.

Accordingly, there has been full briefing on the Master's Report, which is ripe for the Commission's decision based upon the Master's referral of its interlocutory recommendation to the Commission under MCR 9.231(B). No hearing on the objections to the Master's Report is required because there was no hearing before the Master. MCR 9.241.

V. Standard of Proof

Judicial discipline is a civil proceeding, the purpose of which is not to punish but to maintain the integrity of the judicial process. *Matter of Mikesell*, 396 Mich 517, 527 (1976); *In re Seitz*, 441 Mich 590, 624 (1993); *In re Haley*, 476 Mich 180, 195 (2006). The standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360 (1998) (cite omitted). Disciplinary counsel bears the burden of proving the allegations by a preponderance of the evidence. MCR 9.233(A). The Commission reviews the master's findings of fact and conclusions of law de novo, and the Commission may, but need not, defer to the master's findings of fact. *In re Chrzanowski*, 465 Mich 468, 482; 636 NW2d 758 (2001); *see also In re Brennan*, 504 Mich 80, 90-91 (2019), citing *In re Loyd*, 424 Mich 514, 535 (1986); *In re James*, 492 Mich 553, 569 (2012). It is the Commission's, not the master's, conclusions and recommendations that are ultimately subject to review by the Michigan Supreme Court. *Chrzanowski*, 465 Mich at 481.

VI. Law and Analysis

The Commission does not agree with the Master's interlocutory recommendation to grant

Respondent's Motion for Dismissal, as supplemented, and therefore rejects it.

The Master applied the standards for summary disposition under MCR 2.116(C)(10), which Respondent first articulated in her Supplemental Motion for Dismissal after not setting forth any standards in her opening Motion for Dismissal. We do not agree that those standards apply. Further, even if the standards of MCR 2.116(C)(10) applied, the Commission concludes that they require denial of Respondent's dispositive motion and procession of this matter to the public hearing required under MCR 9.233.

A. The Constitution and Subchapter 9.200 of the Michigan Court Rules Control.

The establishment of the Commission and the authority for this proceeding come from the Michigan Constitution. Importantly, Article 6, § 30(2) of the Michigan Constitution of 1963, as amended, provides that: "The supreme court *shall make rules implementing this section* and providing for confidentiality and privilege of proceedings." (emphasis added). Thus, the rules applicable to this proceeding are those as implemented by our Supreme Court, which are contained in subchapter 9.200 of the Michigan Court Rules.

B. MCR 2.116 Does Not Apply.

The rules applicable to this proceeding do not reference summary disposition under MCR 2.116. They reference only "dispositive motions" under MCR 9.231(B). Further, under that rule, the default manner of handling dispositive motions is for the Master *to withhold a recommendation* on any dispositive motion "until the conclusion of the hearing[.]" *Id*. (emphasis added). The "except[ion]" to this rule is that "the master *may* refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion," (emphasis added), which is what the Master chose to do here, in his discretion.

The applicable rules under subchapter 9.200 do not define "dispositive motion." Nor do they expressly make applicable any type of dispositive motion, such as the various types of motions for

summary disposition under MCR 2.116. Therefore, while MCR 9.231(B), by its terms, gives the Master discretion to make this interlocutory referral to the Commission, we understand the rule to give the Commission broad discretion to deny the recommendation without regard to the (C)(10) standards relied upon by the Master, particularly where, as here, it is the exception to the general rule to issue an interlocutory recommendation on a dispositive motion prior to the hearing.

The Commission can certainly envision circumstances where an interlocutory recommendation to grant a dispositive motion could be warranted and adopted by the Commission. For example, a decision from our Supreme Court could be released during the pendency of a formal complaint, prior to a hearing, in which the Supreme Court announces that the misconduct alleged in the FC is not misconduct. Or the Respondent could produce unassailable exculpatory or alibi evidence with his or her dispositive motion that would defeat the charges, rendering a hearing unnecessary. Or, as the Commission did in FC 97 (Halloran, J), the Commission may adopt an interlocutory recommendation to dismiss a proceeding on any other sufficient basis. But in this case, we do not believe that a finding of *insufficient evidence* to establish a genuine issue of material fact for proceeding to hearing – based upon Respondent's denials, exclusion of the video of the incident, and disciplinary counsel's decision not to include affidavits of its anticipated witnesses – is appropriate for dismissing this proceeding without a hearing. The Commission does not aim to prejudge this case. It could still be that disciplinary counsel may fail to meet its burden of proving Respondent's misconduct by a preponderance of the evidence following the public hearing, but the public hearing should be held.

Everything about subchapter 9.200, and judicial disciplinary proceedings in general, is geared toward having a public hearing. Before a complaint is ever filed, there is an investigation "conducted to determine whether a complaint should be filed *and a hearing held*." MCR 9.220(B) (emphasis added). Under MCR 9.223(A)(1), if the Commission determines after the investigation

and before filing any complaint "that there are insufficient grounds to warrant filing a complaint, the commission may . . . dismiss the matter[.]" But, "[u]pon determining that *there is sufficient evidence* to believe that the respondent under investigation has engaged in misconduct, the commission may issue a complaint against that respondent." MCR 9.224(A) (emphasis added). That is what occurred here. Therefore, pursuant to MCR 9.224(B) and (C), the Commission appointed disciplinary counsel and petitioned the Supreme Court to appoint a master in this proceeding. On March 10, 2023, the Supreme Court appointed the Master "to *hear* Formal Complaint No. 106." (3/10/23 MSC Order, emphasis added). Indeed, under MCR 9.231(A), the Supreme Court appointed the Master to "*conduct the hearing within a reasonable period of the date of the petition and shall establish a date for completion of the hearing procedure*." (emphasis added).

When it is held, "[t]he *public hearing* must conform *as nearly as possible to the rules of procedure and evidence governing the trial* of civil actions in the circuit court." MCR 9.233(A) (emphasis added). Subchapter 9.200 says nothing about the pre-hearing matters of judicial disciplinary proceedings, such as discovery or dispositive motion practice, conforming as nearly as possible to civil actions in the circuit court. In fact, MCR 9.232 specifically addresses discovery in judicial disciplinary proceedings in an immensely more circumscribed manner than the broad discovery allowed in civil actions in the circuit court, and no rule under subchapter 9.200 expounds upon what "dispositive motions" as referenced in MCR 9.231(B) entail. Thus, strict adherence to MCR 2.116(C)(10), as the Master proceeded, is not supported under the Michigan Constitution or subchapter 9.200.

The Supreme Court's decision in *Matter of Mikesell*, *supra*, 396 Mich at 531-533, is instructive. In *Mikesell*, the Supreme Court rejected the respondent's arguments concerning the master's denial of certain discovery. The Court noted that former GCR 1963, 932.11 (now contained in MCR 9.233(A)), required the master to "proceed with a public hearing which as nearly as may be

shall conform to the rules of procedure and evidence governing the trial of civil actions in the circuit courts, whether or not the respondent has filed an answer or appears at the hearing." *Id* at 531-532. Based on this language, our Supreme Court cited with approval the Supreme Court of Louisiana's decision in *In re Haggerty,* 241 So 2d 469, 475 (La 1970), in noting that, in judicial disciplinary proceedings, "'technical niceties required in suits between private parties where the court is called upon to adjudicate conflicting claims is not essential, *and all that is required is that the charges against the respondent shall be so specific as to fairly inform him of the misconduct of which he is accused*.'" *Id* at 532 (emphasis added). Our Supreme Court in *Mikesell* also quoted with approval the California Supreme Court's decision in the judicial removal case of *McCartney v Commission on Judicial Qualifications,* 526 P2d 268, 273 (1974), where that court held that "'*matters of discovery are generally within the sound discretion of the initial trier of fact, however, we consider that the determination as to whether a discovery order shall issue is within the sound discretion of the Commission.*'" *Id* at 533 (emphasis in original.)

These decisions regarding discovery apply equally to dispositive motions under subchapter 9.200. It is the public hearing, not pre-hearing matters, which "must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court." MCR 9.233(A); *Mikesell*, 396 Mich at 531-532. In pre-hearing matters, such as interlocutory dispositive motions under MCR 9.231(B), the Commission may reject a master's recommendation to grant such a motion where, as here, it deems having a hearing appropriate, as the prime due process consideration is that "the charges against the respondent shall be so specific as to fairly inform [her] of the misconduct of which [s]he is accused." *Id* at 532, quoting *Haggerty*, 241 So 2d at 475. This likewise defeats the arguments presented in Respondent's initial Motion for Dismissal that she should have been provided with a copy of the video more than eleven days in advance of her testimony or that disciplinary counsel somehow failed to produce video that it did not yet have, or

that she should have known her status as a target (before she became one), as Respondent cited no authority for any entitlement to such items, for which is there is none under subchapter 9.200.

Thus, in this case, we reject that the Master's strict and overly technical application of the standards under MCR 2.116(C)(10) in recommending interlocutory dismissal of this proceeding based upon a perceived lack of evidence to create a genuine issue of material fact for the public hearing. The Commission already deemed the evidence from the investigation sufficient to authorize and file FC 106. MCR 9.224(A). Evidentiary concerns regarding the video of the incident on Mackinac Island should be handled at the hearing but, again, we do not understand the video to be in genuine dispute by the parties.

Further, disciplinary counsel should not be required to present all or any of its witness testimony in affidavits pre-hearing. This is particularly true in this case, where the Master has already *denied* disciplinary counsel's request to consolidate this proceeding with the very closely related proceeding involving the same incident on Mackinac Island in FC 105 as to Respondent Judge Brue, thereby necessitating disciplinary counsel to call the same eleven anticipated witnesses to give the same testimony in two proceedings instead of one proceeding. The Master's interlocutory recommendation here would have disciplinary counsel present these witnesses' testimony for at least the third time, in affidavit format, which is simply not required as a precursor to the public hearing under subchapter 9.200, and is overly burdensome for all involved (including the witnesses). The Commission agrees with disciplinary counsel that what the Master required on dispositive motion practice "is precisely what the hearing is for." (9/1/23 Response, p. 5.) Respondent in this case is no doubt fairly informed of the charges against her and the misconduct of which she is accused, which is all that is required. *See Mikesell*, 396 Mich at 532. The hearing should be conducted.

C. In Any Event, Summary Disposition Under (C)(10) is Not Warranted.

In any event, even if the standards of MCR 2.116(C)(10) strictly applied pre-hearing to

Respondent's dispositive motion, the Commission concludes, upon its *de novo* review, that the motion should have been denied. The Master believed it was "unique" for disciplinary counsel to rely upon Respondent's own sworn testimony in which she denied the allegations. This was not a fair characterization of disciplinary counsel's opposition to Respondent's motion. Disciplinary counsel was not relying on Respondent's testimony in a vacuum or on an island unto itself. Disciplinary counsel set forth that Respondent's denials were sufficiently implausible *in the context of the surrounding circumstances, including the video of the incident*, to demonstrate a genuinely disputed issue of fact for the hearing. It was only by wholly discounting the video as "inadmissible" that the Master was able to downplay the significance of Respondent's denials. Incidentally, these denials by Respondent formed the entire basis for the formal complaint alleging that Respondent's denials amount to misrepresentations under oath.

The technical chain of custody and other arguments made by Respondent for seeking to exclude the video failed to actually dispute the authenticity of the video, including that Respondent was in the video. Further, the video has been made widely available to the public, including viewable on the webpage for the Detroit Free Press.[5] Even under the (C)(10) standard, the Master could have taken judicial notice of the contents of the video rather than excluding it from his consideration. "Under MRE 201(c), a court may take judicial notice whether or not requested to do so." *People v Burt*, 89 Mich App 293, 297 (1979). "MRE 201(c) allows judicial notice to be taken at any stage of the proceeding." *Id*. The disparity between the video footage and Respondent's testimony, taken together with all surrounding circumstances, was enough to defeat summary disposition under (C)(10) and require a hearing even without the affidavits of several witnesses that disciplinary counsel intends to call at the hearing, particularly where Respondent's only argument depends upon her own credibility and the fact finder's belief of her denials of having the requisite intent, which is

[5] See https://www.freep.com/videos/news/local/michigan/2023/01/05/metro-detroit-judges-under-

not amenable to summary disposition. *See Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 476-477 (2020) ("A conflict in the evidence may generally only be removed from the trier of fact's consideration if it is based on testimony that is essentially *impossible or is irreconcilably contradicted by unassailable and objective record evidence*," therefore "summary disposition is improper when *the resolution of a matter turns on the relative credibility of witnesses, even if a party cannot submit documentary proof to refute the opposing party's claims*.") (emphasis added) (cites omitted).

D. The Commission Directs the Hearing to Commence on February 3, 2025.

The Commission notes that the Master has both (1) denied consolidation of this matter with FC 105; and (2) stayed both proceedings indefinitely pending the resolution of a separate audit of the Commission. The result is that both FC 105 and 106 are indefinitely paused, which runs afoul of MCR 9.231(A) requiring the Master to "conduct the hearing *within a reasonable period of the date of the petition*" for appointment of the master and to "*establish a date for completion of the hearing procedure*." (emphasis added). Therefore, pursuant to MCR 9.243, the Commission directs the Master to conduct the public hearing in this matter to commence February 3, 2025, at 9:30 a.m. at Farmington Hills District Court (D47), 31605 W Eleven Mile Rd, Farmington Hills, MI 48336, and continue thereafter until complete, at which evidence is to be taken in support of the charges set forth in the Amended FC consistent with MCR 9.233(A), and to allow for development of any defenses Respondent may have to the claims made in the Amended FC. The Master shall enter an order to this effect, and the order shall be sent to the Respondent at least 14 days before the hearing. MCR 9.243.

VII. Conclusion and Directive

The Judicial Tenure Commission of the State of Michigan hereby rejects the Master's May 20, 2024 "Report and Recommendation Pursuant to MCR 9.231(B)," and directs the Master,

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pursuant to MCR 9.231(A), MCR 9.231(B), MCR 9.233(A), and MCR 9.243, to conduct the public hearing in this matter, to commence February 3, 2025, at 9:30 a.m. at Farmington Hills District Court (D47), 31605 W Eleven Mile Rd, Farmington Hills, MI 48336, and continue thereafter until complete, at which evidence is to be taken in support of the charges set forth in the Amended FC consistent with MCR 9.233(A), and to allow for development of any defenses Respondent may have to the claims made in the Amended FC. The Master shall enter an order to this effect, and the order shall be sent to the Respondent at least 14 days before the hearing. MCR 9.243.

JUDICIAL TENURE COMMISSION

/s/ *Hon. Jon H. Hulsing*
HON. JON H. HULSING
Chairperson

/s/ *James W. Burdick*
JAMES W. BURDICK, ESQ.
Vice-Chairperson

/s/ *Hon. Brian R. Sullivan*
HON. BRIAN R. SULLIVAN
Secretary

/s/ *Hon. Monte J. Burmeister*
HON. MONTE J. BURMEISTER

/s/ *Dr. Maxine Hankins Cain*
DR. MAXINE HANKINS CAIN

/s/ *Hon. Thomas C. Cameron*
HON. THOMAS C. CAMERON

/s/ *Siham Awada Jaafar*
SIHAM AWADA JAAFAR