STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

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

Docket No. 159088
Formal Complaint No. 100

Judicial Tenure Commission
Lynn A. Helland P32192
Margaret N.S. Rynier P34594
3034 W. Grand Boulevard, Suite 8-450
Detroit, Michigan 48202
313 875-5110

Collins Einhorn Farrell PC
Donald D. Campbell P43088
Colleen H. Burke P63857
Trent B. Collier P66448
4000 Town Center, Floor 9
Southfield, Michigan 48075
248 355-4141
Attorneys for Hon. Byron J. Konschuh

Hon. Bryon J. Konschuh's Proposed Findings of Fact and Conclusions of Law

Introduction

1. This case focuses on what was, at worst, an honest mistake. Before his election to the bench, Judge Byron Konschuh was the Lapeer County prosecutor. As an autonomous elected official, Konschuh believed that he had the authority to use funds belonging to his office for the benefit of his office. So he used certain funds for lunches, refreshments, and other benefits for his staff, and reimbursed himself with office funds as appropriate. John Biscoe, the county controller, admitted that he never told Konschuh that he was spending funds improperly. Although Biscoe now questions Konschuh's practices, he acknowledged that the main question—whether the funds at issue belonged to the county—is a difficult and "fuzzy" one. Reasonable minds can disagree.

2. The Michigan Attorney General appointed a special prosecutor, who charged Konschuh with five felonies. Although Konschuh maintained (and still maintains) his innocence,

he wanted to avoid the time, costs, and uncertainties involved in a criminal trial. So he entered into a plea agreement. After a short period, the Lapeer County Circuit Court dismissed the case against him. Then he returned to serving Lapeer County as a circuit-court judge.

3. In this case, Disciplinary Counsel is trying to turn Konschuh's arguable mistake about a difficult legal issue into a basis for discipline. Most of the Amended Formal Complaint re-litigates Konschuh's criminal case and events that took place over a decade ago. The complaint also addresses matters including his conversation with Bonnie and Samuel Oyster and his recusal practices. The remainder of the complaint largely concerns supposed misrepresentations that Konschuh made as the Michigan State Police and Disciplinary Counsel investigated his use of funds to benefit the prosecutor's office.[1]

4. The Master should conclude that Disciplinary Counsel failed to prove any misconduct. Konschuh did not knowingly misuse any funds. He did not behave improperly in his conversation with the Oysters. His recusal procedures were consistent with his instructions from his chief judge. And he never made an intentional misrepresentation to the Michigan State Police, the Judicial Tenure Commission, or anyone else. If Konschuh erred in using funds directed to the prosecutor's office, he has paid more than enough for that error. And, under the Michigan Court Rules, the Commission should not fault Konschuh if memories have faded and documents have been lost. MCR 9.205(3) (stating that the Judicial Tenure Commission should consider "the

[1] Disciplinary Counsel can recover costs, fees, and expenses under MCR 9.202(B) only if it establishes an intentional misrepresentation. See MCR 9.202(B); *In re Gorcyca,* 500 Mich 588, 639; 902 NW2d 828 (2017). In an attempt to make Konschuh solely responsible for the cost of Disciplinary Counsel's investigation and the months-long trial, Disciplinary Counsel recasts as "misrepresentations" various instances in which Konschuh legitimately disagreed with Disciplinary Counsel's legal positions. They also recast minor, non-substantive errors in Konschuh's many written answers as attempts to mislead the Judicial Tenure Commission. This approach is contrary to the spirit of MCR 9.202(B) and the letter of *Gorcyca.*

staleness of the allegations or unreasonable delay in pursuing the matter"). The Master should dismiss all claims against Konschuh and allow him to continue his decades of service to the people of Lapeer County.

I. Proposed Findings of Fact

A. Background

5. Konschuh joined the Lapeer Prosecutor's Office as an assistant prosecuting attorney in 1988. (7-1-19 tr. at 77). He became Lapeer County's prosecutor in 2000. (*Id.* at 78). After he served as prosecutor for thirteen years, Lapeer County elected Konschuh to the bench. (*Id.* at 76, 79). He now sits on Michigan's 40th Circuit Court in Lapeer County. (*Id.*)

6. Cathy Strong was Konschuh's office manager until 2010. (7-2-19 tr. at 254). She served seven prosecutors during her 40 years of service to Lapeer County. (8-27-19 tr. at 2291). Leigh Hauxwell became his office manager after Strong retired. (*Id.)*

7. Konschuh regularly spent his own money to buy refreshments, meals, and similar items for his staff while working as prosecutor. (7-2-19 tr. at 277). He kept receipts but did not create a formal accounting. (*Id.* at 262, 277). For example, Konschuh took members of his staff to a local restaurant on various occasions. (7-8-19 tr. at 522-24). He bought cookies for the office, and ice and refreshments for office events. (*Id.* at 524, 529-30). He bought rounds of drinks and appetizers at post-trial celebrations. (7-9-19 tr. at 699-70; 9-6-19 tr. at 3087). He even purchased a dishwasher for the office. (8-27-19 tr. at 2304).

8. Strong recalled Konschuh buying lunches and snacks for crime victims who were working with the prosecutor's office. (8-27-19 tr. at 2321-2322). Lorraine Konschuh, Konschuh's wife, corroborated his testimony about buying coffee for the office. (8-27-19 tr. at 2280).

9. In 2004, Konschuh bought a coffeemaker for the office and never sought reimbursement. (9-5-19 tr. at 3062-63). He bought another coffeemaker in 2011 and was

reimbursed $26.37. (7-3-19 tr. at 375). Controller John Biscoe approved the second coffeemaker. (7-11-19 tr. at 1018-19). Biscoe testified that it was appropriate to purchase a coffeemaker so the prosecutor's office could provide refreshments for crime victims. (*Id.)* He added that this public purpose would remain intact even if employees used the machine. (*Id.* at 1021).

10. Although others within the prosecutor's office would also contribute toward coffee and water, those contributions were irregular and a source of controversy in the office. (8-27-19 tr. at 2304). As Strong put it, "it was just a mess." (*Id.)*

11. Konschuh believes that his expenditures for the prosecutor's office totaled well over the approximately $7,783 that he can show and reasonably estimate. (7-9-19 tr. at 714). This amount includes over $1,800 that he spent on water. (*Id.* at 709). Konschuh either spent office funds directly on water or reimbursed himself with BounceBack funds. (*Id.* at 717).

B. Transmodus

12. In 2008, while acting as prosecutor, Konschuh contracted with a company called Transmodus to collect from individuals who passed bad checks. (7-1-19 tr. at 157-58). He hoped that Transmodus could minimize the drain on the prosecutor's resources from pursuing bad-check cases. (*Id.* at 164-65). Transmodus charged a $35 collection fee for each check. (*Id.* at 163). The Transmodus contract was not with the county. (9-6-19 tr. at 3124).

13. Through this program, the prosecutor's office obtained a money order from Sherri O'Henley for $60.28, consisting of $25.28 for the underlying check and a $35 fee. (7-1-19 tr. at 181-82). The money order sat on the desk of then Chief Assistant Prosecuting Attorney Michael Hodges for several months. (8-16-19 tr. at 1689-91). Konschuh understood that he could not sign the money order over the county. (*Id.* at 188-89; 9-5-19 tr. at 2986). In May 2009, Konschuh

decided to cash the money order and turn the money over the appropriate parties. (9-5-19 tr. at 2986).

14. Patricia Redlin, Konschuh's assistant, deposited the money order into Konschuh's personal account on May 14, 2019. (7-1-19 tr. at 188-92). An employee in Konschuh's office then forwarded $45.28 to the county. (*Id.* at 191; Exhibit 6H). The county distributed that amount to the victim of the bad check at issue. (*Id.* at 192; Exhibit 6I).

15. Konschuh did not take the missing $15. (9-5-19 tr. at 2987). Nor does he know what happened to it. (*Id.*) Redlin does not know either. (8-21-19 tr. at 2074).

16. Someone wrote "Byron J. Konschuh" on the money order but it was not Konschuh himself. (9-5-19 tr. at 2962). Konschuh's wife confirmed that the handwriting was not Konschuh's. (8-27-19 tr. at 2282-83).

C. BounceBack

17. The prosecutor's office felt that there were problems with Transmodus (7-1-19 tr. at 161). Accordingly, it looked for a new bad-check-collections company. In 2008, Konschuh entered into an agreement with BounceBack, Inc. that was similar to the agreement with Transmodus. (7-2-19 tr. at 220). BounceBack is a popular program with prosecutors in Michigan and other states. (8-16-19 tr. at 1757).

18. Before entering into this agreement, Konschuh spoke to Norm Early, a Colorado district attorney who used the BounceBack program. (7-9-19 tr. at 702; 8-16-19 tr. at 1681-83; 1756-57)). Early told Konschuh that he used funds from the BounceBack program for his office's benefit. (*Id.*) Konschuh recalled speaking to other prosecutors about the BounceBack program but could not remember their names. (*Id.* at 703). These discussions took place at conferences between 2005-2008. (*Id.* at 704). Mike Hodges corroborated Konschuh's testimony. (8-16-19 tr. 1681-83).

19. BounceBack and the prosecutor's office entered into agreements dated October 23, 2008, December 31, 2008, and January 7, 2009. (7-2-19 tr. at 221). These contracts were with the prosecutor's office, not with Lapeer County. (*Id.* at 226). Controller John Biscoe confirmed that the BounceBack contract was with the prosecutor's office—though, "in [his] opinion," it should have been with the county. (7-11-19 tr. at 1112-13).

20. At some point, Lapeer County had a policy requiring county departments and county elected officials to submit contracts to the county board of commissioners for review. (7-1-19 tr. at 167). But Konschuh did not receive a book of county policies when he joined the prosecutor's office. (7-1-19 tr. at 209; 9-5-19 tr. at 2984). His office manager, Cathy Strong, confirmed that the office did not receive a binder. (8-27-19 tr. at 2296).

21. It is also unclear whether the contracts policy was in effect in 2008. Biscoe testified that he did not believe the policy existed in written form in 2008, when Konschuh entered into the BounceBack agreement. (7-11-19 tr. at 982-83). He testified that the contracts policy was uploaded to the county server in 2009, after the prosecutor's office entered into the BounceBack agreement. (*Id.* at 983). Biscoe cited a "statutory obligation" but did not provide a citation to support that claim. (*Id.*; see Paragraph 140 below).

22. Biscoe testified that a "Request for New Accounts" form (Exhibit 5C) was in effect when Konschuh was a prosecutor. (7-10-19 trans. at 900). That form does not address whether the BounceBack funds were public funds. (Exhibit 5C). Biscoe testified that a deposit advice form (Exhibit 5B) was in effect "at least for part of the time … that Judge Konschuh was the prosecuting attorney for Lapeer County." (7-10-19 tr. at 903). But this blank form does not address Konschuh's obligations concerning BounceBack funds. Similarly, neither the county's cash receipts policy (Exhibit 5K) nor its claims-processing procedure (Exhibit 5M) identifies which funds belonged to

the county and which did not. (7-10-19 tr. at 902). So the critical policy—the contracts policy—was not in effect when Konschuh implemented the BounceBack program. And nothing in the county's subsequent policies indicated that Konschuh was handling those funds improperly.

23. The BounceBack program was public knowledge. Merchants had to sign up with BounceBack for restitution services. (9-5-19 tr. at 2989-90). Konschuh's office sent a notice to Lapeer County merchants to notify them about the new program. (7-2-19 tr. at 240). The program also received publicity in a local newspaper. (*Id.* at 241). Given this degree of publicity, Konschuh believed that the Board of Commissioners knew about the BounceBack program. (*Id.* at 238).

24. Offenders paid a $40 processing fee per check, a $25 payment plan fee, a $25 victim fee, and a $95 educational fee. (7-2-19 tr. at 227). The prosecutor's office received $5 from each processing fee paid. (*Id.* at 228). BounceBack sent checks payable to the prosecutor's office. (*Id.* at 229).

25. Konschuh treated the checks from BounceBack as reimbursement for expenses he already incurred for the prosecutor's office. (7-2-19 tr. at 273; 9-5-19 tr. at 2981). Accordingly, he deposited them into his own accounts. (*Id.*) He also used one check to fund a post-work celebration for his staff at Abruzzo's restaurant. (7-2-19 tr. at 266). Konschuh received around 40 checks, which totaled over a thousand dollars. (7-2-19 tr. at 248).

26. Konschuh did not—and does not—view these funds as county monies subject to MCL 129.11. (7-2-19 tr. at 250; 9-5-19 tr. at 2959, 2989). District Court Judge Dignan disagreed with Konschuh's position and concluded, after remand, that the definition of "public money" was irrelevant to whether Konschuh was guilty of embezzlement under MCL 750.175 (Exhibit 1d). On review, Judge Neithercut ruled that the definition of "public money" was a question for the jury and that it was "not a legal term relevant to the statute with which Defendant is charged." (Exhibit

1z, page 4). Neither the Court of Appeals nor the Michigan Supreme Court has ruled on whether the funds at issue were public money. (9-5-19 tr. at 2960; Exhibit 4a; Exhibit 4b; Exhibit 4d); see also *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 313 n 3; 901 NW2d 577 (2017) ("[D]enials of leave to appeal do not establish a precedent.").

D. City of Lapeer Fees

27. From the early 1990s until 2008, attorneys from the Lapeer County Prosecutor's Office would assist the City of Lapeer with matters in the district court. (7-2-19 tr. at 331).

28. City attorneys Ron Shamblin or Bruce Lawrence delivered checks for these services to the prosecutor's office. (7-2-19 tr. at 337). Konschuh estimated that his office received between $300 and $500 per year for this work while he was the prosecutor. (*Id*. at 337).

29. Mike Hodges confirmed that Konschuh personally worked for the City of Lapeer. (8-16-19 tr. at 1736 ("Judge Konschuh did numerous Lapeer City pretrials.") So did Tom Sparrow. (8-26-19 tr. at 2173 ("…Byron Konschuh would routinely come down and do pretrials.").

30. Konschuh deposited these checks into his checking account as reimbursement for expenses he incurred to benefit the prosecutor's office. (7-2-19 tr. at 338-339). Konschuh understood that his predecessor, then-prosecutor Justus Scott, did the same thing with City of Lapeer fees. (7-2-19 tr. at 338; 7-3-19 tr. at 351).

E. The Corelogic Fund

31. In 2011 and 2012, the prosecutor's office represented the Lapeer County treasurer in litigation with a company called Corelogic. (7-3-19 tr. at 413). Steve Beatty, an assistant prosecuting attorney, handled the file. (*Id.*)

32. The Corelogic litigation resulted in a settlement. (7-3-19 tr. at 414). Corelogic issued two checks. (*Id.* at 414). One check, issued to "Lapeer, County of," was for $100,000. (*Id.*

at 416; Exhibit 93A). Steve Beatty added "Treasurer" to this check. (8-29-19 tr. at 2595). Corelogic issued a second check to "Lapeer, County of" for $5,000. (7-3-19 tr. at 416, 419; Exhibit 93E). Beatty added "prosecutor" to that check. (8-29-19 tr. at 2596). Beatty did not tell Konschuh that he was altering these checks. (8-29-19 tr. at 2666).

33. The $5,000 check represented fees for Beatty's legal services. (7-3-19 tr. at 419). The prosecutor's office forwarded both checks to the county. (7-3-19 tr. at 420, 423).

34. Beatty decided to discuss how to use the $5,000 with John Biscoe, the Lapeer County controller. (7-3-19 tr. at 424-25; 7-8-19 tr. at 470). Konschuh did not discuss this issue with Biscoe. (7-8-19 tr. at 471). Although Biscoe believes that Konschuh was at his meeting with Beatty (7-11-19 tr. at 964), Beatty confirmed that Biscoe and Beatty were the only ones present at this meeting. (8-29-19 tr. at 2668, 2684).

35. After talking to Biscoe, Beatty told Konschuh that he could use the $5,000 fund for the benefit of the prosecutor's office. (7-8-19 tr. at 474-75). Konschuh understood that the $5,000 fund would become a special line item for discretionary use in the prosecutor's office budget. (7-3-19 tr. at 423-25). Biscoe later testified that he believed the $5,000 fund was a public fund, but he stressed that was just "in [his] opinion." (7-11-19 tr. at 975).

F. The Corrections Academy and Police Training Updates

36. The Lapeer County Prosecutor's Office conducted training sessions for the Law Enforcement Officers Regional Training Commission (the "Corrections Academy"). (7-2-19 tr. at 286). Until 2011, the Corrections Academy did not pay the prosecutor's office. (8-15-19 tr. at 1508-09).

37. The prosecutor's office also conducted training sessions for local law enforcement. (8-14-19 tr. at 1318). It received payment for these training sessions, both while Konschuh was

prosecutor and while his predecessor, now-Judge Justus Scott, was prosecutor. (*Id.*) Although he was present through each session, Konschuh did not train the entire time. (7-9-19 tr. at 739). Even when he did not provide substantive training, Konschuh would attend each session so he could answer questions and know what his staff was teaching. (7-2-19 tr. at 310-11). He also set up the room and cleaned afterwards. (*Id.* at 329; see also 8-29-19 tr. at 2654 (where Beatty testifies that Konschuh opened and closed 911 dispatch training and brought donuts)).

38. In September 2011 and September 2012, Cailin Wilson of the prosecutor's office conducted trainings at the Corrections Academy. (7-1-19 tr. at 83; 7-2-19 tr. at 285).

39. Konschuh maintained a flex-time approach to working hours in the prosecutor's office. (7-3-19 tr. at 353). He allowed staff to leave early when necessary because they often worked evenings and weekends without overtime pay. (*Id.*; see also 8-29-19 tr. at 2630 (Beatty's description of flextime in the prosecutor's office)). Given this flextime approach, Wilson did not need to use vacation time when she presented to the Corrections Academy. (7-2-19 tr. at 283).

40. During Konschuh's tenure as prosecutor, the Corrections Academy issued a check for $300 and a check for $480. (7-2-19 tr. at 288). Both checks were payable to the Lapeer County Prosecutor's Office. (*Id.*) He gave $80 to Wilson as extra compensation for her work at the Corrections Academy. (*Id.* at 298; 8-15-19 tr. at 1433). Wilson testified that she gave the remaining funds to Konschuh to be applied to office expenditures, such as coffee, water, and meals. (8-15-19 tr. at 1515-18).

41. Konschuh did not keep a record of funds he received through the Corrections Academy and the law-enforcement training programs. (7-2-19 tr. at 326). He shared some of the funds from the Corrections Academy with his staff by taking them to a local restaurant. (7-2-19 tr. at 324-25). He used any remaining funds as reimbursement for office expenses.

G. Staff Luncheons

42. The prosecutor's office has a longstanding tradition of hosting a holiday luncheon in December and an Administrative Professionals Day luncheon in April. (7-3-19 tr. at 388).

43. These luncheons had two functions: they were both social events and opportunities to discuss and improve office operation. (7-3-19 tr. at 390). Konschuh often implemented changes at the office based on discussions at these luncheons. (*Id*. at 391). Biscoe acknowledged that this dual-purpose approach was arguably permissible: "Q. …[I]f there is office banter along with those things, that's okay, that's the dual purpose…? A. One might argue that." (7-11-19 tr. at 1058).

44. These luncheons improved office morale and efficiency. (7-8-19 tr. at 430; 7-9-19 tr. at 757-58). Konschuh could get information from his staff in a relaxed atmosphere and use that information to improve the office's functioning. (*Id.*)

45. Strong corroborated Konschuh's testimony about those luncheons. She testified that staff discussed office-related issues, caseloads, scheduling, and upcoming events at these lunches. (8-27-19 tr. at 2323). They also discussed ways to improve public service—and that was one of the reasons for the luncheons. (*Id.*) Beatty corroborated Konschuh's testimony as well, explaining that the lunches included discussion of cases and scheduling. (8-29-19 tr. at 2589).

46. From 2001 through 2012, Konschuh continued the tradition of taking the office staff to lunch in April and December. (7-3-19 tr. at 437-443). Until December 2011, Konschuh did not submit reimbursement requests for these lunches. (*Id.* at 443-44). He began seeking reimbursement nine months prior to the prosecutor's office establishing a $5,000 line item with funds from the Corelogic settlement. All of those submitted to the county for reimbursement were approved with the "OK" from Biscoe after review.

47. In December 2011, Konschuh submitted a $125.25 receipt from a holiday lunch for reimbursement. (7-3-19 tr. at 389). Konschuh characterized the luncheon as a "legal update training luncheon." (*Id*. at 389-90).

48. Konschuh also submitted an April 25, 2012 receipt for $184.61 for reimbursement. (7-3-19 tr. at 394-97). When seeking reimbursement for $174.61 for this luncheon, Konschuh characterized it as a "staff development luncheon." (*Id*. at 395). Konschuh believes he omitted $10 from his reimbursement request because he purchased a gift certificate for someone who was unable to attend. (*Id*. at 398).

49. The prosecutor's office attended a holiday lunch in December 2012. (7-3-19 tr. at 427). Konschuh requested reimbursement for $180.66. (*Id*. at 429). That figure represented a $146.66 receipt plus a $40 tip. (*Id.*) Konschuh's reimbursement request characterized the lunch as "training." (*Id.*) He testified that the lunch included "general discussion regarding the operation of the office." (7-8-19 tr. at 487).

50. Based on conversations with Steve Beatty, Konschuh understood that he should label any request for reimbursement as "training." (7-8-19 tr. at 495). Biscoe testified that "training" includes staff development. (7-11-19 tr. at 1065).

51. Biscoe spoke to Konschuh about the December 14, 2012 luncheon. (7-8-19 tr. at 494; 7-11-19 tr. at 968). Konschuh explained to Biscoe what transpired at the luncheon. (7-8-19 tr. at 496). He "explained … that we discussed the operation of the office, that there were lots of issues that [he] could discuss with [his] staff in a relaxed atmosphere that they would not bring up at a formal staff meeting, and [he] found them to be even more productive than [his] regular staff meetings because people would open up and tell [him] what was bothering them." (7-8-19 tr. at

496). According to Konschuh's recollection, Biscoe told him that he may have to provide that explanation to the board of commissioners or auditors. (7-9-19 tr. at 761).

52. Biscoe never told Konschuh that he had a problem with Konschuh's requests for reimbursement. (7-11-19 tr. at 1099). Because Biscoe never raised an issue with Konschuh's practices, Konschuh had no way to obtain a ruling from the county board of commissioners on whether his accounting practices were improper. (9-5-19 tr. at 3060).

H. Office Donuts

53. Attorneys in the prosecutor's office took turns being on-call for the week. (7-8-19 tr. at 488). An on-call attorney would be available at all hours to answer legal questions from police agencies. (*Id.*) The on-call attorney received extra compensation for that week. (*Id.*)

54. The prosecutor's office had a custom in which the on-call attorney for that week would buy donuts for the office on Fridays. (7-8-19 tr. at 488; 8-14-19 tr. at 1250). Konschuh continued that practice. (7-8-19 tr. at 489).

55. From 2001 to 2012, Konschuh did not submit reimbursement requests when he bought donuts. (7-819 tr. at 489). Beginning in 2012—after Biscoe approved the $5,000 line item for the prosecutor's office—Konschuh submitted reimbursement requests for donuts. (7-8-19 tr. at 490). He labeled the expense as "training" when he sought reimbursement. (*Id.* at 491). His reimbursement requests included donuts that he purchased as well as donuts that other attorneys purchased. (*Id*. at 492).

56. Konschuh's staff would place the donuts on a table near Konschuh's office, toward the back of the suite. (8-14-19 tr. at 1251). Witnesses, victims, and police officers would often visit the office and a have a cup of coffee from the machine at the back of the suite. (8-27-10 tr. at

2306). They would also be free to help themselves to any donuts or snacks in that area. (8-29-19 tr. at 2571). That happened frequently, as Beatty testified. (8-29-19 tr. at 2572).

57. Biscoe testified that it was fine for Konschuh's office to use "training" funds to pay for publicly available donuts. (7-11-19 tr. at 1013).

I. Trophies and Plaques

58. The prosecutor's office had a tradition of buying plaques and trophies for law-enforcement officials and Konschuh decided to continue that tradition. (7-8-19 tr. at 467). For example, in 2004, he purchased plaques for two deputy sheriffs. (7-3-19 tr. at 450). Apart from a plaque for Strong, all of the plaques were for law-enforcement officials. (*Id.* at 451).

59. Konschuh also used the BounceBack, the Corrections Academy, and City of Lapeer funds to reimburse himself for buying trophies and plaques. (7-3-19 tr. at 449-51). Other members of Konschuh's office occasionally contributed to expenses for plaques and trophies. (*Id.* at 452).

J. Discussion with the Oysters

60. Samuel Oyster lives with his parents, Ed and Bonnie Oyster. (7-12-19 tr. at 1132). Ed Oyster is involved in Lapeer County politics. (7-8-19 tr. at 530-31).

61. In 2016, David Richardson was running for the 40th Circuit Court in Lapeer County. (7-8-19 tr. at 532). Richardson is a friend and law-school classmate of Konschuh's. (*Id.* at 532). Konschuh supported Richardson throughout his campaign. (*Id.* at 551-52).

62. Konschuh posted a campaign sign for Richardson in an easement near the Oysters' home, a popular location for campaign signs. (7-8-19 tr. at 536; 7-12-19 tr. at 1135).

63. On October 5, 2016, Konschuh drove by the Oysters' home and saw that the Richardson sign was gone. (7-8-19 tr. at 537). He stopped and rang the bell at the Oysters' home. (*Id.* at 538). Bonnie Oyster answered the door. (7-8-19 tr. at 538). Konschuh introduced himself

and asked about the Richardson sign. (*Id.* at 539-40). He may have asked for Ed Oyster first. (7-12-19 tr. at 1134). Bonnie Oyster said that she knew nothing about it. (7-8-19 tr. at 540).

64. Samuel Oyster was listening to the conversation from the Oysters' kitchen. (7-12-19 tr. at 1164). He appeared at the door after Konschuh's initial exchange with Bonnie Oyster. (7-8-19 tr. at 540-41). He told Konschuh that he had no information about the sign. (7-8-19 tr. at 541). Samuel Oyster also mentioned that he knew who Konschuh was and understood that he was involved with Families Against Narcotics. (7-8-19 tr. at 542). He mentioned that he had a history of substance-abuse struggles. (*Id.*)

65. Konschuh replied that he was supporting Richardson in part because he favors a drug court. (7-8-19 tr. at 542). He also said that Judge Holowka had blocked efforts to establish a drug court. (*Id.* at 543). That was about the extent of their conversation. (*Id.* at 542).

66. Bonnie Oyster believes that Konschuh said that Judge Holowka "had been a pain in his—a thorn in his ass for 30 years." (7-12-19 tr. at 1138). Konschuh did not remember saying that Judge Holowka was a "pain in the ass." (7-8-19 tr. at 544). Nor does he recall telling the Oysters that Judge Holowka "had to go." (*Id.* at 552).

67. Bonnie Oyster described Konschuh's demeanor as "very insistent that I should know" and "[q]uite belligerent, like I should know." (7-12-19 tr. at 1136). Later, she testified that she felt like she was "on [sic] a court, I guess, in front of him." (*Id.* at 1139). She felt that Konschuh did not believe her. (7-12-19 tr. at 1141).

68. Konschuh denied that he was loud and belligerent and maintained that he spoke appropriately to the Oysters. (7-8-19 tr. at 544). Loud, belligerent behavior would have been out of character for him. Strong testified that she saw him under pressure daily and he "was always pretty much even-keel." (8-27-19 tr. at 2312). She could not recall him getting angry. (*Id.*)

Similarly, Julie Richardson testified that she could not recall Konschuh ever raising his voice. (8-29-19 tr. at 2520). James Lee Smith, who has known Konschuh for years, testified that he has never seen Konschuh use profanity. (8-30-19 tr. at 2730). He added that Konschuh tends to get calmer when he gets mad and that he never gets "rattled" or "upset." (*Id.*)

69. Bonnie Oyster did not recall Konschuh using the word "fuck" (7-12-19 tr. at 1139) and Konschuh adamantly denied using that term. (7-8-19 tr. at 545-46). The Oysters' report to the Judicial Tenure Commission did not state that Konschuh used profanity. (7-12-19 tr. at 1184).

70. At the hearing, however, Samuel Oyster testified that Konschuh said, "Who the fuck took my sign down?" (7-12-19 tr. at 1164). According to Samuel Oyster, he was "around the corner" in the kitchen and had difficulty hearing at the time: "It was very weak and shaky, so I couldn't—*at that point I couldn't hear.* I was around the corner, but I could hear the voices talking, being loud." (7-12-19 tr. at 1165 (emphasis added)).

71. Bonnie Oyster's memory was flawed in several respects. For example:

a. She said the discussion took place on October 7, 2016. (7-12-19 tr. at 1132). It was actually October 5, 2016. (*Id.* at 1132-33).

b. She admitted that she was "[n]ot sure just how it went," when asked what happened next on October 5, 2016. (7-12-19 tr. at 1136).

c. She testified that Konschuh used the word "ass." (7-12-19 tr. at 1138). Then she said she did not recall whether Konschuh used profanity: "I don't recall. I didn't—most of it was against Holowka when he said that." (7-12-19 tr. at 1139).

72. The Oysters' testimony also conflicted several ways.

a. Bonnie Oyster said that Samuel Oyster was listening to the conversation while "watching the news." (7-12-19 tr. at 1140). But Samuel Oyster said he overheard the conversation from the kitchen. (*Id.* at 1164).

b. Bonnie Oyster described Konschuh as pacing. (7-12-19 tr. at 1138). Samuel Oyster testified that Konschuh was "standing stationary." (*Id.* at 1173).

c. Samuel Oyster said that Konschuh was wearing jeans and a long-sleeve shirt, "which [he] thought was odd." (7-12-19 tr. at 1173). Bonnie Oyster testified that Konschuh was wearing "khaki shorts and a t-shirt." (*Id.* at 1138).

d. Samuel Oyster testified that Konschuh used the word "fuck." (7-12-19 tr. at 1164). But Bonnie Oyster's written report to the Judicial Tenure Commission did not describe Konschuh using profanity. (7-12-19 tr. at 1184). Samuel Oyster tried to explain away this discrepancy by saying that Bonnie Oyster would not type profane words because "[s]he's a devout Christian[.]" (7-12-19 tr. at 1186). But Bonnie Oyster used the word "ass" at the hearing without difficulty. (7-12-19 tr. at 1138).

73. In addition, Samuel Oyster testified that he removed Richardson's sign. (7-12-19 tr. at 1189). In fact, Dave Richardson's wife, Julie Richardson, removed it. (8-29-19 tr. at 2517).

K. Prosecution after Appointment to the Bench

74. In July 2014, the Shiawassee County Prosecuting Attorney, acting as special prosecutor through the Michigan Office of the Attorney General, charged Konschuh with five counts of embezzlement by a public official over $50 in violation of MCL 750.175. See *People v Konschuh,* Case No. 14-1779-FY 71-A District Court. (7-8-19 tr. at 548-49; Exhibit 1A).

75. Deana Finnegan was the special prosecutor. (7-1-19 tr. at 81, 85; Exhibit 1B). Mike Sharkey and Tom Pabst represented Konschuh in the criminal matter. (7-1-19 tr. at 83).

76. Konschuh's preliminary examination was in September and October 2014. (7-1-19 tr. at 86). Sharkey argued that the funds at issue were not public funds. (*Id.* at 87). The district court disagreed and bound Konschuh for trial. (*Id.* at 86, 88-89).

77. The parties mediated the charges against Konschuh on March 8, 2016. (8-27-19 tr. at 2355). At the end of the mediation, the parties signed a stipulation stating, in part: "In order to prevent further taxpayer expense of a trial in this matter, the parties have agreed that Konschuh will plead 'no contest' that there may be an interpretation of MCL 21.44 that supports the argument that he should have reported the collection of these funds to the State or other appropriate entity for accounting purposes. After a delay of sentence as determined by the Court, the matter will be dismissed with prejudice. …" (7-1-19 tr. at 101-102; Exhibit 1I). The parties' agreement did not involve Konschuh entering a plea to MCL 750.485. (9-5-19 tr. at 2963. See also 9-4-19 tr. at 2772).

78. After mediation, Finnegan arrived at court with an amended complaint. (8-27-19 tr. at 2368). Konschuh was surprised by the amendment. (9-9-19 tr. at 3218).

79. The parties had not agreed to or discussed adding a count under MCL 750.485. (8-27-19 tr. at 2368). The amended complaint that Finnegan produced at the hearing was the first time anyone raised that issue. (*Id.*)

80. Finnegan described the plea agreement in court, stating that Konschuh would plead to Count 6, a misdemeanor, and that the charge would be dismissed if he successfully completed the delayed sentence. (7-1-19 tr. at 105-6; Exhibit 1L; Exhibit 1CC).

81. Konschuh signed a sentence agreement stating that he was pleading no contest to "failure to account contrary to MCL 750.485." (7-1-19 tr. at 98-100; Exhibit 1F).

82. Judge Neithercut accepted Konschuh's plea but indicated that he would keep the count open, pending Konschuh's completion of probation: "… [T]he Court accepts the plea and

finds Mr. Konschuh guilty of count six, failure to account for county money, and dismisses without prejudice counts—well, no, wait a minute. When am I supposed to do the dismissal, now or later? This says a delayed sentence with a dismissal with prejudice upon successful completion, so I guess that means I'm supposed to keep those open for the time being." (9-919 tr. at 3238; Exhibit 1m at 12). The court decided to "follow protocol," which meant getting a presentencing report and having Konschuh return for sentencing. (Exhibit 1m at 13).

83. At the March 31, 2018 sentencing (Exhibit 1p), the court did not mention MCL 750.485. Instead, the court recited the agreement that Konschuh worked out with the prosecutor (*id.* at 23) and held that the county was not entitled to restitution. (*Id.* at 25). The Court then delayed sentencing until July 1, 2016. (*Id.*at 26). In July 2016, the court dismissed the case with prejudice in July 2016. (7-1-19 tr. at 133).

L. The Nunc Pro Tunc Motion

84. Konschuh filed a civil action against certain individuals who worked for Lapeer County in May 2017. (7-1-19 tr. at 140). The lawsuit included a malicious-prosecution count. (7-1-19 tr. at 140). Malicious prosecution requires proof that the underlying matter was resolved in the plaintiff's favor. (*Id.*) Tom Pabst, Konschuh's attorney, argued that "the criminal proceedings terminated in Konschuh's favor with a no contest plea to an arguable misdemeanor that was ultimately dismissed." (7-1-19 tr. at 143).

85. In February 2018, Pabst filed a *Motion for Entry of Order Nunc Pro Tunc*. (Exhibit 1T, 7-1-19 tr. at 135). The motion argued that Konschuh pleaded only that "there may be an interpretation of MCL 21.44 that supports the argument that he should have reported the collection of these funds to the State or other appropriate entity for accounting purposes." (7-1-19 tr. at 136-37). It asked the court to correct the record by stating that Konschuh did not plead guilty to a

misdemeanor. (*Id.*) Pabst testified that his argument was "that he didn't get the deal that he did agree to and stipulate to with the prosecutor[.]" (9-4-19 tr. at 2887). Konschuh did not see the motion before Pabst filed it. (9-5-19 tr. at 2978).

86. The court denied Konschuh's *nunc pro tunc* motion in the criminal case. (7-1-19 tr. at 144). Then, in the civil case, Judge Kumar granted the defendants' summary-disposition motions and concluded that Konschuh pleaded to a misdemeanor. (7-1-19 tr. at 145-46).

M. Disclosures and Recusals Involving Sharkey

87. Chief Judge Holowka suspended Konschuh in July 2014 after he was charged with five felony counts. (7-8-19 tr. at 549). Konschuh returned to the bench in July 2016. (*Id.* at 562).

88. When he returned to the bench, Konschuh asked Chief Judge Holowka to authorize retaining an ethics expert to assist with recusals and conflicts. (8-27-19 tr. at 2409). Judge Holowka denied that request. (*Id.* at 2409). He told Konschuh to "handle the criminal cases at the pretrial level, potential adjournments, scheduling, ministerial acts, … that if anything was going to be contested like a preliminary examination," he should recuse himself. (9-6-19 tr. at 3183).

89. In Lapeer County, "it was common knowledge" that Sharkey represented Konschuh in the criminal matter. (7-9-19 tr. at 603; 7-10-19 tr. at 790).

90. Sharkey appeared before Konschuh after July 2016. (7-8-19 tr. at 562). Konschuh did not have a blanket policy of disqualifying himself from any case involving Sharkey. (7-8-19 tr. at 563-65, 567). He made disclosures on the record—although, consistent with Judge Holowka's instructions, he did not do so in every case. (7-8-19 tr. at 565). If a matter involved traffic offenses or probation, he did not address his association with Sharkey. (7-8-19 tr. at 565-66). That approach was based on Konschuh's discussion with Chief Judge Holowka. (8-30-19 tr. at 2710).

91. Some witnesses attested to cases in which Konschuh did not disclose any relationship with Sharkey. (Caughel, 7-9-19 tr. at 652; Zeleney, 7-9-19 tr. at 665; Hart, 7-9-19 tr. at 675, Jaworski, 7-10-19 tr. at 803). But Colleen Starr testified that she heard one of Konschuh's disclosures about Sharkey. (7-9-19 tr. at 590). She also noted that she had a written record of a disclosure in one case. (7-9-19 tr. at 597). Although Starr also mentioned files for which she lacked a disclosure, she acknowledged that those cases represented a "very small percentage of the overall cases that [she] had in front of Konschuh[.]" (7-9-19 tr. at 595, 609). Lawrence Gadd also testified that Konschuh discussed his background with Sharkey before a facilitation in which Sharkey was Gadd's opposing counsel. (8-29-19 tr. at 2550).

92. In addition to statements from the bench, Konschuh placed disclosure statements on the attorneys' tables, as Starr testified. (7-9-19 tr. at 588, 607-08). Although Starr testified that the disclosures were not always available (7-9-19 tr. at 608), Konschuh's court reporter, Michelle Schrader, testified that Konschuh referenced these disclosures from the bench every Wednesday during the court's criminal docket. (8-30-19 tr. at 2711). At a May 19, 2017 hearing in *People v Davis,* Konschuh specifically referred counsel to his written disclosures. (8-30-19 tr. at 2703). Konschuh made a similar statement in *People v Wilson.* (*Id.* at 2706).

93. Sharkey charged Konschuh $415,250 for legal services. (7-1-19 tr. at 84; 7-8-19 tr. at 552). Konschuh did not receive his itemized bill until October 2017. (7-8-19 tr. at 553; 8-27-19 tr. at 2448). Until that time, Sharkey had not given Konschuh any billing statements. (8-27-19 tr. at 2399). Pabst worked on Konschuh's case pro bono. (9-4-19 tr. at 2756).

N. Disclosures and Recusals Involving Turkelson

94. When Konschuh was elected to the 40th Circuit Court in Lapeer County in 2013, Tim Turkelson took over the prosecutor's office. (7-8-19 tr. at 561). Konschuh and Turkelson have

an acrimonious relationship. For example, Turkelson sent an email calling Konschuh a "bitch." (8-14-19 tr. at 1341, 1343). In another profanity-laden email exchange, Turkelson called Konschuh a "[f]ucking dick." (*Id.* at 1349). Turkelson also blames Konschuh for his election loss in the 2016 campaign for Lapeer County prosecutor. (*Id.* at 1350-51).

95. Turkelson appeared before Konschuh after his return to the bench. (7-8-19 tr. at 564). Similar to his approach to Sharkey, Konschuh did not have a blanket policy of disqualifying himself from any case involving Turkelson. (7-8-19 tr. at 563-65). He made disclosures on the record, although not in every case. (*Id.* at 565). If a matter involved traffic offenses or probation, he did not address his relationship with Turkelson. (*Id.* at 565-66). Turkelson filed a motion to disqualify Konschuh in one case, which Konschuh granted. (8-14-19 tr. at 1381).

96. Frederick Blanchard, who had two cases before Konschuh, did not recall Konschuh identifying a conflict with Turkelson. (7-10-19 tr. at 779, 781). But Blanchard knew that Konschuh was facing criminal charges and watched the preliminary examination online. (*Id*. at 783-84).

O. Disclosures and Recusals Involving Richardson

97. Attorney David Richardson ran as a write-in candidate for the 40th Circuit Court in 2016. (9-5-19 tr. at 2917). Konschuh did not encourage Richardson to do so; to the contrary, he advised against it. (*Id.* at 2917-18). But Konschuh endorsed Richardson at some point in the campaign. (*Id.* at 2918).

98. Richardson appeared occasionally before Konschuh but not on substantive matters. (9-5-19 tr. at 2927). Konschuh did not recall making any disclosures about his friendship with Richardson. (7-8-19 tr. at 567). But attorney Carol Ann Jaworski testified that she recalled Konschuh disclosing his work with Richardson: "I know there was a discussion with Dave Richardson, my colleague, and the judge, and I don't know if it was on the record or prior to or

just after the record that said you know I worked—this would be Konschuh speaking: You know I worked with Dave on his campaign and if you guys hadn't settled it, I couldn't hear this case. So there was an awareness of the relationship." (7-10-19 tr. at 802).

P. Statements to Michigan State Police

99. In 2014, Mark Pendergraff was an officer with the Michigan State Police. (8-16-19 tr. at 1588). He retired in 2017 and is now an investigator with the Shiawassee County Prosecutor's Office. (*Id.* at 1588, 1613).

100. In 2014, Finnegan told Pendergraff that she needed him to investigate Konschuh. (8-16-19 tr. at 1592). Konschuh first met with Pendergraff on April 29, 2014. (7-9-19 tr. at 697). Konschuh told Pendergraff that he used BounceBack money to reimburse himself for office-related expenses. (7-9-19 tr. at 698). He also mentioned using BounceBack funds to buy refreshments for crime victims as well as celebratory items like flowers, cards, and cakes, and plaques. (7-9-19 tr. at 699). Konschuh also said that he spent over $1,800 of his own money on water for the prosecutor's office. (7-9-19 tr. at 709).

101. Despite the substantial passage of time, Konschuh did everything he could to provide information to Pendergraff. Through a series of meetings, Konschuh provided Pendergraff a list of expenditures and copies of receipts. (7-3-19 tr. at 380; 7-9-19 tr. at 712). Pendergraff encouraged Konschuh to bring him more receipts. (8-16-19 tr. at 1619, 1623-24). Pendergraff testified that Konschuh was cooperative. (8-16-19 tr. at 1615 ("…[H]e did not act or say anything that indicated he was not going to cooperate or he was going to be hostile.")).

102. Pendergraff also spoke to others during his investigation. John Biscoe told Pendergraff that the rules applicable to the funds at issue were "foggy," "fuzzy," "iffy," and "gray." (7-11-19 tr. at 993, 1033).

103. Pendergraff interviewed Tim Turkelson. (8-16-19 tr. at 1629 ("We sat down and talked and I asked him questions.")). Yet Turkelson testified that Pendergraff did not interview him. (8-14-19 tr. at 1312 ("I was never interviewed by Detective Pendergraff.")).

Q. Pendergraff's misrepresentations to Pat Redlin

104. When Pendergraff spoke to Pat Redlin in 2019, he identified himself as a detective. (8-16-19 tr. at 1630). But "detective" was not Pendergraff's title at the time. (*Id.* at 1613, 1631-32). Nor was he present on official business. (*Id.* at 1633). His false statement caused Redlin to believe that Pendergraff was there in his capacity as a police detective. (8-21-19 tr. at 2040-41).

105. Pendergraff asked Redlin about the Transmodus money order. (8-16-19 tr. at 1636). Pendergraff told Redlin that Konschuh accused her of stealing this $15. (8-16-19 tr. at 1640-41). Based on Pendergraff's false statements, Redlin wrongly believed that Konschuh testified that she stole the money. (8-21-19 tr. at 2049-50).

R. Statements to Judicial Tenure Commission

106. After the Judicial Tenure Commission received two requests for investigation concerning Konschuh, Disciplinary Counsel issued an initial request for information on April 14, 2016. Konschuh submitted a timely response on July 6, 2016.

107. "Tab C" to Konschuh's July 6, 2016 response (Exhibit 95) is Konschuh's best effort to itemize office expenses that he paid. (7-3-19 tr. at 406). It included all of the receipts that he provided to Pendergraff. (7-8-19 tr. at 512). Konschuh's July 2016 submission to Disciplinary Counsel inadvertently included his "Tab K," which lists unreimbursed charitable contributions. (7-3-19 tr. at 402; 7-8-19 tr. at 502, 514). He did not realize the error until January 2019, when he informed Disciplinary Counsel. (7-8-19 tr. at 505-06).

108. Disciplinary Counsel issued a "28-day letter" on December 14, 2016, outlining allegations against Konschuh and requesting a response. Konschuh submitted a lengthy written response on February 8, 2017

109. Disciplinary Counsel sent another request for information on January 25, 2017. Konschuh filed timely responses on March 3, 2017.

110. Disciplinary Counsel subsequently made an informal request for additional information. Konschuh submitted a detailed letter on May 22, 2017.

111. On February 26, 2018, Disciplinary Counsel issued another request for information. Konschuh responded on April 23, 2018.

112. Disciplinary Counsel sent a second 28-day letter—its fifth request for responses—on October 3, 2018. Konschuh filed a timely response on January 14, 2019. Exhibit 94F.

113. On February 6, 2019, the Commission filed a request for appointment of a master along with a complaint. Konschuh filed a timely answer on April 2, 2019. The Master held hearings in June, July, August, and September of 2019.

II. Standard of Review

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

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

III. Proposed Conclusions of Law

A. Disciplinary Counsel's vague, stale theories.

119. Disciplinary Counsel's complaint does not connect specific factual allegations with rules or statutes that Konschuh allegedly violated. Instead, the Amended Formal Complaint provides 613 paragraphs of factual allegations, followed by a list of 25 allegedly implicated rules.

120. As the Michigan Supreme Court has noted, this is a consistent problem with Disciplinary Counsel's complaints. See *In re Gorcyca,* 500 Mich 588, 645 n 1; 902 NW2d 828 (2017) (Viviano, J., concurring) (noting the Judicial Tenure Commission's "custom of making a laundry list of findings of misconduct, including findings based on rules that are duplicative, vague, and, … entirely unnecessary").

121. In addition, many of Disciplinary Counsel's allegations go back a decade or more. Konschuh was forced to account for small purchases like lunch or coffee that took place years in the past. Under MCR 9.205(3), the master should view the evidence in this light, considering the unfair prejudice to Konschuh from Disciplinary Counsel's stale claims. MCR 9.205(3).

B. Count I: 2016 Criminal Misdemeanor

122. In Count I of the Amended Formal Complaint, Disciplinary Counsel asserts that Konschuh made a false and misleading representation on February 19, 2018 when his attorney filed a *Motion for Entry of Order Nunc Pro Tunc* stating that Konschuh did not plead to a misdemeanor under MCL 750.485. (*Amended Formal Complaint*, ¶¶33-37). Disciplinary Counsel failed to prove this alleged misconduct.

123. It is not enough for Disciplinary Counsel to establish that Konschuh made a false statement. It must prove that Konschuh had a wrongful intent at the time. *In re Gorcyca,* 500 Mich 588, 639; 902 NW2d 828 (2017) ("Even though there may be some instances in which a

misrepresentation and a misleading statement are not based on an actual intent to deceive, we believe that, at a minimum, *there must be some showing of wrongful intent*.") (emphasis added).

124. There is no evidence of wrongful intent here. First, Konschuh did not see the motion before his attorney, Tom Pabst, filed it. (9-5-19 tr. at 2978). The Master cannot find that Konschuh intended to mislead the court when Konschuh had no opportunity to review the statements at issue.

125. Second, the *nunc pro tunc* motion did not hide the fact that Konschuh pleaded no contest to MCL 750.485. (Exhibit 1t). The motion included two documents entitled "Motion/Order of Nolle Prosequi," both of which reference MCL 750.485. (Exhibit 1t). Although the motion argued that including MCL 750.485 was a mistake, it included a document supporting a counterargument. The Attorney Discipline Board addressed similar facts in *Grievance Administrator v Wax* (Bd. Opinion, 98-112-Ga, September 22, 1999) (*Attachment A*). There, the Grievance Administrator accused the respondent of lying about the contents of his appellate brief even though the respondent submitted a copy of his brief with the document that supposedly lied about it. *Id.* at 1-2. The hearing panel concluded—and the Attorney Discipline Board agreed—that, "If respondent intended to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer." *Id.* at 2. The same rationale applies here. If Konschuh intended to mislead the court, he would not have included documents referencing MCL 750.485.

126. Third, Konschuh's motion made a good-faith legal argument about his plea. The parties' agreement *was* limited to MCL 21.44 (7-1-19 tr. at 101-102) and they never discussed adding MCL 750.485 before the hearing. (8-27-19 tr. at 2368). The prosecutor *did* surprise Konschuh when she showed up for the post-facilitation hearing with a new complaint. (9-9-19 tr. at 3218). In hindsight, he felt caught off guard and railroaded into an outcome inconsistent with

the mediated agreement. He properly brought the issue before Judge Neithercut and accepted the court's ruling. His *nunc pro tunc* motion was not misconduct.

127. The court left the misdemeanor count open after Konschuh's plea (9-919 tr. at 3238) and then dismissed it after Konschuh successfully completed agreed-upon conditions. (7-1-19 tr. at 133).

C. Count II: Transmodus Heartland

128. In Count II, Disciplinary Counsel asserts that Konschuh failed to comply with Lapeer County accounting and contracting procedures. (*Amended Formal Complaint,* ¶¶ 52-53). They also assert that Konschuh improperly deposited a money order into his personal checking account and then forwarded only $45.28 of the $60.28 money order to the county. (*Id.,* ¶68). In other words, they accuse Konschuh of pocketing $15.

129. As with their other allegations, Disciplinary Counsel makes no effort to connect the factual allegations in Count II to any specific rules. See *Gorcyca,* 500 Mich at 645 n 1 (Viviano, J., concurring) (noting the Judicial Tenure Commission's vague and unhelpful pleading practices).

130. The allegations in Count II are contrary to the record. First, Disciplinary Counsel did not prove that Konschuh's actions violated a policy that was actually in effect when Konschuh dealt with Transmodus. John Biscoe testified that he did not think the contracts policy existed in written form in 2008. (7-11-19 tr. at 982-83). Disciplinary Counsel has not carried their burden of proving by a preponderance of the evidence that Konschuh's actions violated a policy that was in effect at the relevant time. *Haley,* 476 Mich at 189.

131. Second, the state treasury guidelines do not help Disciplinary Counsel's case. Those guidelines are neither binding nor authoritative. (7-3-19 tr. at 358; 7-11-19 tr. at 1006-07). John

Biscoe described the treasury publication as "a narrative" and "a guideline." (7-11-19 tr. at 1008). And Konschuh never even saw a copy of those guidelines. (7-3-19 tr. at 362).

132. Even Cary Vaughn, Disciplinary Counsel's expert in accounting, was unfamiliar with Lapeer County's policies. (8-20-19 tr. at 1945). Vaughn also confirmed that the state treasury guidelines that Disciplinary Counsel relied on are "for training purposes only and should not be considered a legal interpretation of the items presented." (8-20-19 tr. at 1951). Moreover, he testified that the Treasury removed these guidelines from its website in 2004. (8-20-19 tr. at 1973). He could not say when they first appeared on the website. (*Id.* at 1973-74).

133. Tim Turkelson was willing to speculate that some accounting policy was in effect in 2005 and that it precluded Konschuh's actions. (8-14-19 tr. at 1212). But Turkelson provided no specifics. Moreover, he blames Konschuh for his election loss in 2016. (*Id.* at 1350-51). He also has a practice of sending unprofessional emails that label Konschuh a "bitch" and a "fucking dick." (*Id.* at 1341, 1349). Turkelson is not a credible witness.

134. On the other hand, John Biscoe has no personal ax to grind. And Biscoe did not believe that the contract policy existed in written form in 2008. (7-11-19 tr. at 982-83). The Court should believe Biscoe's testimony instead of Turkelson's vague and animosity-driven testimony. Biscoe disproved the claim that Konschuh's actions were subject to contrary accounting policies in 2008 and that is fatal to most of Count II.

135. The remaining portions of Count II concern the missing $15. Disciplinary Counsel faults Konschuh for depositing the money order in his personal account. But Konschuh credibly testified that, to his understanding, he could not sign a money order over to the county. (*Id.* at 188-89; 9-5-19 tr. at 2986). That is why he had his staff deposit the money order and turn the money

over the appropriate parties. (9-5-19 tr. at 2986). An employee in Konschuh's office forwarded $45.28 to the county, which distributed that amount to the victim. (7-1-19 tr. at 191-92).

136. It is not reasonable to conclude that Konschuh would handle the bulk of the money order appropriately but risk his career and his livelihood for $15. Moreover, not a single witness testified that Konschuh kept the missing $15. Disciplinary Counsel has not proven their allegations by a preponderance of the evidence.

D. Count III: BounceBack

137. Count III concerns the BounceBack program. Disciplinary Counsel alleges that Konschuh entered into the program without following county policies. They also assert that Konschuh deposited BounceBack checks into his personal checking accounts. (*Amended Formal Complaint,* ¶84). The complaint cites 42 checks, all listing the Lapeer County Prosecutor as payee.

138. As explained above, Disciplinary Counsel has not proven by a preponderance of the evidence that the contract policy was in effect in 2008 and John Biscoe believed it was not. (7-11-19 tr. at 982-83). So, even if Disciplinary Counsel has some basis to use a Judicial Tenure Commission proceeding to pursue alleged violations of local accounting policies, they have proven no such violations here.

139. As for the 42 checks listed in the Amended Formal Complaint, Konschuh never disputed that he deposited them. But that does not establish Disciplinary Counsel's claim.

140. The issue of whether the BounceBack funds belonged to the county is a difficult legal issue. "Public money" is "money collected or received by an officer of a local public entity in this state, *pursuant to any provision of law authorizing the officer to collect or receive the money*, is public money for the purposes of this act." MCL 129.11 (emphasis added). Disciplinary Counsel has never identified a "provision of law authorizing" the prosecutor to collect

BounceBack fees. So it is unclear whether BounceBack fees are "public money" under this definition. In addition, MCL 48.40 states that a county treasurer must "receive all money belonging to the county, from whatever source they may be derived…" BounceBack issued funds under a contract with the prosecutor's office, not the county. (7-11-19 tr. at 1112-13). With these facts, it is unclear that the funds "belong[ed] to the county[.]"

141. These ambiguous laws are exactly why Biscoe told Pendergraff that the rules applicable to the funds at issue were "foggy," "fuzzy," "iffy," and "gray." (7-11-19 tr. at 993, 1033). Even Dana Miller, the county treasurer, testified that she could not define "public money." (8-21-19 tr. at 2137-38).

142. In this context, Konschuh formed the good-faith view that the BounceBack funds were outside the definition of public money and, therefore, that they belonged to the prosecutor's office. (9-5-19 tr. at 2989).

143. Konschuh testified that he spent approximately $7,783 on the prosecutor's office. (7-9-19 tr. at 714). The BounceBack funds were a small fraction of that amount.

144. Konschuh did not commit misconduct when he used checks that he understood to belong to the prosecutor's office to reimburse himself for payments he made for the benefit of the prosecutor's office. There is no doubt that he could have kept a better record of what he spent for the office's benefit. But subpar record-keeping before assuming the bench is not judicial misconduct. Disciplinary Counsel failed to prove misconduct by a preponderance of the evidence.

E. Count IVA: LEORTC

145. In Count IVA, Disciplinary Counsel alleges "financial improprieties" related to fees that the prosecutor's office received from the Corrections Academy. They assert that Konschuh did not participate in the 2011 and 2012 seminars and improperly kept fees from the

Corrections Academy. (*Amended Formal Complaint,* ¶¶349, 358). In addition, this count asserts that Konschuh improperly deposited checks from the Corrections Academy. (*Id.,* ¶361).

146. Disciplinary Counsel fails to support the allegation that Konschuh mishandled funds from the Corrections Academy. They did not produce evidence of any law or regulation that was both (a) in effect at the time and (b) contrary to Konschuh's handling of the Corrections Academy funds. Even Disciplinary Counsel's accounting expert, Cary Vaughn, was unfamiliar with Lapeer County's policies. (8-20-19 tr. at 1945). Although Disciplinary Counsel relied on Treasury policies, Vaughn confirmed that these policies are "for training purposes only and should not be considered a legal interpretation of the items presented." (8-20-19 tr. at 1951). Disciplinary Counsel has not established a legal foundation for the claim that Konschuh mishandled these funds.

147. Furthermore, Konschuh used these fees to reimburse himself for funds he expended on behalf of the prosecutor's office. (7-2-19 tr. at 288-89). The prosecutor's office provided the training and the prosecutor's office received the benefits.

148. With no evidence that Konschuh's handling of these funds violated the law, Disciplinary Counsel fails to prove misconduct by a preponderance of the evidence.

F. Count IVB: City of Lapeer cases

149. In Count IVB, Disciplinary Counsel asserts that Konschuh improperly deposited fees from the City of Lapeer into his personal accounts. (*Amended Formal Complaint,* ¶¶372-373). They also allege that Konschuh failed to report these funds for tax purposes. (*Id.,* ¶376).

150. Konschuh testified that he deposited funds from the City of Lapeer into his checking account as reimbursement for expenses he incurred to benefit the prosecutor's office. (7-2-19 tr. at 338-339). Then-prosecutor Justus Scott did the same thing with City of Lapeer fees. (7-2-19 tr. at 338; 7-3-19 tr. at 351).

151. Disciplinary Counsel failed to introduce evidence that Konschuh's handling of City of Lapeer funds was improper. Rather, Disciplinary Counsel relies on a policy that did not exist at the relevant time—2008. (7-11-19 tr. at 982-83) and Treasury guidelines that—according to Disciplinary Counsel's own expert—are not authoritative. (8-20-19 tr. at 1951). Although there is no dispute about the conduct at issue, there is a significant gap in Disciplinary Counsel's case when it comes to the legality of that conduct. Disciplinary Counsel has not established that Konschuh did anything wrong.

152. The same conclusion applies to Konschuh's testimony that he did not report these payments on his income taxes. There was no evidence about Konschuh's income-tax obligations. No one with a relevant expertise testified that Konschuh was required to report these funds.

153. The Master cannot assume judicial misconduct. Disciplinary Counsel must prove misconduct by a preponderance of the evidence. *Haley,* 476 Mich at 189. They failed to do so.

G. Count V: Reimbursement Requests

154. Count V asserts that Konschuh received improper reimbursements. Disciplinary Counsel challenges Konschuh's reimbursements from "Christmas luncheons," "Secretary Day/Administrative Day celebration luncheons," and donuts. (*Amended Formal Complaint,* ¶379). Specifically, this count challenges (a) the December 2011 holiday luncheon, (b) the April 2012 Secretary's Day luncheon, and (c) the December 2012 Christmas luncheon. Disciplinary Counsel alleges that these reimbursements were "not subject to reimbursement under the Michigan Department of Treasury guidelines." (*Amended Formal Complaint,* ¶380).

155. As an initial matter, there is no evidence that Konschuh had any obligation to follow the Michigan Department of Treasury Guidelines. Disciplinary Counsel's expert confirmed that the state treasury guidelines are "for training purposes only and should not be considered a legal

interpretation of the items presented." (8-20-19 tr. at 1951). John Biscoe described the treasury publication as "a narrative" and "a guideline." (7-11-19 tr. at 1008). These guidelines are not law and Konschuh had no obligation to follow them.

156. Nor is there evidence that these guidelines were in effect when Konschuh accepted reimbursements for the 2011 and 2012 luncheons. Disciplinary Counsel's expert testified that the Treasury removed these guidelines from its website in 2004. (8-20-19 tr. at 1973).

157. Disciplinary Counsel asserts that the luncheons were purely social events and, therefore, were not reimbursable as training. But Konschuh testified consistently and credibly that the holiday and Administrative Professionals Day luncheons had a dual purpose: they were both social events and opportunities to discuss and improve office operation. (7-3-19 tr. at 390).

158. Strong and Beatty confirmed that these luncheons involved discussions of cases and scheduling. (8-27-19 tr. at 2323; 8-29-19 tr. at 2589).

159. Moreover, John Biscoe testified that "training" includes staff development. (7-11-19 tr. at 1065). As Strong and Beatty's testimony establishes, these lunches qualified as staff development. Therefore, Konschuh properly sought reimbursement for these lunches as "training."

H. Count VI: "Improper Demeanor"

160. Count VI alleges that Konschuh improperly campaigned for Dave Richardson when he "made telephone calls" and placed "numerous" lawn signs. It also alleges that Konschuh displayed an improper demeanor at the Oysters' home by using a "confrontational and irate tone of voice" and displayed "an aggressive, belligerent, and/or arrogant attitude." (*Amended Formal*

Complaint, ¶440). Disciplinary Counsel asserts that Konschuh said Judge Nick Holowka had been a "pain in [his] ass for 30 years." (*Id.,* ¶444).

161. Konschuh did nothing wrong when he assisted Dave Richardson's campaign. The Code of Judicial Conduct only prohibits judges from "publicly endors[ing] a candidate for a *nonjudicial* office." Canon 7(A)(1) (emphasis added). Because Richardson was running for a judicial office, Konschuh was free to endorse him.

162. Contrary to Disciplinary Counsel's allegations, Konschuh was cordial to the Oysters and he did not use profanity. (7-8-19 tr. at 544). Notably, the Oysters' report to the Judicial Tenure Commission does not mention Konschuh using profanity at all—an omission indicating that the Oysters' later testimony is incorrect. (7-12-19 tr. at 1184).

163. Although Samuel Oyster asserted that Konschuh used the word "fuck," his testimony is not credible because (a) he was not near Konschuh at the time and admitted that he had difficulty hearing (7-12-19 tr. at 1165 (emphasis added)); and (b) Bonnie Oyster did not recall Konschuh using that word. (7-12-19 tr. at 1139). Likewise, Bonnie Oyster's claim that Konschuh used the word "ass" is not credible because that assertion does not appear in her contemporaneous report. (7-12-19 tr. at 1184).

164. Bonnie Oyster described Konschuh's demeanor as "very insistent that I should know" and "[q]uite belligerent, like I should know." (7-12-19 tr. at 1136). She testified that she felt like she was "on [sic] a court, I guess, in front of him." (*Id.* at 1139). Although those statements indicate that Bonnie Oyster was uncomfortable with the conversation, they are not evidence of judicial misconduct. The Code of Judicial Conduct does not prohibit judges from being "very insistent." Nor does it prohibit judges from asking questions and probing the veracity of an individual's factual statements. Indeed, the Code of Judicial Conduct refers to patience and

courtesy only in the context of official proceedings. Canon 3(A)(3) ("A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals *in an official capacity* …") (emphasis added). Consequently, the Oysters' allegations do not establish misconduct.

I. Count VII: Disqualification and Disclosures

165. Count VII alleges that Konschuh failed to disclose conflicts and improperly failed to disqualify himself. It asserts that Dave Richardson appeared before Konschuh in "numerous criminal/traffic and civil cases" and that Konschuh neither disclosed a conflict nor recused himself. (*Amended Formal Complaint,* ¶457). It asserts that Sharkey appeared before Konschuh while his legal fee was outstanding but failed to disclose a conflict or recuse himself. (*Id.,* ¶476). Count VII also includes allegations about failing to recuse himself when Tim Turkelson was a witness.

166. Konschuh reasonably followed instructions from Chief Judge Holowka. After Judge Holowka denied Konschuh's request to retain an ethics expert (8-27-19 tr. at 2409), he told Konschuh to "handle the criminal cases at the pretrial level, potential adjournments, scheduling, ministerial acts, … that if anything was going to be contested like a preliminary examination," he should recuse himself. (9-6-19 tr. at 3183).

167. Konschuh went beyond these instructions by placing disclosures on counsel's tables. (7-9-19 tr. at 588, 607-08). He specifically disclosed conflicts on the record as necessary, including in cases involving Sharkey (8-29-19 tr. at 2550), Turkelson (7-8-19 tr. at 563-65), and Richardson (7-10-19 tr. at 802).

J. Count VIII: Alleged Misrepresentations

168. Count VIII asserts that Konschuh made misrepresentations to the Michigan State Police (that is, to Pendergraff) and to the Judicial Tenure Commission. Disciplinary Counsel

asserts that Konschuh lied when he said that he paid for (a) lunches and meals for the prosecutor's office, (b) lunches and snacks for crime victims, (c) flowers, cards, water, and cakes, (d) plaques for retiring members of the prosecutor's office, and (e) plaques for retiring police officers. (*Amended Formal Complaint*, ¶486).

169. These statements were not misrepresentations. Konschuh regularly spent his own money on refreshments, meals, and similar items for his staff. (7-2-19 tr. at 277; 7-8-19 tr. at 522-24; 9-6-19 tr. at 3088). He bought cookies for the office, and ice and refreshments for office events. (*Id.* at 524, 529-30). He bought rounds of drinks and appetizers at post-trial celebrations. (7-9-19 tr. at 699-70; 9-6-19 tr. at 3087). He even purchased a dishwasher for the office. (8-16-19 tr. at 1733-34; 8-27-19 tr. at 2304). Strong corroborated Konschuh's testimony, testifying that he purchased lunches and snacks for crime victims. (8-27-19 tr. at 2321-2322).

170. Disciplinary Counsel asserts that Konschuh lied when he told Pendergraff that other prosecuting attorneys said they used BounceBack funds to buy things for their offices. (*Amended Formal Complaint,* ¶490). Konschuh's statement was not a misrepresentation. Konschuh spoke to Norm Early, a Colorado district attorney who used the BounceBack program. (7-9-19 tr. at 702). Early said that he used BounceBack funds for his office's benefit. (*Id.*) Konschuh spoke to other prosecutors as well but could not recall their names. (*Id.* at 703).

171. Disciplinary Counsel asserts that Konschuh lied when he said that assistant prosecutors who performed training sessions retained a portion of the fees. (*Amended Formal Complaint,* ¶492). Konschuh did not recall making this statement. (9-6-19 tr. at 3093). But Cailin Wilson testified that she retained $80 from her Corrections Academy program. (9-6-19 tr. at 3096).

172. Disciplinary Counsel asserts that Konschuh lied when he told Pendergraff that he appeared on behalf of the City of Lapeer. (*Amended Formal Complaint,* ¶494). Konschuh's

statement was not a misrepresentation. He did, in fact, appear in City of Lapeer matters. (9-6-19 tr. at 3097; 9-23-19 tr. at 3406).

173. Disciplinary Counsel asserts that Konschuh lied when he told Pendergraff that assistant prosecutors retained funds from the City of Lapeer. (*Amended Formal Complaint,* ¶496). Konschuh admitted making this statement. (7-9-19 tr. at 9). Justus Scott retained funds from the City of Lapeer as well. (7-3-19 tr. at 351).

174. Disciplinary Counsel asserts that Konschuh lied when he told Pendergraff that he spent $1,800 of his own money on water for the office water cooler. (*Amended Formal Complaint,* ¶500). Konschuh's statement was not a misrepresentation. He did not state that the entire $1,800 was his own money. (9-6-19 tr. at 3102). But he testified that he did, in fact, contribute close to $1,800 toward watercooler expenses. (*Id.)*

175. Disciplinary Counsel asserts that Konschuh lied when he told Pendergraff that assistant prosecutors voted on how to spend funds from the Corrections Academy and the City of Lapeer. (*Amended Formal Complaint,* ¶¶502, 504). Konschuh's statement was not a misrepresentation. He testified that, although it was not his preference, his "staff wanted to get a watercooler right inside the office so that's how [they] decided to spend the funds." (9-6-19 tr. at 3103). The staff also expressed their opinions regarding the dishwasher that Konschuh purchased. (*Id.)* In these instances, Konschuh followed the consensus opinion from his staff.

176. Disciplinary Counsel asserts that Konschuh falsely testified on November 15, 2017 that he did not plead "no contest" to any type of a crime, including a misdemeanor. (*Amended Formal Complaint,* ¶506). Konschuh's statement was not a misrepresentation. It reflected his view that the plea was limited to his agreement, which stated that he "will plead 'no contest' that there may be an interpretation of MCL 21.44 that supports the argument that he should have reported

the collection of these funds to the State or other appropriate entity for accounting purposes." (7-1-19 tr. at 101-102).That agreement did not involve MCL 750.485. (9-5-19 tr. at 2963; see also 9-4-19 tr. at 2772). Although he signed a document recording a "no contest" plea to MCL 750.485, Konschuh believed that was an improper addition to the parties' agreement. Because his plea was a matter of public record, he did not intend to mislead anyone. See *Wax, supra.*

177. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answer that he pleaded "no contest to the allegation that there may be an interpretation of MCL 21.44 that supports the argument that he should have reported the collection of these funds to the State or other appropriate entity for accounting purposes." (*Amended Formal Complaint,* ¶508). Konschuh's statement was truthful. The prosecutor and Konschuh expressly agreed to this language. (7-1-19 tr. at 101-102).

178. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answer that he "understood that … he was pleading only to MCL 21.44." (*Amended Formal Complaint,* ¶510). Konschuh's statement was not false. The prosecutor and Konschuh expressly agreed to language limiting his plea to MCL 21.44. (7-1-19 tr. at 101-102). Konschuh cannot be faulted for trusting the prosecutor to abide by their agreement.

179. Disciplinary Counsel asserts that Konschuh's February 19, 2018 *Motion for Entry of Order Nunc Pro Tunc* falsely stated that: (a) he did not plead to a misdemeanor, (b) he pleaded no contest "that there may be an interpretation of MCL 21.44 that supports the argument that [he] should have reported the collection of [the BonceBack and Corrections Academy] funds to the State or other appropriate entity for accounting purposes." (*Amended Formal Complaint,* ¶512). These statements are not false. See section III(B) above.

180. Disciplinary Counsel asserts that Konschuh's February 19, 2018 motion asked Judge Neithercut to enter an order *nunc pro tunc* to "correct 'a mistake which, if not corrected, falsely indicated that Byron J. Konschuh pled to a crime, the misdemeanor known as MCL 750.485, which he clearly and objectively did not." (*Amended Formal Complaint,* ¶514). This request, according to Disciplinary Counsel, was a false representation. (*Id.,* ¶515). But Konschuh's statements were not false. See section III(B) above.

181. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answer that he was not aware of Lapeer County's "Adopted Accounting Procedures" and/or "Cash Receipts" policies. (*Amended Formal Complaint,* ¶516). Konschuh's statements were not false. Konschuh did not receive a book of county policies when he joined the prosecutor's office. (7-1-19 tr. at 209; 9-5-19 tr. at 2984). His office manager, Cathy Strong, confirmed that the office did not receive a binder. (8-27-19 tr. at 2296). Even if it had, it is unclear whether the contracts policy would have been in effect in 2008. Biscoe testified that he did not believe the contract policy existed in written form in 2008. (7-11-19 tr. at 982-83).

182. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answer that the Transmodus was not a county contract. (*Amended Formal Complaint,* ¶518). Konschuh's statement was truthful. Disciplinary Counsel may think the contract *should* have been with the county but the Transmodus contract was not with the county. (9-6-19 tr. 3124).

183. Disciplinary Counsel asserts that Konschuh falsely stated in his July 6, 2016 answers that he did not keep $15 from Cherri O'Henley's money order. (*Amended Formal Complaint,* ¶520). Konschuh's answer was true; he did not keep that $15. (9-6-19 tr. at 3126).

184. Disciplinary Counsel asserts that Konschuh falsely denied in his February 8, 2017 answers that he failed to forward $15 from O'Henley's money order to the Lapeer County

Treasurer's Office. (*Amended Formal Complaint,* ¶522). Konschuh's answer was true; he did not keep that $15. (9-6-19 tr. at 3126).

185. Disciplinary Counsel asserts that Konschuh falsely denied in his February 8, 2017 answers that he failed to send or cause to be sent to Transmodus a $35 collection fee. (*Amended Formal Complaint,* ¶524). Disciplinary Counsel failed to produce evidence establishing an obligation to send $35 to Transmodus.

186. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answer that he 'gave the equivalent of Sherry O'Henley's money order to the Lapeer County Treasurer's Office to voucher to the appropriate parties.'" (*Amended Formal Complaint,* ¶526). Konschuh's statement was truthful. Konschuh deposited the money order into his account and he gave the full amount to his staff, in cash, to voucher to the appropriate parties. (7-1-19 tr. at 188-92). The county distributed $45.28 to the victim of the bad check at issue. (*Id.* at 192).

187. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answers that the BounceBack contact was not a "county contract." (*Amended Formal Complaint,* ¶528). Konschuh's statement was correct. Biscoe testified that the BounceBack contract was with the prosecutor's office rather than the county, though he thought it *should* have been with the county. (7-11-19 tr. at 1112-13; see also 9-6-19 tr. at 3133).

188. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answer that "Mr. Biscoe has acknowledged and testified that he was aware of [the BounceBack contract]." (*Amended Formal Complaint,* ¶530). That answer referred to Biscoe's testimony at Konschuh's September 24, 2014 preliminary examination. (9-9-19 tr. at 3138; Exhibit 94f, ¶129). It was a truthful statement. (Exhibit 94f, pages 136 and 184 of Sept. 24, 2014 exam).

189. Disciplinary Counsel asserts that Konschuh falsely stated in his July 6, 2016 answers that he never directed Leigh Hauxwell "not to forward any of the checks the [prosecutor's office] received from BounceBack to the Lapeer County Treasurer's Office." (*Amended Formal Complaint,* ¶532). Konschuh's statement was correct. He testified that he never told Hauxwell not to forward BounceBack checks to the treasurer's office. (9-6-19 tr. at 3140-41).

190. Disciplinary Counsel asserts that Konschuh falsely stated in his February 8, 2017 answers that he did not instruct Cathy Strong and Leigh Hauxwell "to deliver to him all checks the [prosecutor's office] received from BounceBack…" (*Amended Formal Complaint,* ¶534). Konschuh's statement was correct. He never told Strong and Hauxwell to send all BounceBack checks to him. (9-6-19 tr. at 3142).

191. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answers that the BounceBack funds deposited into his checking account were reimbursement "for numerous and ongoing office expenses that respondent had initially paid far." (*Amended Formal Complaint,* ¶536). Konschuh answered truthfully. As noted above, he incurred thousands of dollars in office-related expenses. (7-9-19 tr. at 714). He understood that the BounceBack fees reimbursed him for these expenditures. (7-2-19 tr. at 273; 9-5-19 tr. at 2981).

192. Disciplinary Counsel asserts that Konschuh falsely stated in his January 14, 2019 answers that he used the BounceBack monies "to pay for office expenses such as coffee, donuts, bottled water and other luncheons." (*Amended Formal Complaint,* ¶538). Konschuh's statement was correct. He treated BounceBack funds as reimbursement for these expenses. (7-2-19 tr. at 273; 9-5-19 tr. at 2981).

193. Disciplinary Counsel asserts that Konschuh falsely stated in his July 6, 2016 answers that Tab C represented $16,854.30 in out-of-pocket expenditures for the prosecutor's

office. (*Amended Formal Complaint,* ¶¶540-41). Disciplinary Counsel alleges that this representation is false because (a) Tab C includes expenditures from before Konschuh became prosecuting attorney; (b) Tab C includes expenses that Konschuh did not pay for; (c) Tab C includes improper governmental expenditures; (d) Tab C includes expenditures that Konschuh was reimbursed for; and (e) Tab C includes coffee and cookies for his May 6, 2013 investiture. (*Id.,* ¶542). Konschuh's exhibit was truthful. In fact, Konschuh expressly stated that the exhibit included "older documentation to show that there was a pattern of purchasing things for the office with these types of funds …." (Exhibit 95, Page 157). So he did not represent that every receipt was a non-reimbursed expense during the relevant timeframe. As for the inclusion of refreshments from his investiture, Disciplinary Counsel overlooks Konschuh's explanation that he also used those cookies in the victims advocate's room. (Exhibit 94e, ¶ 20).

194. Disciplinary Counsel asserts that Konschuh's April 23, 2018 answers stated that he did not seek reimbursement for cookies and coffee from his investiture "because he provided the coffee and cookies to the prosecutor's office the day after the May 6, 2013 investiture." (*Amended Formal Complaint,* ¶543). Konschuh's answer was truthful. He used the cookies for his investiture *and* for prosecutor's use in the victim advocate's room. (Exhibit 94e, ¶ 20).

195. Disciplinary Counsel asserts that Konschuh's July 6, 2016 answers falsely stated that he spent $400 per year between 2001 and 2008 on the "Flower/Cake/Card Fund." (*Amended Formal Complaint,* ¶545). Konschuh identified that amount as an estimate. (9-6-19 tr. at 3157). It is a good-faith estimate of his contributions to the flower/cake/card fund. (7-9-19 tr. at 699).

196. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely stated that "when the flower/cake/card/water fund did not have sufficient funds, which occurred

every year, [he] personally covered the costs." (*Amended Formal Complaint,* ¶547 (cleaned up)). Konschuh's statement was truthful. (7-9-19 tr. at 699).

197. Disciplinary Counsel asserts that Konschuh's July 6, 2016 answers falsely stated that he spent $1,800 of his own money on water cooler bills." (*Amended Formal Complaint,* ¶549). Konschuh's statement was truthful. He spent over $1,800 of his own money on water for the prosecutor's office. (7-9-19 tr. at 709).

198. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely stated that "the office did not have sufficient money to cover the water cooler service." (*Amended Formal Complaint,* ¶551). Konschuh's statement was correct. Office contributions to the water/coffee fund were irregular and controversial. (8-27-19 tr. at 2304). As Cathy Strong put it, "it was just a mess." (*Id.)*

199. Disciplinary Counsel asserts that Konschuh's May 2017 supplemental response falsely represented that he incurred "about $2,000" in out-of-pocket expenditures on behalf of the prosecutor's office since the BounceBack program began. (*Amended Formal Complaint,* ¶553). Disciplinary Counsel asserts that this response is misleading because (a) that figure includes expenditures that were purchased before Konschuh became prosecuting attorney, (b) it includes expenditures that Konschuh did not pay for; (c) it includes expenditures that "are not proper governmental expenditures"; (d) it includes expenditures that Konschuh was reimbursed for; and (e) it includes expenditures that he occurred after leaving the prosecutor's office. (*Id.,* ¶554). Disciplinary Counsel's allegations are based on the false assumption that purchases like donuts and coffee could be only for the public or for office staff, but never for both. Disciplinary Counsel produced no evidence to support that assumption. To the contrary, John Biscoe testified, for example, that the prosecutor's office could purchase a coffeemaker to provide refreshment for

crime victims, and that the public purpose would remain intact if employees in Konschuh's office used the machine, too. (7-11-19 tr. at 1018-19, 1021). To the extent Disciplinary Counsel challenges reimbursement for alcohol purchases, they have produced neither a law nor a rule of ethics that would prohibit those reimbursements. Any remaining discrepancies are de minimis and not evidence of an intent to deceive. *Gorcyca,* 500 Mich at 639.

200. Disciplinary Counsel asserts that Konschuh's February 8, 2017 answers falsely stated that Judge Scott "pocketed the fees for teaching, kept the funds paid by the local municipalities for coverage of cases and treated those funds not only as outside of MCL 129.11 but as his own booty and a benefit to him personally as being the prosecutor." (*Amended Formal Complaint,* ¶555). Konschuh's statement was truthful according to the best of his information and belief. (7-2-19 tr. at 338; 7-3-19 tr. at 351; 8-27-19 tr. at 2339).

201. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely stated that "he attended and participated as a presenter/trainer in the entire session of the March 2008 'Legal Update with Emphasis on CSC' LEORTC training session/seminar/legal update." (*Amended Formal Complaint,* ¶557). Disciplinary Counsel makes similar allegations regarding a March 2009 presentation (¶559), a September 2009 presentation (¶561), a July 2010 presentation (¶563), an April 2011 presentation (¶565), and a June 2011 presentation (¶567). Disciplinary Counsel's allegations are false. Konschuh never said that he attended *and presented* for the entire training session. (9-6-19 tr. at 3169). Rather, he testified that he attended the whole session and presented during part of the session. (*Id.; s*ee also Exhibit 96f, ¶626). That testimony was true.

202. Disciplinary Counsel asserts that Konschuh falsely stated in a December 2011 invoice voucher that the December 16, 2011 luncheon was a "Legal Update/Training" lunch. Disciplinary Counsel asserts that this statement is false because that lunch "was a Christmas

luncheon for the [prosecutor's office] staff." (*Amended Formal Complaint,* ¶¶569-570). But Konschuh's statements were correct. The luncheons had a dual purpose. (7-3-19 tr. at 390). Cathy Strong and Steve Beatty confirmed that these luncheons involved discussions of cases and scheduling. (8-27-19 tr. at 2323; 8-29-19 tr. at 2589).

203. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely represented that the December 16, 2011 luncheon "was a legal update/training session rather than a Christmas luncheon for the [prosecutor's office] staff." (*Amended Formal Complaint,* ¶571). But Konschuh's statements were correct. The luncheons had a dual purpose. (7-3-19 tr. at 390). Cathy Strong and Steve Beatty confirmed that these luncheons involved discussions of cases and scheduling. (8-27-19 tr. at 2323; 8-29-19 tr. at 2589).

204. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely represented that neither "Mr. Biscoe nor his staff ever informed Konschuh that the [December 2011] lunch was not a reimbursable expense." (*Amended Formal Complaint,* ¶573). Konschuh's statement was truthful. Biscoe did not testify that he made this statement to Konschuh.

205. Disciplinary Counsel asserts that Konschuh's July 6, 2016 answers falsely represented "Mr. Turkelson, my successor, it appears was reimbursed $67.53 and was directed $99.60 to go to Hugo's Pizza [as] well as directing the remaining balance of $1,813.00 to be a 'Transfer to General Fund to cover Chief Asst. Promotion' in violation of my understanding from Mr. Biscoe that such funds could not be used for salaries and in apparent violation of MCR 49.153, 49.155, and 49.158." (*Amended Formal Complaint,* ¶575). Paragraph 577 makes a similar allegation. Although this statement was erroneous, it was only a statement of opinion based on facts as Konschuh understood them. (9-6-19 tr. at 3199-3201). There is no evidence that Konschuh

had an intent to mislead. Therefore, this statement is not a valid basis for a finding of misconduct. *Gorcyca,* 500 Mich at 639.

206. Disciplinary Counsel asserts that Konschuh's April 25, 2012 invoice voucher falsely stated that the April 25, 2012 luncheon was a "Staff Development Luncheon." (*Amended Formal Complaint,* ¶579). According to Disciplinary Counsel, the lunch was really the prosecutor's office "celebration of Secretary/Administrative Assistant Day and not a staff development luncheon." (*Id.,* ¶580). Disciplinary Counsel also accuses Konschuh of making a false and misleading statement when he denied that these representations were false and misleading. (*Id.* at ¶¶581, 583). But Konschuh's statements were correct. The luncheons had a dual purpose. (7-3-19 tr. at 390). Cathy Strong and Steve Beatty confirmed that these luncheons involved discussions of cases and scheduling. (8-27-19 tr. at 2323; 8-29-19 tr. at 2589).

207. Disciplinary Counsel asserts that Konschuh's December 17, 2012 invoice voucher falsely stated that the December 14, 2012 lunch was for "training." (*Amended Formal Complaint,* ¶585). They also claim that Konschuh told John Biscoe that the lunch "was a training session and not a holiday luncheon." (*Id.,* ¶588). Konschuh's statements were truthful. John Biscoe's testimony establishes that "training" designated a budgetary source and it was not strictly limited to actual training. For example, Biscoe testified that it would have been fine for Konschuh's office to use "training" funds to pay for publicly available donuts. (7-11-19 tr. at 1013). "Training" includes staff development. (7-11-19 tr. at 1065). And the December 12, 2012 lunch involved staff development. (7-8-19 tr. at 487). There is no evidence that Konschuh ever said that the lunch was a training session and not a holiday luncheon." He would never say such a thing, since the luncheons had a dual purpose. (7-3-19 tr. at 390).

208. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely represented that (a) John Biscoe never told respondent that the only way to justify the luncheon was if it was for training, (b) the only thing John Biscoe told Konschuh about the lunch is that he might have to answer questions from the Board of Commissioners or auditors." (*Amended Formal Complaint,* ¶589). Konschuh's answer was truthful. Biscoe did not testify that he told Konschuh that "the only way to justify the luncheon was if it was for training." Although Biscoe did not recall making the statement about the board or auditors (7-11-19 tr. at 1087), it does not follow that Konschuh engaged in misconduct. An incorrect statement does not establish misconduct in itself. *Gorcyca,* 500 Mich at 639. A finding of misconduct requires proof of an intent to mislead, which Disciplinary Counsel has not established. *Id.*

209. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers claim that Biscoe did not question whether the December 14, 2012 lunch was a holiday lunch and that he did not tell Konschuh that he could not submit a holiday lunch expense for reimbursement. (*Amended Formal Complaint,* ¶591). Konschuh's statement was correct. Disciplinary Counsel's question presumed that luncheon can have only one purpose: "Mr. Biscoe questioned whether the December 14, 2012 luncheon was a holiday celebration and not a 'training' session." (Exhibit 94f, ¶769). Biscoe's testimony is ambiguous about whether he actually said to Konschuh that he could not submit a holiday lunch expense. (7-11-19 tr. at 969 ("My recollection of the discussion was a question in terms of was this a Christmas event, and, obviously, if it was a Christmas event, that would not be a legal expenditure.")). Disciplinary Counsel has not proven misconduct.

210. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely represented that he did not tell Biscoe that the December 14, 2012 lunch was "a 'training' session rather than a holiday lunch." (*Amended Formal Complaint,* ¶593). Konschuh's statement was

correct. Disciplinary Counsel's question presumes that a training lunch cannot be a holiday lunch. In fact, the luncheons had both purposes. (7-3-19 tr. at 390). Konschuh would not and did not tell Biscoe that the December 2012 lunch had a single purpose.

211. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely represented that Biscoe never told Konschuh that "the only way the 2012 Christmas luncheon expense could be justified was if the luncheon was for training." (*Amended Formal Complaint,* ¶575). Konschuh's statement was truthful. John Biscoe did not testify that he said "the only way the 2012 Christmas luncheon expense could be justified was if the luncheon was for training."

212. Disciplinary Counsel asserts that Konschuh's January 14, 2019 answers falsely represented that the December 12, 2012 luncheon was a training session. (*Amended Formal Complaint,* ¶597). Konschuh's statement was truthful. The luncheon was both a social event and a training session (7-8-19 tr. at 487). As Biscoe testified, "training" includes staff development. (7-11-19 tr. at 1065).

213. Disciplinary Counsel asserts that Konschuh falsely represented that donut purchases in 2012 and 2013 were for "training." (*Amended Formal Complaint,* ¶611.) This allegation is false. In fact, Biscoe testified that "training" includes staff development. (7-11-19 tr. at 1065). He also testified that it was fine for Konschuh's office to use "training" funds to pay for publicly available donuts. (7-11-19 tr. at 1013). The donuts at issue were for the benefit of Konschuh's office and those members of the public who interacted with Konschuh's office. As Steve Beatty testified, the public often helped themselves to donuts. (8-29-19 tr. at 2572)

214. Disciplinary Counsel asserts that Konschuh falsely stated that he was "cordial" to the Oysters, that he did not use an angry tone of voice, that he was not aggressive or belligerent,

that he did not refuse to accept Bonnie Oysters' statements, and that he did not use profanities. (*Amended Formal Complaint,* ¶612). Konschuh's statements were truthful. See Section III(H).

Conclusion

For the reasons stated above, the Master should find that Disciplinary Counsel failed to establish misconduct by a preponderance of the evidence and dismiss Disciplinary Counsel's complaint with prejudice.

Respectfully submitted,

Collins Einhorn Farrell PC

By: */s/ Donald D. Campbell*
Donald D. Campbell (P43088)
Trent B. Collier (P66448)
4000 Town Center, Floor 9
Southfield, Michigan 48075
(248) 355-4141
Attorneys for Hon. Byron J. Konschuh

Attachment A

Grievance Administrator,

Petitioner/Appellant,

v

Harvey I. Wax, P-22054,

Respondent/Appellee,

98-112-GA.

Decided: September 22, 1999

BOARD OPINION

The Grievance Administrator filed a formal complaint alleging, in Count One, that respondent violated MRPC 3.3(a)(1) and MRPC 8.4(b) by making a false statement in an appellate brief. Count Two charges respondent with violating various rules by making a false statement in his answer to the request for investigation. After the Administrator rested, Tri-County Hearing Panel #1 dismissed both counts pursuant to MCR 2.504(B)(2). The panel also took respondent's motion for sanctions under advisement. The Administrator has filed a petition for review asking this Board to reverse only the dismissal of Count Two of the formal complaint. The Administrator also seeks an order directing the panel to deny respondent's motion for sanctions. We affirm the hearing panel's order of dismissal, and we narrowly conclude that sanctions are not appropriate in this case.

The first question before us involves respondent's denial, in answer to the request for investigation, that he made a certain statement in the appellate brief at issue in Count One (but not at issue in this review). Count Two alleges that:

> Respondent violated his duties and responsibilities by denying that he misled the Court of Appeals and directing the Attorney Grievance Commission to page 6 of Appellant's Brief when Respondent knew or should have known that the relevant portion of Appellant's Brief was at page 18.

As is set forth more completely in the panel's report (appended to this opinion), respondent admitted at the hearing that page 18 of the brief does contain the statement he denied making. The panel's report states in pertinent part:

> With respect to count II, respondent testified after having been called for cross-examination by petitioner's counsel, MCR 9.115(H), that, although his response to the request for investigation contained a misstatement, he did not intend to mislead or knowingly misrepresent a material fact to the grievance administrator. Rather, he stated that his focus was directed to a different portion of his brief by the nature of the request for investigation and the allegations against him. He acknowledged neglect and haste in examining his pleadings before filing his answer to the request for investigation, but stated that he in no way intended to mislead or prevaricate.

> We find that the respondent's testimony is credible and has not been contradicted by any evidence offered by the petitioner. If respondent intended to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer. To the extent that the brief itself was incorporated into Mr. Wax's written response, the answer to the request for investigation is internally inconsistent, not patently false. The petitioner has not proven by a preponderance of the evidence that respondent knowingly made a false statement of material fact in connection with a disciplinary matter, and has not established a violation of MRPC 8.1(a), 8.4(a-c) or MCR 9.103(C), or MCR 9.104(1-4) or (6). Count II likewise must be dismissed.

On review, the Administrator argues that the hearing panel's decision to dismiss Count Two is not supported by the evidence. We disagree. This Board reviews the factual findings of a hearing panel for proper evidentiary support. Grievance Administrator v Donald H. Stolberg, Nos 95-72-GA; 95-107-FA (ADB 1996) (affirming panel dismissal), citing Grievance Administrator v James H. Ebel, 94-5-GA (ADB 1995). In applying this standard of review, it is not our function to substitute our own judgment for that of the panel or to offer a *de novo* analysis of the evidence. Grievance Administrator v Carrie L. P. Gray, 93-250-GA (ADB 1996). And, because the hearing panel has the opportunity to observe witnesses during their testimony, we defer to the panel's assessment of their demeanor and credibility. Grievance Administrator v Neil C. Szabo, 96-228-GA (ADB 1998); Grievance Administrator v Deborah C. Lynch, No 96-96-GA (ADB 1997). See also In re McWhorter, 449 Mich 130, 136 n 7 (1995).

The Administrator argues that:

> The hearing panel apparently focused its analysis on whether Respondent had "knowingly" made false statements of material fact in his Answer [to the request for investigation]. However, Respondent's state of mind is irrelevant to a finding of misconduct pursuant to MCR 9.103(C) and MCR 9.113(A).
>
> The only relevant issue is whether Respondent made the offending statement in the Appellant's Brief.

In other words, the Administrator is arguing for strict liability in the event of a misstatement in response to a request for investigation. The rules wisely do not provide for this.

The first rule relied upon, MCR 9.103(C), is not applicable here. Thus, although the panel did not state this basis for its ruling, the panel correctly concluded that this rule was not violated. MCR 9.103(C) plainly refers to the duty of an attorney who is not a respondent to assist the Administrator in an investigation. A respondent's duty is governed by MCR 9.113(A), and it is to file an answer to the Administrator's request "fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct." That rule further provides: "Misrepresentation in the answer is grounds for discipline."

Of course MCR 9.113(A), and, assuming for the sake of argument that it is applicable, MCR

9.103(C), must be read in light of MCR 9.104(6) and MRPC 8.1(a) which provide that knowing misrepresentation in connection with a disciplinary investigation is misconduct. We need not now decide the precise mental state necessary to support a finding of misconduct under MCR 9.113(A). It was not recited in the charging paragraph in the formal complaint, and was therefore not addressed by the panel. Moreover, we reject the notion that respondent's state of mind is irrelevant and we find no basis to disturb the panel's determination in this case that respondent's unintentional misstatement in answer to the request for investigation does not amount to misconduct.

The Administrator also asks that we order the panel to dismiss the respondent's motion for sanctions which has been taken under advisement. The Administrator argues that the hearing panel has no authority to entertain a motion for sanctions against the Attorney Grievance Commission or its counsel in light of MCR 9.125 (immunity) and 9.128 (costs). Respondent argues, more persuasively, that MCR 2.114's provisions on sanctions are made applicable to discipline proceedings through MCR 9.115(A). We need not decide this question now because we find that, in any event, a violation of MCR 2.114(D) has not been established. Unfortunately, however, the question is a close one. But, although the case against respondent lacks merit, we are not prepared to say that the petitioner's filings in this matter rise to the level of sanctionable conduct. Accordingly, in the interest of adjudicative economy, we decline to remand this matter or to permit further proceedings by the panel on respondent's motion for sanctions. The panel's order of dismissal is affirmed.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Roger E. Winkelman, and Nancy A. Wonch concurred in this decision.

Board Members Grant J. Gruel, Albert L. Holtz, Michael Kramer, and Kenneth L. Lewis were absent and did not participate.