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 Response to Disciplinary Counsel's Brief in Support of Master's Findings of Fact and Conclusions of Law & Disciplinary Analysis

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Introduction

There is a stark contrast between the Master's report and Disciplinary Counsel's defense of that report.[1] The Master concluded that certain statements from respondent Hon. Bruce Morrow amounted to judicial misconduct. Judge Morrow disagrees with that conclusion for the reasons stated in his *Objections to Master's Report*. One of those reasons is the Master's failure to apply *Matter of Hocking* (1996),[2] the controlling opinion from the Michigan Supreme Court. But that's a dispute about the legal conclusions to be drawn from the relevant facts.

Disciplinary Counsel's defense of the Master's report raises very different issues. Like the Master, Disciplinary Counsel fail to address *Hocking*. But they go far beyond overlooking the controlling law. Not content with the Master's factual findings, Disciplinary Counsel invent new facts—like their false claim that Judge Morrow "made an analogy to orgasm."[3] They also spin and embellish other facts, always trying to make Judge Morrow look like a sexual aggressor. In this way, Anna Bickerstaff's false assertion that Judge Morrow was "hitting on" her continues to haunt these proceedings.

Under *Hocking,* Judge Morrow did not commit misconduct. Some may find his comments distasteful, but distasteful comments are not judicial misconduct. And if the Commission finds any misconduct here, it should look to *In re Gorcyca* (2017)[4] for the

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[1] See *Disciplinary Counsel's Brief in Support of Master's Findings of Fact and Conclusions of Law & Disciplinary Analysis* ("Disciplinary Counsel's Brief").
[2] *Matter of Hocking,* 451 Mich 1; 546 NW2d 234 (1996).
[3] Disciplinary Counsel's brief, p 25.
[4] *In re Gorcyca,* 500 Mich 588; 902 NW2d 828 (2017).

appropriate sanction. The respondent in *Gorcyca* was abusive to children while on the bench. She received public censure. Judge Morrow is accused of using inappropriate language with adults while off the bench. Given the principles of proportionality and stare decisis, Judge Morrow's discipline cannot exceed public censure.

Argument

1. Disciplinary Counsel's arguments improperly use rebuttal evidence as substantive evidence.

Disciplinary Counsel's arguments make a serious legal error—coincidentally, the very same error that Ashley Ciaffone made during her closing argument in the underlying *Matthews* litigation.

Judge Morrow offered witnesses who testified to his good character. So Disciplinary Counsel offered rebuttal evidence to challenge that testimony with specific instances of behavior. Specifically, they offered testimony from Joe Kurily that Judge Morrow spoke to Kurily and another prosecutor about armpit hair.

The Master allowed this rebuttal. As the Court of Appeals explained in *Nolte v Port Huron Area School Dist Bd of Educ* (1986),[5] "The trial judge may admit evidence offered in rebuttal where it contradicts or negates evidence offered by the adverse party even though it tends incidentally to show a matter as to which evidence is not usually admissible."[6]

But admitting rebuttal evidence doesn't mean that it can be used for any purpose.

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[5] *Nolte v Port Huron Area Sch Dist Bd of Educ*, 152 Mich App 637; 394 NW2d 54 (1986).
[6] *Id.* at 645.

This principle is codified in Model Civil Jury Instruction 3.07: "Whenever evidence was received for a limited purpose or limited to [certain parties], you must not consider it for any other purpose or as to any other [party]."[7]

Rebuttal evidence has a limited purpose: it is not admissible as substantive evidence in support of a party's case-in-chief. Rather, the Michigan Supreme Court held in *People v Figgures* (1996) that "[r]ebuttal evidence is admissible to *contradict, repel, explain or disprove evidence produced by the other party* and tending directly to weaken or impeach the same."[8] This limit on the use of rebuttal evidence has a critical function. It "prevent[s] the prosecution from 'sandbagging' the defendant by introducing new, substantive evidence on rebuttal that should have been introduced in its case in chief."[9] And, in that way, it "prevent[s] the unfair ordering of proofs."[10]

Using rebuttal evidence as substantive evidence is an error. The Court of Appeals stated this rule succinctly in *People v Ridgeway* (1977): "The testimony was admitted during the prosecutor's rebuttal case, but only for purposes of impeaching the defendant's attempts to implicate the passenger. The testimony could only be considered for impeachment purposes. … We may not consider it as substantive evidence supporting the possession charge."[11] So rebuttal evidence may be admissible to

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[7] Mich Civ. J. I. 3.07.

[8] *People v Figgures,* 451 Mich 390, 399; 547 NW2d 673 (1996) (emphasis added).

[9] *People v Vasher,* 449 Mich 494; 537 NW2d 168 (1995).

[10] *Id.*

[11] *People v Ridgeway*, 74 Mich App 306, 315, n 6; 253 NW2d 743 (1977), citing *Oregan v Hass,* 420 US 714 (1975); *People v Jones,* unpublished per curiam opinion of the Court of Appeals, issued March 29, 2002 (Docket No. 225969), 2002 WL 483430, at 4.

contradict character evidence, but it cannot be treated as substantive evidence in support of the primary charges. That's as true in civil matters as it is in criminal ones; as the Court of Appeals held in *Nolte,* "Rebuttal evidence countering this character trait was properly admitted *to contradict evidence petitioner put in on direct examination.*"[12]

This "armpit hair" testimony is rebuttal evidence. On the fourth day of this hearing, Disciplinary Counsel called Joseph Kurily as a rebuttal witness. There's no question that Kurily was a rebuttal witness because that's what Disciplinary Counsel told the Master: "Judge, the reason we're recalling Joseph Kurily in my rebuttal case is that under Michigan Rule of Evidence 405(b) I am allowed to rebut character evidence that the defense presented."[13] Kurily testified that Judge Morrow raised the issue of armpit hair in one conversation.[14]

This rebuttal evidence—which, according to Disciplinary Counsel, was admitted solely to impeach Judge Morrow's character evidence—has become central to Disciplinary Counsel's arguments. Their brief mentions "armpit hair" six times (with Disciplinary Counsel incredibly claiming that a question about armpit hair "clearly has a sexual connotation"[15]). But impeachment evidence cannot be treated as substantive evidence. Under *Figgures,* it is admissible only to "contradict, repel, explain or disprove evidence produced by the other party[.]"[16] Disciplinary Counsel's arguments go far

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[12] *Nolte,* 152 Mich App at 645 (emphasis added).
[13] Vol. IV, p. 1050.
[14] Vol IV, p 1056.
[15] Disciplinary Counsel's brief at 8.
[16] *Figgures,* 451 Mich at 399.

beyond permissible bounds for rebuttal evidence.

Disciplinary Counsel may use rebuttal evidence solely to challenge the credibility of Judge Morrow's character evidence, but they cannot use it as substantive evidence of misconduct. Just as the Court of Appeals rejected reliance on rebuttal evidence in *Ridgeway,* the Commission must reject any substantive arguments based on this "armpit hair" issue.

2. Disciplinary Counsel's brief is full of factual misstatements.

Aside from attempting to use rebuttal evidence as substantive evidence, Disciplinary Counsel filled their brief with factual misstatements and material omissions. And all of these embellishments on the record have the same goal: making Judge Morrow look sexually aggressive with female attorneys.

2.1 Disciplinary Counsel falsely claim that Judge Morrow only used sexual analogies or language with female attorneys.

Disciplinary Counsel try to convince the Commission that Judge Morrow only used sexual analogies or language with female attorneys: "Respondent used inappropriately graphic sexual language, sexual analogies, and sexual examples with [female attorneys] while the evidence showed that he did not do so with male lawyers."[17] This assertion about what the "evidence showed" is incorrect. William Noakes—a male lawyer—was involved in the conversation in which Judge Morrow used the word *fucked*, used an analogy involving asking about a date's proclivities regarding sex, and expressed skepticism about Matthews's assertion regarding his inability to have "normal" sex with

[17] Disciplinary Counsel's brief, p 4.

the victim.[18] Moreover, if one could accept Disciplinary Counsel's bizarre assertion that a "question about the color of [a] woman's armpit hair clearly has a sexual connotation,"[19] then Disciplinary Counsel's brief disproves the claim that Judge Morrow only directed "sexual" comments to women. It states that Judge Morrow discussed shaving his own armpit hair with a female *and* a male assistant prosecuting attorney.[20] In other words, Disciplinary Counsel's characterization of the evidence isn't correct even according to Disciplinary Counsel's own brief.

2.2 Disciplinary Counsel falsely claim that *tease, climax,* and *crescendo* "sexually connoted"

Next, Disciplinary Counsel argue that words like *tease, climax,* and *crescendo* are inappropriate: "Respondent never used sexual analogies and he never used the sexually connoted words 'tease,' 'climax,' 'crescendo' or 'foreplay' when speaking with him."[21] Disciplinary Counsel's claim that all of these words are "sexually connoted" is false.

Tease is not necessarily a sexual word. Merriam-Webster reports that it can refer to arousing desire *or curiosity*.[22] And many legal commentators—like Judge Morrow—use the term to refer to arousing a jury's curiosity: "…[O]pening should *tease the jury* with facts to be proved …";[23] "Technologies previously seen only on television and computer screens are now available to showcase themes and *tease jurors* …";[24] "…[T]he lawyer

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[18] Vol. III, pp. 919-920.
[19] Disciplinary Counsel's brief at 8.
[20] Id.
[21] Disciplinary Counsel's brief, p 5.
[22] https://www.merriam-webster.com/dictionary/tease (last visited March 16, 2021).
[23] *Opening statement; defendant, Ga. Soft Tissue Injuries* § 7-9 (emphasis added).
[24] Ann T. Greeley, *Understanding Jury Psychology Through Research: A Powerful Technique for Your Trial Preparation Arsenal,* Brief, Spring 2010, at 48, 49 emphasis added).

honestly believes that the best way to save [the client's] life … is to not *tease the jury* with arguments of innocence."[25] It is not improper to refer to "teasing" a jury.

Crescendo isn't a sexual term either. Merriam-Webster reports that it refers to a "gradual increase," particularly in the volume of music.[26] Judges use this term all the time to refer to an increase: "…[T]he culmination of a *'crescendo'* of first amendment activity";[27] "There was a *crescendo* of this talk on September 8 …";[28] "That brings me, in *analytic crescendo*, to the concurrence's suggestion that …"[29] It is not improper for a judge to use the word *crescendo*.

Disciplinary Counsel's suggestion that Judge Morrow used the term *climax* in its sexual sense—as referring to orgasm—is false.[30] Even Anna Bickerstaff 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."[31] No reasonable person could interpret *climax* in this sentence as "orgasm." Bickerstaff later testified that the word *climax* "was used in a sexual nature" and could not have referred to anything other than sex.[32] But that doesn't mean that Judge Morrow was using *climax* as referring to orgasm. At worst, Judge Morrow was referring to sexual intercourse as the climax of a

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[25] Alan Dershowitz, *Legal Ethics and the Constitution*, 34 Hofstra L. Rev. 747, 769 (2006) emphasis added).

[26] https://www.merriam-webster.com/dictionary/crescendo (last visited March 16, 2021).

[27] *Leonard v City of Columbus*, 705 F2d 1299, 1306 (CA 11, 1983) emphasis added).

[28] Johnson v ITT Aerospace/Commc'ns Div of ITT Indus, Inc, 272 F3d 498, 500 (CA 7, 2001) emphasis added).

[29] *Zivotofsky ex rel Zivotofsky v Kerry*, 576 US 1, 83 (2015) (Scalia, J., dissenting) emphasis added).

[30] *Answer*, ¶¶12-13.

[31] Vol. II, p. 389.

[32] *Id.*, p. 437.

romantic relationship. That's very different from Disciplinary Counsel's lewd spin on Judge Morrow's statements.

2.3 Disciplinary Counsel falsely claim that Judge Morrow sat in an "intimate position" with Bickerstaff.

Disciplinary Counsel argue that there was something wrong with the way Judge Morrow was sitting: "Yet respondent never sat in an intimate position with Mr. Kurily."[33] The Master did not find that Judge Morrow sat in an "intimate position." The only testimony on this issue from an objective observer—Joe Kurily—established that there was nothing unusual about how Judge Morrow was behaving during his conversation with Bickerstaff.[34] Indeed, Judge Morrow occupied the very seat that Ciaffone had just vacated—a fact that Disciplinary Counsel admitted in their opening statement.[35] Because Disciplinary Counsel does not claim that Ciaffone was seated "in an intimate position," they cannot reasonably claim that Judge Morrow's position was "intimate."

2.4 Disciplinary Counsel falsely claim that Judge Morrow used multiple "sexually-based swear words."

Disciplinary Counsel suggest that Judge Morrow used more than one "sexually-based swear word" when speaking with the assistant prosecutors: "… [A]nd he did not use sexually-based swear words in conversation with him."[36] There is reliable evidence of only one swear word: Judge Morrow used the word *fucked* to refer to sexual intercourse. The word was "sexually-based" only because the testimony at issue was

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33 Disciplinary Counsel's brief, p 5.
34 Vol. III, p. 709.
35 Vol. I, p. 16.
36 Disciplinary Counsel's brief, p 5.

about sexual intercourse. It's not possible to refer to sexual intercourse without using a "sexually-based" word. Anna Bickerstaff is the only person who testified that Judge Morrow used the word *dick*.[37] But her credibility problems are legion: she lied to Chief James Bivens,[38] she lied to disciplinary counsel,[39] and she lied under oath in this proceeding.[40] Then she violated the sequestration order.[41] The record establishes, therefore, that Judge Morrow used *one* "sexually-based" swear word, and that's because the testimony at issue concerned sex.

2.5 Disciplinary Counsel falsely suggest that Judge Morrow had only "male character witnesses."

Disciplinary Counsel imply that Judge Morrow had only male character witnesses: "Respondent offered male character witnesses…."[42] In fact, Gabi Silver, Nicole James, and Joan Kennedy-Hughes all testified on Judge Morrow's behalf. Silver has tried ten to twenty cases before Judge Morrow, and she never saw him treat women differently than men.[43] James testified that the Prosecutor's Office made her think Judge Morrow was a "bad judge," and that she formed a very different opinion once she entered private practice.[44] Like Silver, James believes that Judge Morrow treats women and men

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[37] Vol. II, pp. 401-402.

[38] Vol. V, p. 1174-75 (Chief Bivens testifying that Bickerstaff said that Judge Morrow was trying to hit on her).

[39] Exhibit M, Stipulation, pp. 1-2 (Bickerstaff said she had not seen Chief Bivens's report); Vol. II, pp. 421-22 (Bickerstaff testifying that she reviewed Chief Bivens's report previously).

[40] Vol. II, pp. 599-600, 607 (Bickerstaff testifying that she never told anyone that Judge Morrow hit on her); Vol. V, p. 1174-75 (Chief Bivens testifying that Bickerstaff said Judge Morrow hit on her).

[41] Vol. V, p. 1235.

[42] Disciplinary Counsel's brief, p 5.

[43] Vol IV, pp. 968-970.

[44] Vol. IV, p. 1007.

equally.[45] Kennedy-Hughes was Judge Morrow's assistant for a time, and she testified that Judge Morrow "has been very respectful."[46] The suggestion that Judge Morrow had no women to testify on his behalf is not true.

2.6 Disciplinary Counsel falsely claim that Judge Morrow would not address a male attorney's height or weight.

Disciplinary Counsel argue that they can't imagine Judge Morrow raising a male attorney's height or weight: "It is similarly hard to imagine that respondent would question any male attorney about his height or weight, or inform a male attorney that he had not yet assessed the attorney's muscle mass…"[47] That's not hard to imagine at all. In fact, it's right there in the record. Judge Morrow used the example of a man's height to demonstrate bias.[48] Judge Morrow 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.[49]

Attorney Steven Fishman recounted another example in which Judge Morrow used height to demonstrate bias.[50] Judge Morrow is 6'4" and Fishman is just shy of 5'10".[51] During voir dire in a homicide trial, Judge Morrow asked a juror to guess whether

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[45] Vol. IV, p. 1007.
[46] Vol. IV, pp. 1047-1048.
[47] Disciplinary Counsel's brief, p 6.
[48] Vol. II, p. 415.
[49] Vol. II, p. 482.
[50] Vol. III, pp. 796-98.
[51] *Id.*, pp. 796-97.

Judge Morrow or Fishman played basketball at the University of Michigan.[52] The juror picked Judge Morrow—and that was wrong.[53] Judge Morrow brought out the fact that the juror was making presumptions based on height and perhaps race, too.[54] Height—including men's height—is exactly the kind of fact that Judge Morrow uses to illustrate bias and challenge jurors' assumptions. So there's no need to "imagine" whether Judge Morrow would introduce a man's height as a subject of discussion. The record proves that he did.

2.7 Disciplinary Counsel falsely claim that Judge Morrow "overtly eyed" a woman.

Repeating the false claim that Judge Morrow "overly eyed" the assistant prosecutors' bodies, Disciplinary Counsel argue that Judge Morrow would not "overly eye" a male attorney: "It is also highly unlikely that respondent would overtly eye a male attorney's body in the courtroom …."[55]

Judge Morrow did *not* "overtly eye" a female attorney's body. Bickerstaff testified that Judge Morrow looked at Ciaffone and Bickerstaff *once* when guessing their height.[56] And Ciaffone's testimony on this point was so vague that it was meaningless: " … [A]nd you can toss in how he looked with his eyes as part of that whole thing."[57] This "overtly eyed" theme is Disciplinary Counsel's own invention. Moreover, it is *not* unlikely that Judge Morrow would look at a "male attorney's body in the courtroom." The record

[52] *Id* Vol. III, p. 796.
[53] *Id.*, p. 797.
[54] *Id.*, p. 798.
[55] Disciplinary Counsel's brief, p 6.
[56] Vol. II, p. 408.
[57] Vol. I, p. 322.

contains two examples of Judge Morrow using men's height to illustrate bias.[58]

2.8 Disciplinary Counsel falsely claim that "armpit hair" has a "sexual connotation."

Disciplinary Counsel claim that a question about armpit hair had a "sexual connotation": "…[T]he question about the color of the woman's armpit hair clearly has a sexual connotation."[59] Legal-writing experts often remind lawyers that the word *clearly* is a sign of a weak argument.[60] This sentence from Disciplinary Counsel's brief is Exhibit A for that principle. "Armpit hair" does not have a sexual connotation. Adding the word *clearly* does not make a false statement true. (And this "armpit hair" issue isn't properly before the Commission anyway, since it came in through rebuttal evidence.[61])

2.9 Disciplinary Counsel falsely claim that simply mentioning sex is a "graphic sex-based hypothetical."

Disciplinary Counsel suggest that Judge Morrow used a "graphic sex-based hypothetical" in court: "There was absolutely no case-related need for respondent to pose a graphic sex-based hypothetical question to the female prosecutor."[62]

There was no "graphic sex-based hypothetical." Judge Morrow asked counsel about the reasonable expectation of privacy, and the difference between subjective and objective expectations.[63] Judge Morrow only asked whether he would have an expectation of privacy if he were "having sex with another man in that stall, and we're

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[58] Vol. II, p. 482; Vol. III, pp. 796-98.
[59] Disciplinary Counsel's brief, p 8.
[60] Bryan A. Garner, *The Winning Brief,* §79 (quoting relevant authorities).
[61] *Figgures,* 451 Mich at 399.
[62] Disciplinary Counsel's brief, p 9.
[63] Exhibit 16, *Adrian White* transcript.

not talking."[64] Merely mentioning sex is not "graphic." (And if the suggestion is that this statement is "graphic" because it involves two men, then this argument is the product of rank homophobia.) Even first-year law students must have the maturity to address constitutional questions about privacy—an area that often involves sex. In *Lawrence v Texas* (2003), for example, the U.S. Supreme Court analyzed whether adult males have a constitutional right to engage in consensual sex.[65] Judge Morrow's hypothetical was the kind that any reasonably mature lawyer should be able to handle when talking about the scope of the right to privacy.

2.10 Disciplinary Counsel falsely claim that Judge Morrow said his comments would be "offensive or embarrassing."

Disciplinary Counsel suggest that Judge Morrow told Bickerstaff that his criticism would be "offensive": "Respondent was well aware that his first conversation with Ms. Bickerstaff—which was the subject of count one—'may be offensive or embarrassing.' He warned her that it might be exactly that, just before talking with her."[66]

Judge Morrow did *not* say that his criticism would be "offensive." That is a falsehood—one that Disciplinary Counsel concocted to make it appear that Judge Morrow intended to act in a sexually aggressive manner. In fact, Bickerstaff only testified that Judge Morrow said his criticism "was going to make [her] blush."[67] Kurily's testimony was similar.[68] Criticism can make a person blush. There is no evidence that

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[64] Exhibit 16, *Adrian White* transcript, p. 27.
[65] *Lawrence v Texas,* 539 US 558 (2003).
[66] Disciplinary Counsel's brief, p 11.
[67] Vol. II, p. 385.
[68] Vol. III, p. 700.

Judge Morrow intended to offend Bickerstaff.

2.11 Disciplinary Counsel falsely suggest that there are articles on the internet about Judge Morrow's comments alone.

Disciplinary Counsel suggest that there's lots of reporting about Judge Morrow's comments alone: "A search of the internet reveals articles about his inappropriate comments to Ms. Ciaffone and Ms. Bickerstaff on the following news sources…."[69] This statement is false. A search of the internet reveals articles about *Disciplinary Counsel's allegations and this disciplinary proceeding,* not about Judge Morrow's comments themselves. Indeed, the YouTube links that Disciplinary Counsel cites are links to the underlying hearing. Disciplinary Counsel cite no press about Judge Morrow's conduct that is independent of Disciplinary Counsel's allegations about his conduct. Accusing someone of misconduct and then using press about those allegations to justify discipline is improper.

2.12 Disciplinary Counsel falsely claim that Judge Morrow's comments caused Bickerstaff's anxiety.

Disciplinary Counsel cite a number of self-serving statements from Bickerstaff in an attempt to make it appear that Judge Morrow's comments traumatized her: "A judge should never make a woman feel that way."[70]

In fact, the record establishes that Bickerstaff's troubles began the moment she lied to Det. Kinney. Ashley Ciaffone testified that Bickerstaff looked "concerned" after speaking with Det. Kinney.[71] According to Ciaffone, Bickerstaff walked out of Det.

[69] Disciplinary Counsel's brief, p 18-19.
[70] Disciplinary Counsel's brief, p 19.
[71] Vol. I, p. 307.

Kinney's office and said, "*I'm worried,* some of the stuff that JoAnn put in here wasn't correct."[72] That's the first instance when Bickerstaff appeared worried—and she was worried that she allowed Det. Kinney to form the wrong impression about what happened with Judge Morrow.

Then Bickerstaff made things much worse. Chief Bivens testified that Bickerstaff told him that Judge Morrow was "hitting on" her.[73] If failing to correct Det. Kinney's report made Bickerstaff "worried," overtly lying to Chief Bivens about Judge Morrow no doubt made her *extremely* worried. As an attorney, Bickerstaff must know about America's long history of violence and injustice arising from false accusations about Black men being sexual aggressors. With her lie to Chief Bivens, Anna Bickerstaff became part of that reprehensible history.

And Bickerstaff's lie to Chief Bivens was hardly her only misrepresentation. She lied under oath in this very proceeding when she said she never told anyone that Judge Morrow was hitting on her.[74] She lied to Disciplinary Counsel by claiming that she never reviewed Chief Bivens's report before.[75] She even violated the sequestration order in this case.[76] Bickerstaff's lies have tainted these proceedings from the start. Little wonder that her conscience would trouble her. It doesn't take a degree in psychology to see why Bickerstaff would be uncomfortable seeing Judge Morrow after falsely accusing him of

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[72] Vol. I, p. 307 (emphasis added).
[73] Vol. V, p. 1174.
[74] Vol. II, pp. 599-600, 607.
[75] See Exhibit M, Stipulation, pp. 1-2; Vol. II, pp. 421-22.
[76] Vol. V, p. 1235-36, 1238-1240.

"hitting on" her.

2.13 Disciplinary Counsel falsely claim that "sexual harassment" is "business as usual."

Disciplinary Counsel claim that "sexual harassment" is routine in Judge Morrow's court: "Respondent's conduct demonstrated that in his courtroom at least, sexual harassment is business as usual."[77] This assertion disregards the factual record. Three women testified that Judge Morrow treats women with respect: Gabi Silver,[78] Nicole James,[79] and Joan Kennedy-Hughes.[80] Disciplinary Counsel can argue about whether Judge Morrow's comments were improper. But they cannot reasonably claim that "sexual harassment is business as usual" in Judge Morrow's courtroom.

2.14 Disciplinary Counsel falsely claim that Judge Morrow "made an analogy to orgasm."

Disciplinary Counsel state that Judge Morrow "made an analogy to orgasm."[81] That allegation is false. Judge Morrow did *not* make "an analogy to orgasm." According to Bickerstaff, 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."[82] No reasonable person could read *climax* as *orgasm* in this sentence. Disciplinary Counsel has taken an innocuous analogy—the kind that appears in law reviews and judicial opinions[83]—and turned it into something more sexual and more aggressive.

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[77] Disciplinary Counsel's brief, p 20.
[78] Vol IV, pp. 968-970.
[79] *Id.*
[80] Vol. IV, pp. 1047-1048.
[81] Disciplinary Counsel's brief, p 25.
[82] Vol. II, p. 389.
[83] See Respondent Hon. Bruce Morrow's Objections to Master's Report, § 3.1.

2.15 Disciplinary Counsel falsely claim that Judge Morrow "laughed at the size of [a defendant's] penis."

Disciplinary Counsel write that Judge Morrow "laughed at the size of defendant Matthews's penis…[84] This claim is false, too. *No one* testified that Judge Morrow "laughed at the size of defendant Matthews's penis." He laughed at the implausibility of the defendant's claim that he couldn't have vaginal intercourse with the victim because that might cause a miscarriage: "Oh, so like what—like, he [is] saying that, like, what he's working with … was so big that it would cause a miscarriage[?]"[85] That's a far cry from "laugh[ing] at the size of defendant Matthews's penis." At worst, Judge Morrow's comment was distasteful—which means that it is not a valid basis for finding of misconduct under *Hocking*.[86] Once again, Disciplinary Counsel have taken a statement that is *not* misconduct under *Hocking* and twisted it to make it seem lewd and aggressive.

3. Disciplinary Counsel did not establish that Judge Morrow treats people differently based on gender.

Although Disciplinary Counsel frame their brief as a defense of the Master's report, they actually ask the Commission to depart from the Master's conclusions in a significant way. Disciplinary Counsel charged Judge Morrow with a violation of MCR 9.202(B)(1)(d). This rule prohibits treating people unfairly or discourteously "because of the person's race, gender, or other protected characteristic."[87] The Master didn't find a violation of Rule 9.202(B)(1)(d). Disciplinary Counsel ask the Board to reach a different

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[84] Disciplinary Counsel's brief, p 26.
[85] Vol. I, pp. 62-63.
[86] *Hocking*, 451 Mich at 12.
[87] MCR 9.202(B)(1)(d).

conclusion. But their arguments are contrary to both governing law and the factual record.

In *Hocking,* this Commission found "a strong indication of gender bias in Respondent's conduct" but declined to find misconduct on that basis because the complaint did not allege gender bias.[88] The Michigan Supreme Court rejected the Commission's reasoning about the presence of gender bias. It held that the fact that the judge's objectionable comments were directed at women was not evidence of discrimination: "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 pattern."[89] Bickerstaff and Ciaffone are both women. Under *Hocking,* that is not evidence of a discriminatory pattern.

Moreover, Disciplinary Counsel's factual assertions in support of their gender-discrimination claim are contrary to the record. They claim that Judge Morrow used sexual analogies with women but not men.[90] That's false: William Noakes was part of the in-chambers conversation at issue in this case.[91] Noakes testified that he's "a man from the South."[92] So the record shows that Judge Morrow used sexual analogies when talking to a man.

Disciplinary Counsel argue that Judge Morrow must have discriminated based on

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[88] *Hocking,* 451 Mich at 24.
[89] *Id.*
[90] Disciplinary Counsel's brief, p 4.
[91] Vol. III, pp. 919-920.
[92] Vol. III, p. 871.

gender because he sat in an "intimate position" with Bickerstaff but not Kurily.[93] That assertion is false, too. Kurily witnessed Judge Morrow's conversation with Bickerstaff,[94] and he was obviously a party to his own conversations with Judge Morrow. Nobody was in a better position than Kurily himself to compare Judge Morrow's position with Kurily to his position with Bickerstaff. And Kurily saw "nothing unusual" in Judge Morrow's conduct.[95] That testimony belies Disciplinary Counsel's unsupported claim that Judge Morrow treated Bickerstaff differently than Kurily.

Disciplinary Counsel also try to support this argument about gender discrimination by relying on Judge Morrow's conversation with "another young female assistant prosecuting attorney" that involved armpit hair. (Disciplinary Counsel repeatedly mention the attorney's hijab, as if a judge ought to make presumptions about attorneys based on their religion. They should not. Religious discrimination is *always* wrong, just like any other form of discrimination.) This rebuttal testimony is not substantive evidence of misconduct; see Section 1, above. More importantly, Disciplinary Counsel's discussion of this conversation omits an important fact: Joe Kurily—a man—was part of it.[96] Kurily testified that Judge Morrow told him that he shaves his own armpit hair.[97] So it's not "very difficult to imagine" that Judge Morrow would have asked a male attorney about his armpit hair, as Disciplinary Counsel claim.[98] Judge Morrow *did* have

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[93] Disciplinary Counsel's brief, p 4.
[94] Vol. III, p. 709.
[95] *Id*.
[96] Vol. IV, pp 1056-1057.
[97] Vol IV, p 1057.
[98] Disciplinary Counsel's brief, p 5.

a conversation about armpit hair with a male attorney.

The record also disproves Disciplinary Counsel's claim that "[it] is similarly hard to imagine that respondent would question any male attorney about his height or weight, or inform a male attorney that he had not yet assess the attorney's muscle mass…."[99] Again, Judge Morrow raised the issue of attorney Steven Fishman's height when talking to the jury about bias.[100] No imagination is required; the record itself shows that Judge Morrow raised these issues with male attorneys.

Disciplinary Counsel argue that "[i]t is clear that it was Ms. Bickerstaff's and Ms. Ciaffone's gender that caused respondent to disrespect them with offensively sexual language as he did."[101] Yet none of the evidence cited in their brief supports a finding of gender discrimination. Their argument relies on the fact that Bickerstaff and Ciaffone are women. But, as noted above, *Hocking* establishes that this fact is not enough to establish gender discrimination.[102] The Commission should reject Disciplinary Counsel's arguments concerning MCR 9.202(B)(1)(d).

4. A few instances of alleged discourtesy, with a thirteen-year gap between them, is not "persistent" discourtesy.

Disciplinary Counsel argue that they proved a "persistent" failure to treat people with courtesy.[103] The incidents that establish this "persistent" failure, according to Disciplinary Counsel, are Judge Morrow's comments during the 2019 homicide trial at

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[99] Disciplinary Counsel's brief, p 6.
[100] Vol. III, pp. 796-98.
[101] Disciplinary Counsel's brief, p 6.
[102] *Hocking,* 451 Mich at 24.
[103] Disciplinary Counsel's brief, pp 6-7.

issue, along with comments "in the early 2000s and again in 2018 and 2019."[104] So, in Disciplinary Counsel's view, conduct is "persistent" if it occurred in 2004 and 2005 and then—after a thirteen-year gap—again in 2019.

Disciplinary Counsel propose that this timeline fits Merriam-Webster Dictionary's definition of *persistent*: "existing for a long or longer than usual time or continuously."[105] The Court of Appeals defined consistent in a similar manner in 1997, stating that *persistent* means "'constantly repeated; continued.'"[106]

Judge Morrow's alleged discourteousness fits neither definition. A few supposedly objectionable statements in 2004 and 2005, followed by a few supposedly objectionable statements over *thirteen years later* is neither "constant" nor "continuous." And Merriam-Webster's "existing for a long or longer than usual time" doesn't help Disciplinary Counsel's case because they never define a "usual time" for making supposedly objectionable statements. The definition of *persistent* disproves Disciplinary Counsel's claim.

The problem with Disciplinary Counsel's argument is evident when one applies their logic to other "persistent" actions. Section 19a of the Michigan Vehicle Code defines "person with disabilities" as including those who have a "persistent reliance upon an oxygen source other than ordinary air."[107] Suppose a person used oxygen a few times in

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[104] Disciplinary Counsel's brief, p 9.
[105] Disciplinary Counsel's brief, pp 6-7.
[106] People v Perez-DeLeon, 224 Mich App 43; 568 NW2d 324 (1997) (quoting Random House Webster's College Dictionary (1992)).
[107] MCL 257.19a.

2004, a few times in 2005 and then—after a thirteen-year gap—a few times in 2018 and 2019. With those facts, no reasonable person could assert that the individual has a "persistent reliance upon an oxygen source other than ordinary air." The same conclusion applies to this case. Disciplinary Counsel have not established a persistent failure to treat people with courtesy.

5. Under the *Brown* factors, the maximum possible sanction is public censure.

Judge Morrow's objections to the Master's report address the *Brown* factors. For purposes of discipline, the key decision is the Michigan Supreme Court's opinion in *In re Gorcyca* (2017).[108] There, the Michigan Supreme Court imposed public censure for a judge's "discourteous and hostile conduct toward children[.]" In this case, Disciplinary Counsel accuse Judge Morrow of discourteous and hostile conduct toward *adults*—a much less vulnerable group. Judge Gorcyca was on the bench, deciding the children's fate, when she made those remarks. Judge Morrow made the comments at issue in private conversations off the bench. If Judge Gorcyca received a public censure for discourtesy on the bench to children, then Judge Morrow can receive no more than public censure for discourtesy off the bench to adults. None of Disciplinary Counsel's arguments to the contrary has merit.

5.1 Disciplinary Counsel did not establish a pattern.

Disciplinary Counsel argue that they established a "pattern" of "saying sexually inappropriate things to women" based on an SCAO letter from 2004, a 2005 letter from

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[108] *In re Gorcyca*, 500 Mich 588; 902 NW2d 828 (2017).

the Commission, and the 2019 incidents at issue in this case. A few alleged incidents with a thirteen-year gap between them is not a “pattern” in any meaningful sense.

5.2 Judge Morrow’s conduct was not “on the bench.”

Disciplinary Counsel claim that, under three Michigan Supreme Court opinions, anything a judge does as a judge is “on the bench” for purposes of the *Brown* factors. There’s an obvious flaw in this argument: a judge does *everything* as a judge. That rule arises directly from the Michigan Code of Judicial Conduct. Canon 2(B) states: “*At all times,* the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary.”[109] If judges are subject to scrutiny “at all times” and if anything a judge does in their judicial capacity is “on the bench” as Disciplinary Counsel claim, then this *Brown* factor is meaningless.

It’s not surprising, then, that none of the cases that Disciplinary Counsel rely upon—*In re Chrzanowski* (2001), *In re Barglind* (2008), and *In re Adams* (2013)[110]— actually supports their argument. In *Chrzanowski,* the respondent was disciplined for appointing her boyfriend to defend parties, for failing to disclose her relationship, and her making false statements to the police.[111] The Commission and the Supreme Court found misconduct “on the bench.” The Court didn’t specifically address whether the false statements to police were “on the bench.” But the other misconduct—appointing counsel and choosing whether to disclose a personal relationship in pending cases—were “on the

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109 Michigan Code of Judicial Conduct, Canon 2(B) (emphasis added).
110 *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001); *In re Barglind,* 482 Mich 1202; (2008); *In re Adams,* 494 Mich 162; 833 NW2d 897 (2013).
111 *Chrzanowski*, 465 Mich at 490.

bench" in its usual sense. The respondent was carrying out her official duties as a judge. So *Chrzanowski* does not support treating private conversations between a judge and an attorney as "on the bench."

Nor does *Barglind.* In that case, the respondent was disciplined for delay in deciding cases. The Court's order states that

> respondent engaged in a pattern of delay in rendering decisions in matters submitted to her for review. In some instances, the delays exceeded two years. Respondent failed to respond over a several month period to numerous inquiries made by the State Court Administrative Office Regional Director regarding the status of various matters. On several occasions, respondent failed to report, as required by MCR 8.107, all matters that remained undecided for more than four months from the date submitted to respondent. After a January 2007 implementation plan was put in place, respondent failed to report all undecided matters to the State Court Administrative Office.[112]

Barglind does not support treating private conversations between a judge and an attorney as "on the bench."

Like *Chrzanowski* and *Barglind, Adams* provides no support for Disciplinary Counsel's claim that a private conversation between a judge and an attorney is "on the bench." In *Adams,* the respondent testified falsely under oath, filed forged pleadings, and made misrepresentations to the Commission.[113] Both the Commission and the Michigan Supreme Court concluded that this conduct was very troubling. But, contrary to Disciplinary Counsel's suggestion, the Court found that this conduct was *not* "on the

[112] *Barglind,* 482 Mich at 1203.
[113] *Adams,* 494 Mich at 165.

bench":

> Again, we agree with the JTC that ***although there is no evidence that respondent committed misconduct on the bench***, she did "attempt[ ] to leverage her position as a … judge in order to obtain special treatment not available to other non-judicial litigants." Despite being told by her attorney that Judge Brennan's staff stated that the March 16, 2011 hearing could not be rescheduled, respondent took it upon herself to personally call Judge Brennan's chambers in an attempt to reschedule the hearing. In addition, although respondent's misconduct ***did not occur while she herself was on the bench,*** she did repeatedly testify falsely under oath in a courtroom, with all the gravity that such a venue should communicate, especially to a judge, in response to questions asked of her by a judge on the bench.[114]

Appointing a lawyer and making disclosures is on the bench (*Chrzanowski*). Delaying official decisions is on the bench (*Barglind*). But lying to prosecutors and filing false pleadings are *not* on the bench (*Adams*).

This case does not concern official decisions as in *Chrzanowski* and *Barglind.* Instead, it involves private conversations between a judge and attorneys. That conduct is not "on the bench."

5.3 Disciplinary Counsel failed to prove that Judge Morrow's comments were "premediated."

Attempting again to embellish the record, Disciplinary Counsel argue that Judge Morrow's comments were premeditated. They cite the fact that, before talking to Bickerstaff, Judge Morrow said that his comments might make her blush.[115] But that statement only shows that Judge Morrow knew he would have to make critical comments

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[114] *Adams,* 494 Mich at 181-182 (emphasis added).
[115] Disciplinary Counsel's brief at 13.

to Bickerstaff. There is no evidence that Judge Morrow planned to use an analogy involving a romantic relationship at that point.

Next, Disciplinary Counsel cite various statements in Judge Morrow's chambers and argue that Judge Morrow had an "opportunity to reassess his use of further sexual references[.]"[116]This supposed "opportunity to reassess his use of further sexual references" is a reference to *Adams*.[117] There, the Court held that "although respondent's initial false testimony about never having called Judge Brennan's chambers while she was represented may have been 'spontaneous,' all of her lies thereafter were made after she had time to reflect upon these matters, i.e., after periods of 'deliberations.'"[118] So the passage of time that supported a finding of premeditation in *Adams* involved weeks or months—the time between the initial misconduct and the respondent's statements in an investigation about that conduct. That's significantly longer than the two-hour meeting at issue here. Moreover, Judge Morrow's comments were *reactions* to Ashley Ciaffone's attempts to defend the prosecutor's needless introduction of DNA evidence.[119] He obviously didn't know what Ciaffone was going to say before she spoke, so there was no meaningful opportunity for deliberation, as in *Adams.*

Disciplinary Counsel also claim that the fact that Judge Morrow "deliberately followed" Ciaffone and Bickerstaff to counsel's table "demonstrates his

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[116] Disciplinary Counsel's brief at 15-16.
[117] *Adams,* 494 Mich at 182.
[118] *Id.* at 183.
[119] Disciplinary Counsel's brief at 13-14.

premeditation."[120] Even if one presumes that Judge Morrow intended to speak with Ciaffone and Bickerstaff about *something*, it doesn't follow that he planned to discuss height and weight. In fact, Disciplinary Counsel omit a key fact: Bickerstaff invited Judge Morrow to comment further on their height and weight by stating, "Judge, I'm five-three for context."[121] Judge Morrow wasn't giving a soliloquy; he was engaged in a conversation. His statements were spontaneous.

Straining credulity again, Disciplinary Counsel argue that Judge Morrow "effectively admitted that [his] discussion [with Ciaffone and Bickerstaff] was premeditated" because he said that it was "part of a continuation of the in-chamber[s] discussion that was centered on bias."[122] The fact that Judge Morrow resumed an earlier subject of discussion doesn't mean that he planned exactly what he was going to say. Disciplinary Counsel's argument is a stretch, to put it mildly.

5.4 Disciplinary Counsel failed to establish unequal treatment based on gender.

Next, Disciplinary Counsel argue that Judge Morrow's comments to Bickerstaff and Ciaffone were "unequal treatment on the basis of gender."[123] This argument overlooks the Michigan Supreme Court's holding in *Hocking*: "The fact that attorneys Maas and Sharp are both women and both happen to have been the object of respondent's anger does not evidence a disciplinary pattern."[124] Bickerstaff and Ciaffone are both

[120] Disciplinary Counsel's brief at 15-16.
[121] Vol. I, p. 70.
[122] Disciplinary Counsel's brief at 16.
[123] Disciplinary Counsel's brief at 18.
[124] *Hocking*, 451 Mich at 24.

women. But, under *Hocking,* that doesn't mean that Judge Morrow's comments had anything to do with their gender.

Indeed, the premise of Disciplinary Counsel's argument—that Judge Morrow supposedly didn't make similar comments to male attorneys—is demonstrably false. He made some of the comments at issue in this very case in a conversation with Ashley Ciaffone *and William Noakes.*[125] And he made the "armpit hair" comment—the one that Disciplinary Counsel try to spin as sexual—in a conversation with a female prosecutor *and Joe Kurily*.[126] Disciplinary Counsel's claim that he only used these analogies with women is false.

Accordingly, the *Brown* factors and the precedent established in *Gorcyca* prove that the sufficient discipline in this case is public censure.

6. None of Disciplinary Counsel's additional factors justifies increasing discipline.

Disciplinary Counsel cite a number of issues outside the *Brown* factors that, in their view, warrant an increase in discipline. Again, their arguments lack merit.

6.1 "Negative publicity" about this proceeding is not Judge Morrow's responsibility.

First, Disciplinary Counsel claim that "[Judge Morrow's] conduct has garnered a lot of negative publicity" and that a number of websites have "articles about his inappropriate comments to" Ciaffone and Bickerstaff.[127] This argument fudges an

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[125] Vol. III, pp. 919-920.
[126] Disciplinary Counsel's brief at 8.
[127] *Id*. at 18.

important fact. Those articles aren't about Judge Morrow's comments to Ciaffone and Bickerstaff, as Disciplinary Counsel claim. They're about Disciplinary Counsel's *allegations* and *these proceedings*. Increasing Judge Morrow's discipline based on press coverage of disciplinary proceedings is wholly inappropriate—particularly when some allegations are demonstrably false, like the "overtly eying" canard and the claim that he used "sexually graphic language."

6.2 The "impact on female lawyers" that Disciplinary Counsel cite is the impact of Anna Bickerstaff's lies, not Judge Morrow's conduct.

Next, Disciplinary Counsel cite the "impact on female lawyers." Apart from vague generalities, they address the impact on only two female lawyers: Bickerstaff and Ciaffone. Bickerstaff certainly testified to feelings of anxiety. But the record also showed that her anxiety was more likely the product of her lie about Judge Morrow, and its racist connotations.[128]

The only negative effect that Disciplinary Counsel cite for Ciaffone is that she was "afraid to report" Judge Morrow's actions.[129] Again, it's not hard to see why. When Bickerstaff and Ciaffone reported Judge Morrow's statements, Bickerstaff embellished those statements with a racist lie.[130] Ciaffone knew about Bickerstaff's false claims.[131] And then she did nothing at all to correct them. Again, it's not surprising that someone who allows a racist lie to fester would experience distress. It's only surprising that Ciaffone

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[128] Vol. V, p. 1174-75.
[129] Disciplinary Counsel's brief at 19.
[130] Vol. V, p. 1174-75.
[131] Vol. I, p. 307 (emphasis added).

never took any action to address the source of her distress.

As for Disciplinary Counsel's suggestion that Judge Morrow's comments somehow undermined the #MeToo movement, they have forgotten about the testimony of Gabi Silver, Nicole James, and Joan Kennedy-Hughes. Each testified that Judge Morrow treats women with respect.[132] The claim that "sexual harassment is business as usual" in Judge Morrow's chambers is false.

6.3 The Commission should disregard alleged misconduct that Disciplinary Counsel neither charged nor proved.

Disciplinary Counsel ask the Commission to increase discipline based on the alleged ex parte nature of Judge Morrow's conversation with Bickerstaff. The suggestion that the Commission should consider actions that the Commission didn't charge is wholly inappropriate—and contrary to the Michigan Supreme Court's opinion in *In re Simpson* (2017).[133]

This Commission decides what charges to file against a judge and issues a complaint.[134] Under the Michigan Court Rules, the charges, as well as the initial assessment of whether those charges warrant discipline, come from the Commission alone.[135] (This system violates a judge's right to due process under *Williams v Pennsylvania* (2016),[136] but only the Michigan Supreme Court or the United States Supreme Court can correct that constitutional infirmity.) There is no court rule that allows Disciplinary

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[132] Vol IV, pp. 968-970; Vol. IV, p. 1007; Vol. IV, pp. 1047-1048.
[133] *In re Simpson*, 500 Mich 533; 902 NW2d 383 (2017).
[134] MCR 9.224(A)-(B).
[135] MCR 9.224(A).
[136] *Williams v Pennsylvania*, 136 S Ct 1899 (2016).

Counsel to unilaterally introduce new claims or theories during trial. Although Michigan Court Rule 9.235 allows Disciplinary Counsel to ask the Master for permission to amend a complaint to conform to the proofs or include new facts, that rule involves asking the Master for permission to amend and giving a judge the opportunity to file an answer.

So the Commission alone decides what charges warrant discipline. And *Simpson* holds that the Commission's decisions are controlling. The Court held that it would not consider "allegations of misconduct that were not found and recommended to us by the JTC."[137] Doing so, the Court held, would violate both the Michigan Constitution and the Michigan Court Rules.[138] *Simpson*'s rationale doesn't just limit Disciplinary Counsel to the Commission's recommendation. Its reasoning also means that Disciplinary Counsel cannot depart from the Commission's *complaint*:

> Another compelling reason to limit our review in JTC proceedings to allegations of misconduct found and recommended to us by the JTC is that a respondent judge is entitled to notice of the charges and a reasonable opportunity to respond to them. Without such notice, it is not clear to us how a respondent judge would know which charges are at issue and, therefore, which ones he or she should substantively address when a case proceeds to our Court. Is our review limited to the charges in the formal complaint or an amended version of it? Or the findings of the master? Or the findings and recommendations of the JTC? ***Should a respondent and his or her attorney be put in the untenable position of having to argue against possible findings of misconduct that were not charged in the complaint*** or made by either the master or the JTC but might be discerned by a member of this Court? Whatever could be said about such a regime, we would no longer say that it "provides a full panoply of procedural guarantees for adjudicating allegations

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[137] *Simpson,* 500 Mich at 565.
[138] *Id*.

of judicial misconduct.[139]

Plainly, the Michigan Supreme Court has concluded that imposing discipline based on theories outside the four corners of the Commission's complaint violates the right to due process. Michigan may have a significant ways to go to comply with the federal right to due process,[140] but it's clear under *Simpson* that Disciplinary Counsel cannot raise uncharged theories in seeking discipline.

Disciplinary Counsel try to avoid the clear prohibition against adding new allegations by arguing that their new, unpleaded theory about ex parte contact only proves Judge Morrow's "demonstrated incorrigibility."[141] That semantic sleight of hand does not hide the fact that they are accusing Judge Morrow of misconduct that was not charged in the complaint. *Simpson* prohibits Disciplinary Counsel from doing so. The Commission should reject Disciplinary Counsel's arguments.

6.4 This misconduct alleged in this case is not like the misconduct found in the Michigan Supreme Court's 2014 opinion.

Next, Disciplinary Counsel argue that the Commission should increase Judge Morrow's discipline because he "again violated the canons, just a few years after having been suspended by the Court for numerous acts of misconduct …"[142] This argument overlooks an important fact: none of the misconduct alleged in this case has anything in common with the misconduct that the Michigan Supreme Court found in *In re Morrow*

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139 *Simpson,* 500 Mich at 569 (emphasis added).
140 *Williams,* 136 S Ct at 1905.
141 Disciplinary Counsel's brief, p 21-22.
142 Disciplinary Counsel's brief, p 22-23.

(2014).[143] That case did not involve a single allegation of inappropriately sexual conversation. It has no bearing on this case.

6.5 Neither *Iddings* nor *Servaas* is relevant; the controlling cases are *Hocking* and *Gorcyca.*

Ignoring the relevant cases—*Hocking* and *Gorcyca*—Disciplinary Counsel argue that Judge Morrow's conduct is comparable to the respondent in *In re Iddings* (2017)[144] and *In re Servaas* (2009).[145] Neither case is remotely comparable to this one.

Iddings involved a judge's sexual harassment of his secretary over the course of three years.[146] Unlike Judge Morrow, that judge had no pedagogical intent. He made it clear that he wanted a sexual relationship and he persisted—over his secretary's objections—to press that issue over several years.[147] He sent personal text messages, he offered to buy expensive gifts, he invited his secretary to share a hotel room, he shared a sexually suggestive video, he called his secretary "sexy," he touched his secretary and he looked down her blouse.[148] The comments at issue here—which were made over days, not years—are not at all like *Iddings.*

Nor is this case like *Servaas*. There, a judge "drew sexually graphic pictures of breasts and of a penis and attached them to court files. He also commented to an employee … about the small chest size of another employee."[149] Judge Morrow never

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[143] *In re Morrow,* 496 Mich 291; 854 NW2d 89 (2014).
[144] *In re Iddings,* 500 Mich 1026 (2017).
[145] *In re Servaas,* 484 Mich 634; 774 NW2d 46 (2009).
[146] *Iddings,* 500 Mich at 170.
[147] *Id.*
[148] *Id.*
[149] Disciplinary Counsel's brief, p 28.

drew any lewd pictures. He mentioned height and weight—which have nothing to do with sex—rather than a sexual characteristic like breasts. (In an argument that rivals Disciplinary Counsel's sexual-armpit-hair theory for implausibility, Disciplinary Counsel argue Judge Morrow's comments were worse than the respondent's conduct in *Servaas*—which means that, in Disciplinary Counsel's view, commenting on height and weight is somehow worse than commenting on the size of someone's breasts.) Judge Morrow did mention the manner in which the *Matthews* defendant had sex with the victim—but only because that issue was relevant to the case and testimony about what "normal" sex means. It was no more improper than Justice Kennedy's reference to "anal sex" in *Lawrence.*[150]

Both *Iddings* and *Servaas* involve overt sexual harassment. That is not what the Commission charged in this case. It charged Judge Morrow with using improper language. So the Commission must look to the cases that fit its charges—*Hocking* and *Gorcyca.* In *Hocking,* he Michigan Supreme Court held that "tasteless and undoubtedly offensive" comments were *not* misconduct.[151] It added that "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline."[152] And in *Gorcyca,* the Michigan Supreme Court imposed only public censure for a judge's comments *on the bench* that were more shocking by several orders of magnitude than anything Judge Morrow said. Moreover, Judge

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[150] *Lawrence,* 539 US at 562.
[151] *Hocking,* 451 Mich at 14.
[152] *Id*. at 12.

Gorcyca's comments were directed to *children*. If a judge receives only public censure for directing abusive comments to children while sitting on the bench and ruling on the children's fate, there can be no possible justification for demanding more than public censure for pedagogical comments directed to an *adult* while *off the bench.* And that's why Disciplinary Counsel fails to address *Gorcyca* while seeking Judge Morrow's removal.

According to controlling precedent from the Michigan Supreme Court, the sufficient discipline in this case is public censure.

6.6 Judge Morrow's "lack of remorse" is not a valid consideration, given the false allegations and racist rhetoric he had to deal with in this case.

Disciplinary Counsel argue that Judge Morrow should receive a more severe sanction because he failed to show remorse. That argument lacks merit—but it should provoke some reflection about the way this case has been handled.

When Anna Bickerstaff raised the issue of Judge Morrow's comments, she lied to Chief Bivens.[153] And it wasn't just any lie. It was a lie that bore the weight of American history; it was a white woman falsely accusing a Black man of "hitting on" her.[154] Bickerstaff placed Judge Morrow in the same position as Emmett Till and the Scottsboro Boys and every other Black man who has been turned into a sexual monster through the distorting lens of racism. Had Bickerstaff been honest—had she acknowledged Judge Morrow's pedagogical intent and simply challenged his *words*—this case would have been quite different. But she chose to use the same kind of lie that has caused incalculable

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[153] Vol. V, p. 1174.
[154] *Id.*

violence throughout this country's history.

Bickerstaff disowned her statement during the underlying hearing,[155] but the damage was done. Disciplinary Counsel took her false claim as license to portray Judge Morrow as a sexual predator, embellishing and spinning facts to make them seem more lewd. A single glance became "overtly eyeing." The word *climax* became "orgasm." The mere mention of sexual intercourse is "graphic language." Again and again, Disciplinary Counsel turned the dial to enhance racist stereotypes.

To make matters worse, Disciplinary Counsel have steadfastly refused to even acknowledge *Hocking,* the controlling opinion in which the Michigan Supreme Court held that distasteful words are not judicial misconduct. The Michigan Supreme Court wrote, "It is clear, however, that every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline."[156] That was the rule of law for a white judge in *Hocking*; Disciplinary Counsel refuse to acknowledge that it applies to Judge Morrow, too.

Judge Morrow wasn't the only target of this rhetoric. In a moment that dropped jaws to the floor, Disciplinary Counsel dismissed an incredibly successful Black attorney as "pompous."[157] So, from the respondent's chair, this case presented the Scylla and Charybdis of racist attitudes about Black men: they're either dehumanized as hypersexual or dismissed as "pompous." It's very hard to show remorse when facing that

[155] Vol. II, p 594.
[156] *Hocking,* 451 Mich at 12.
[157] Vol. V, p. 1305.

kind of rhetoric.

And what exactly should Judge Morrow show remorse *for*? Yes, he compared cross-examination to a romantic relationship that leads to sex, and he analogized voir dire to asking a date about whether they would have sex. Many other judges and legal commentators use similar analogies.[158] Some might find that analogy distasteful, but that's not a basis for discipline under *Hocking.*[159]

Yes, Judge Morrow used the word "doggy style." That's because he was discussing testimony about sexual intercourse, how it happened, and whether Matthews's statements were credible.[160] There may be a more delicate way to phrase that concept, but *Hocking* excuses judges from having to cater their remarks to the most delicate sensibilities.[161]

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[158] 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 *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);[158] 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).

[159] *Hocking,* 451 Mich at 12.

[160] Vol. III, p. 885.

[161] *Hocking,* 451 Mich at 12.

Yes, Judge Morrow expressed skepticism about Matthews's explanation for why he couldn't have had vaginal intercourse with the victim.[162] Yes, he used words that some might find distasteful.[163] But, again, the legal issue under discussion involved sexual intercourse, and *Hocking* protects judges from having to walk on eggshells when discussing that kind of issue.

Yes, Judge Morrow asked Ciaffone and Bickerstaff about their height and weight. Those inquiries were not remotely sexual. Maybe they were too personal, or too frank. But *Hocking* applies, which means that not every "graceless, distasteful, or bungled" comment can be a basis for discipline.

Of course Judge Morrow regrets if his words caused Ciaffone and Bickerstaff any discomfort. That was not his intent. But it is very difficult to accept a justice system that demands "remorse" from a Black judge falsely accused of "hitting on" a white attorney, while excusing the white attorney who lied about being "hit on."

Given the facts of this case, Judge Morrow's "lack of remorse" is not a valid basis for increasing discipline. Under *Hocking* and *Gorcyca,* the Commission should find that Judge Morrow did not commit misconduct—but, if he did, the maximum discipline should be public censure, as in *Gorcyca.*

Conclusion

This proceeding is unconstitutional under *Williams* and it violated Judge Morrow's rights under the Michigan Court Rules by denying him an in-person hearing.

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[162] Vol. I, p. 63.
[163] *Id.*

Accordingly, Judge Morrow is entitled to a new hearing. If the Commission rejects that argument, however, it should apply *Hocking* and conclude that Judge Morrow did not commit misconduct. And if it does find misconduct, the only appropriate sanction under the *Brown* factors is public censure.

Respectfully Submitted.

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Dated: March 30, 2021

Counsel for Hon. Bruce Morrow

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

PROOF OF SERVICE

Tammie DeJaeghere, being duly sworn, states that on March 30, 2021, I served a copy of ***Respondent's Response to Disciplinary Counsel's Brief in Support of Master's Findings of Fact and Conclusions of Law & Disciplinary Analysis*** by email upon the following:

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