STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. BRUCE U. MORROW
3rd Circuit Court
Detroit, Michigan

Docket No. 161839
Formal Complaint No. 102

DECISION AND RECOMMENDATION FOR DISCIPLINE

At a session of the Michigan Judicial Tenure Commission, Detroit, Michigan, on June 14, 2021,

PRESENT[1]:

Hon. Karen Fort Hood, Chairperson
Hon. Jon H. Hulsing, Vice-Chairperson
Mr. James W. Burdick, Esq, Secretary
Hon. Monte J. Burmeister
Hon. Pablo Cortes
Ms. Siham Awada Jaafar
Mr. Thomas J. Ryan, Esq.
Hon. Brian R. Sullivan

I. Introduction

The Judicial Tenure Commission of the State of Michigan ("Commission") files this recommendation for discipline against Hon. Bruce U. Morrow ("Respondent"), who at all material times was a judge of the 3rd Circuit Court in the City of Detroit, County of Wayne, State of Michigan. This action is taken pursuant to the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.202.

On September 17, 2020, the Supreme Court appointed Hon. Betty R. Widgeon as the master ("Master"). A five-day public hearing commenced on November 13, 2020 and concluded on

[1] Commissioner Ms. Danielle Chaney was not present for the June 14, 2021 session, but she agrees with this decision and recommendation for discipline and has signed it.

December 15, 2020 (the "Hearing"), which was conducted virtually at the decision of the Master. Having reviewed the transcript of the Hearing, the exhibits, the Master's report, disciplinary counsel's brief in support of the Master's findings, Respondent's objections to the Master's report, Respondent's response to disciplinary counsel's brief in support of the Master's findings, and disciplinary counsel's response to Respondent's objections to the Master's report, and having considered the oral arguments of counsel, the Commission unanimously concludes that the Examiner has established by a preponderance of the evidence that Respondent committed misconduct. Respondent took the position in this proceeding that he committed no misconduct and that one of the victims was lying, which the Commission rejects. Respondent also contends that these proceedings are unconstitutional and that he was entitled to an in-person hearing, which the Commission also rejects. Respondent's misconduct included using inappropriate sexually graphic language to female assistant prosecutors on multiple occasions, questioning these female attorneys about their physical appearance, and mistreating them in these regards due to their gender.

For the reasons set forth herein, the Commission unanimously recommends the Supreme Court publicly censure and suspend Respondent without pay from the office of judge of the 3rd Circuit Court for a period of twelve months on the basis of his misconduct.

II. Jurisdiction

Respondent has been a judge at the Wayne County Circuit Court since his election in 1998. Before that, he served as a judge at the Recorder's Court. As a judge, Respondent is subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, the canons of the Michigan Code of Judicial Conduct ("MCJC" and the "Canons"), and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.202. Pursuant to Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.202 and MCR 9.211, the Judicial Tenure Commission has jurisdiction over Respondent's conduct.

III. Procedural Background

On August 11, 2020, the Judicial Tenure Commission filed Formal Complaint (FC) 102. It charged Respondent with three counts of misconduct based on violations of the MCJC and the Canons. The complaint alleged Respondent committed these violations during his tenure as a Wayne County Circuit Court judge.

As to the specific counts of the complaint, Count I charged that Respondent used inappropriate sexually graphic language toward a female assistant prosecutor during a brief break in a homicide jury trial on June 11, 2019. Count II charged that Respondent used inappropriate sexually graphic language toward another female assistant prosecutor in Respondent's chambers on June 12, 2019 while the jury deliberated in the same homicide jury trial. Count III charged that Respondent committed misconduct by questioning these female attorneys about their physical characteristics.

On August 25, 2020, Respondent filed his answer to the complaint together with his affirmative defenses (Respondent's "Answer," cited as "R's Ans."). On September 17, 2020, the Supreme Court appointed the Master. Disciplinary counsel filed an amended complaint on October 21, 2020 to correct certain dates alleged. The five-day virtual Hearing commenced on November 13, 2020 and concluded on December 15, 2020. The parties filed Proposed Findings of Fact and Conclusions of Law and responses by January 15, 2021.

IV. Master's Findings of Fact and Conclusions of Law

On February 9, 2021, the Master issued a report containing her findings of fact and conclusions of law (the "Master's Report"). The Master concluded the Examiner established by a preponderance of the evidence that Respondent committed misconduct in office under Counts I, II and III. As to Counts I and II, the Master concluded Respondent violated Canons 2(B), 3(A)(3), and 3(A)(14). As to Count III, the Master concluded Respondent violated Canons 3(A)(3) and 3(A)(14). Disciplinary counsel filed a brief in support of the Master's findings and disciplinary analysis on

March 9, 2021. Respondent timely filed his objections to the Master's Report on March 9, 2021, and Respondent filed his response to disciplinary counsel's brief in support of the Master's findings and disciplinary analysis on March 30, 2021. Disciplinary counsel filed a response to Respondent's objections to the Master's Report on March 30, 2021.

On May 10, 2021, the Commission held a public hearing on Respondent's objections to the Master's Report pursuant to MCR 9.241, which was conducted via Zoom video based upon various executive orders by the Governor and administrative orders of the Michigan Supreme Court relating to the ongoing COVID-19 pandemic.

V. Standard of Proof

Judicial discipline is a civil proceeding, the purpose of which is not to punish but to maintain the integrity of the judicial process. *Matter of Mikesell*, 396 Mich 517, 527; 243 NW2d 86 (1976); *In re Seitz*, 441 Mich 590, 624; 495 NW2d 559 (1993); *In re Haley*, 476 Mich 180, 195; 720 NW2d 246 (2006). The standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998) (cite omitted). The disciplinary counsel bears the burden of proving the allegations by a preponderance of the evidence. MCR 9.233(A). The Commission reviews the master's findings of fact and conclusions of law de novo, and the Commission may, but need not, defer to the master's findings of fact. *In re Chrzanowski*, 465 Mich 468, 482; 636 NW2d 758 (2001). In *Ferrara*, *supra*, 458 Mich at 362, the Michigan Supreme Court, citing *In re Tschirhart*, 422 Mich 1207, 1209-1210; 371 NW2d 850(1985), recognized:

> "*[t]he proper administration of justice requires that the Commission view the Respondent's actions in an objective light*. The focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers. Although the Respondent's subjective intent as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such *individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary*."

(emphasis added). It is the Commission's, not the master's conclusions and recommendations that are ultimately subject to review by the Michigan Supreme Court. *Chrzanowski*, 465 Mich at 481.

VI. Commission's Findings of Fact and Conclusions of Law

The Commission unanimously accepts and adopts the Master's findings of fact and conclusions of law that Respondent committed the misconduct alleged in Counts I, II, and III of the amended complaint. The Commission unanimously accepts and adopts the Master's conclusions of law that Respondent's misconduct in Counts I and II violated Canons 2(B), 3(A)(3), and 3(A)(14). The Commission unanimously accepts and adopts the Master's conclusions of law that Respondent's misconduct in Count III violated Canons 3(A)(3) and 3(A)(14). In addition, the Commission finds that Respondent's misconduct in Count III also violated Canon 2(B), and Respondent's misconduct in all three counts also constituted a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment in all three counts was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

A. Count I: Inappropriate Use of Sexually Graphic Language.

Count I charged that Respondent used inappropriate sexually graphic language toward a female assistant prosecutor during a brief break in a homicide jury trial on June 11, 2019. The Master concluded the misconduct charged in Count I constitutes: (a) failure to respect and observe the law, failure to act in a manner that promotes public confidence in the integrity of the judiciary, and failure to respect a person's gender, contrary to Canon 2(B); (b) failure to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failure to treat people with respect with regard to their gender, contrary to Canon 3(A)(14). The Commission reviewed the record de novo and adopts the Master's findings and conclusions as to Count I. In addition, the Commission finds and concludes that Respondent's established misconduct in Count I also constitutes a persistent failure to treat the APAs

fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

Respondent presided over the June 2019 homicide trial of James Edward Matthews. (Master's Report p 2.) The case, *People v Matthews*, lasted from June 10, 2019, to June 13, 2019. (*Id*.) The defendant was accused of the 2003 murder of Camille Robinson. He was not charged with any crimes relating to sexual activity, but he acknowledged to the police in 2003 that he had a sexual encounter with the victim before her death. (*Id*.) The Assistant Prosecuting Attorneys ("APAs") in the *Matthews* case were Ms. Ashley Ciaffone ("Ciaffone") and Ms. Anna Bickerstaff ("Bickerstaff"). (*Id*.) Ciaffone had tried one case before Respondent as an intern and had one other case pending before him. (*Id*.) Bickerstaff had never met Respondent until her involvement in the *Matthews* case. (*Id*.)

Respondent often offers advice and criticism to attorneys. (*Id* at p. 3.) On June 11, 2019, during a break, Bickerstaff asked Respondent for feedback about her direct examination of the medical examiner. (*Id*.) She said words to the effect of "was that line of questioning any better?" (*Id*.) Respondent said Bickerstaff's examination was better, but he had another critique for her. (*Id*.) He left the bench, saying that he would talk to Bickerstaff at the counsel's table because giving the critique from the bench might make her "blush." (*Id*.) Respondent sat next to Bickerstaff, who sat in the middle of the three chairs, at the prosecutor's table. (*Id*. at p 4.) The seats were close together, and the arms of the chairs were touching. (*Id*.)

Respondent then illustrated the perceived problem with Bickerstaff's direct examination by using the development of an intimate relationship as an analogy. (*Id*.) He said words to the effect of "when a man and a woman start to get close, what does that lead to?" (*Id*.) Bickerstaff said she didn't understand. (*Id*.) After Respondent repeated his question, Bickerstaff said, "Do you mean sex?" (*Id*.)

Respondent said that foreplay leads to sex and asked Bickerstaff, "Would you want foreplay before or after sex?" (*Id*.) Bickerstaff did not respond. (*Id*.) When Respondent asked the question again, Bickerstaff answered, "Before." (*Id*.) Respondent stated that the climax of the medical examiner's testimony is stating the cause and manner of death. (*Id*.) Respondent said words to the effect that "you start with all the information from the report, all the testimony crescendos to the cause and manner of death, which is the sex of the testimony." (*Id*.) Respondent stated that a lawyer should "tease the jury with the details of the examination." (*Id*.)

Respondent admits he said and did almost all of what Ms. Bickerstaff heard him say and do. Respondent knew ahead of time that what he was going to say might make her blush. At the time he spoke explicitly about sex to Ms. Bickerstaff he had no prior relationship with her. Respondent knew Ms. Bickerstaff was young and inexperienced. She was 27 years old and had only been a prosecutor for a year and a half. He placed himself intimately close to her with the arms of the chairs touching and their faces 12 to 18 inches apart and his eyes locked on hers. He knew or should have known that as a young prosecutor she was a captive audience and did not have the freedom to leave or to end the conversation. As the Master found, Ms. Bickerstaff's reaction or response to the conversation is not the standard by which the appropriateness of the exchange is evaluated and, moreover, it would be unreasonable to expect that, under such circumstances, Ms. Bickerstaff was, or would have considered herself to be, free to disengage from the conversation or complain about the inappropriate nature of the conversation. (Master's Report pp 4-5.)

Respondent claims he did not mean to use the word "climax" in a sexual context. The Commission finds this explanation not credible. After talking to Ms. Bickerstaff about how a relationship between a man and a woman develops and discussing foreplay leading to sex, he told her, quote: "You want to tease the jury with the details of the report and that leads to the climax, which is the cause and manner of death." In context, and where Respondent had already steered the

conversation to "foreplay" and "sex," it is not plausible, as Respondent contends, that he did not intend to use the word "climax" sexually. The fact that Respondent followed up these questions with a metaphor for eliciting witness testimony does not make his use of sexual language in the above cited dialogue and context necessary or appropriate. (Master's Report p 5.)

Accordingly, the Commission adopts the Master's findings and conclusions as to Count I, including that Respondent committed misconduct by: (a) failing to respect and observe the law, failing to act in a manner that promotes public confidence in the integrity of the judiciary, and failing to respect a person's gender, contrary to Canon 2(B); (b) failing to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14).

In addition, the Commission finds and concludes that that Respondent's established misconduct in Count I also constitutes a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

Respondent used inappropriate sexual language with Ms. Bickerstaff because she is a woman. Respondent claims he was teaching and providing feedback to Ms. Bickerstaff. The Master concluded, correctly the Commission believes, that even accepting his explanation, Respondent's explicitly sexual way of teaching was not courteous, respectful, or dignified, and constituted misconduct. Respondent knows how to accomplish teaching and feedback objectives without using sexual words and analogies. For example, he provided feedback to Mr. Kurily, his assigned courtroom assistant prosecutor, many times during Mr. Kurily's 18 months in Respondent's courtroom. During those 18 months Respondent never sat intimately with Mr. Kurily, he never used

sexual analogies with Mr. Kurily, and he never used the words "tease," "foreplay," "climax," or "crescendo" with Mr. Kurily.

Respondent was on notice that such conduct is not acceptable. In 2004, the State Court Administrative Office (SCAO) warned Respondent it is inappropriate to discuss matters of a personal nature with staff unless that individual is an acquaintance or friend, which resulted from such instances of Respondent's personal contacts with a female secretary. SCAO further warned Respondent to refrain from initiating or participating in inappropriate conversations with staff regarding topics of a personal nature, and to refrain from hugging female employees. (DC Exh. 11.) Similarly, in 2005, the Commission formally admonished Respondent for such hugging of court staff and engaging in conversations with court staff which are of a personal or intimate nature and which may be regarded as offensive or embarrassing. (DC Exh. 10.)

Since Respondent was warned by SCAO in 2004 and the Commission in 2005, public awareness about sexual harassment by people in positions of power has undeniably grown stronger, and people in positions of power are on clear notice that sexually harassing words and conduct are unacceptable.

B. Count II: Inappropriate Use of Sexually Graphic Language.

Count II charged that Respondent used inappropriate sexually graphic language toward another female assistant prosecutor during the same homicide trial in Respondent's chambers on June 12, 2019 while the jury deliberated. The Master concluded the misconduct charged in Count II constitutes: (a) failure to respect and observe the law, failure to act in a manner that promotes public confidence in the integrity of the judiciary, and failure to respect a person's gender, contrary to Canon 2(B); (b) failure to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failure to treat people with respect with regard to their gender, contrary to Canon 3(A)(14). The Commission

reviewed the record de novo and adopts the Master's findings and conclusions as to Count II. In addition, the Commission finds and concludes that Respondent's established misconduct in Count II also constitutes a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

When the jury was deliberating on June 12, 2019, Respondent invited counsel — Ms. Ciaffone, Ms. Bickerstaff, and Defense Attorney Mr. Noakes ("Noakes") — into his chambers. (Master's Report p 7.) By that time, Noakes had made a motion for directed verdict, and that motion remained pending during the conversation that followed. (*Id.*) Respondent believed that Ciaffone had cited the wrong standard when responding to Noakes's motion. (*Id.*)

Respondent asked Ciaffone about her decision during the trial to seek admission of evidence showing the defendant's DNA was on the victim's vaginal swab. (*Id.*) Ciaffone responded that she felt the evidence was relevant "because it showed that they had close, recent contact near in time to the homicide." (*Id.*) Respondent disagreed and said words to the effect of "all that shows is that they fucked. Like that's all it shows, that they fucked." (*Id.*)

During this discussion, Ciaffone said the defendant had stated that he had "non-traditional sex" or "not normal sex" with the victim. (*Id.*) That led to a conversation about what "non-traditional sex" meant. (*Id.*) Ciaffone said that "non-traditional sex" meant something other than intercourse. (*Id.*) Ciaffone thought that defendant's statement was inconsistent with the DNA evidence; however, in Respondent's view, defendant meant that the two had engaged in what Respondent called "doggy style" intercourse. (*Id.*) Respondent stated that Ciaffone's view was the product of her own bias and inexperience. (*Id.*) Ciaffone stated that Respondent's view was incorrect because defendant had claimed that he "couldn't penetrate [the victim] because she could have a miscarriage." (*Id.*)

Respondent laughed and stated words to the effect of "oh, so like what — like he [is] saying that, like, what he's working with ... was so big that it would cause a miscarriage[?]" (*Id.* at p 8.)

During this in-chambers conversation, Respondent again criticized Ciaffone's voir dire as being too indirect and said words to the effect of, "If I want to have sex with someone on the first date, what do I ask them?" (*Id.*) When no one responded, Respondent said, "I would ask them, 'Have you ever had sex on a first date?' What's the next question I would ask them?" (*Id.*) Again, no one answered. (*Id.*) Respondent said words to the effect of, "I'd ask, 'Would you have sex with me on a first date?' You don't ask questions like, 'Do you want to get married?' or 'Do you want to have kids?' Like, those things would come later. Right? So just ask the question you want to know." (*Id.*) Respondent was also critical of Noakes during this conference, but he did not use sexual examples in his comments to Noakes, a male defense attorney.

Again, as with the statements forming the basis for Count I, Respondent admits he said virtually all of what is alleged he said during the in-chambers conference with the APAs and defense counsel under Count II. None of it was appropriate. Respondent believed Ms. Ciaffone's voir dire was ineffective, so he created a voir dire example that would help him determine if a woman would sleep with him on their first date.

Respondent also believed that there was no need to present DNA evidence after Ms. Ciaffone explained her reasons. His response: "All it shows is that they fucked." Respondent could have said all it shows is that they were intimate or they had sex, but he chose to use the very graphic word "fucked."

Respondent asked Ms. Ciaffone for her definition of nontraditional sex and commented on her own sexual experience. They discussed the defendant's testimony, and Respondent shared his belief that defendant and the victim had sex, "doggy style." He could have said it in a more professional, less crass way, but he chose not to. Respondent laughed about the defendant's

explanation for not having sex the "normal way," and joked about the size of defendant's penis and what the defendant thought of the size of his penis. Respondent was talking mainly with Ms. Ciaffone at the time he said these things to her. He had no prior relationship with her, except that she had last practiced in front of him when she was an intern nine years earlier.

The APAs were again a captive audience. They were not free to leave and not free to object. Respondent, a judge, was considering a directed verdict motion for the defense, and, if he granted it, the APAs' case would be dismissed.

Just as Respondent claimed he was teaching Ms. Bickerstaff about how to do an exam with respect to Count I, he argued he was only trying to critique and educate Ms. Ciaffone about how she tried the case with respect to Count II. But, again, it was not appropriate for him to choose sexual and offensive demonstratives when he could have, and should have, chosen nonsexual ways to do so. When Respondent critiqued Mr. Noakes, he did not use sexual examples and analogies.

Respondent argued that his use of the words "fuck" or "doggy style" is not misconduct and that people use those words in everyday conversation. This proposition is dubious and, even if accepted, the Commission must consider all of his words in the context in which he used them, which was to inappropriately deluge the APAs with multiple instances of unnecessarily sexually graphic discussions over the course of a three-day homicide trial. The Commission agrees with the Master's finding and conclusion that the totality of the evidence supports a finding that the conversation that took place between Respondent and Ciaffone and Bickerstaff in chambers on June 12, 2019 constituted an inappropriate use of sexually graphic language. (Master's Report p 8.)

Accordingly, the Commission adopts the Master's findings and conclusions as to Count II, including that Respondent committed misconduct by: (a) failing to respect and observe the law, failing to act in a manner that promotes public confidence in the integrity of the judiciary, and failing to respect a person's gender, contrary to Canon 2(B); (b) failing to be patient, dignified, and

courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14).

In addition, the Commission finds and concludes that that Respondent's established misconduct in Count II also constitutes a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d). The topic of the defendant's sexual activity with the victim and whether it was relevant to place him with the victim near the time of the homicide did not make Ciaffone's own sexual experience or the size of the defendant's genitalia appropriate or relevant topics of discussion in the case or in chambers. (*Id.*) Respondent unnecessarily and improperly introduced both subjects as well as analogizing voir dire to asking for sex on a first date. (*Id.*)

The inappropriate nature of the progression of this conversation is underscored by the fact that Respondent commented early in the conversation about what he presumed to be Ciaffone's lack of sexual experience. The Commission is persuaded that Respondent's presumptions and conduct toward Ciaffone was motivated by her gender. To deduce that she was sexually inexperienced and then follow up that observation with coarse sexual joking and unnecessary sexual analogies demonstrates an unprofessional discourtesy toward Ciaffone. (Master's Report p 9.) The conversation would have been inappropriate under any circumstances, but if Respondent thought that Ciaffone was, in fact, sexually inexperienced, he could not have reasonably imagined that the conversational path he was pursuing would have made her feel anything less than uncomfortable. (*Id.*) Furthermore, Respondent offered critiques to Mr. Noakes without making use of sexual examples or assessments, thus undercutting the argument that sex was the best or only teaching tool

at his disposal for offering criticism and critique, (*id.*), or that he would use sexually charged language with young attorneys regardless of gender.

C. Count III: Violations of Canons 2(A), 2(B), 3(A)(14).

Count III charged that Respondent committed misconduct by questioning female attorneys who appeared before him about their physical appearance. The Master concluded the misconduct charged in Count III constitutes: (a) failure to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (b) failure to treat people with respect with regard to their gender, contrary to Canon 3(A)(14). The Commission reviewed the record de novo and adopts the Master's findings and conclusions as to Count III. In addition, the Commission finds and concludes that Respondent's established misconduct in Count III also constitutes Respondent's failure to respect a person's gender, contrary to Canon 2(B), a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and that Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

After the June 12, 2019 conversation in chambers, Ciaffone and Bickerstaff walked to counsel's table to pack their things. (Master's Report p 10.) While they were there, Respondent spoke to them, (*id.*), which was a "continuation" of the improper in-chambers conversation Respondent was having with them. (R's Ans. ¶ 30.) He asked Ciaffone how tall she was: "What are you, like five-one or five-two?" (Master's Report p 10.) Ciaffone said words to the effect of, "No, but I accept that, Judge." (*Id.*) Bickerstaff volunteered, "Judge, I'm five-three for context." (*Id.*) Respondent then estimated Ciaffone's height as four feet, ten inches. (*Id.*) Ciaffone said that she is "four-eleven and a half." (*Id.*) Respondent then asked if Ciaffone weighed around 105 pounds. (*Id.*) Ciaffone said words to the effect of "Judge, you're not supposed to ask a girl her weight." (*Id.*) Then Respondent asked Bickerstaff if she was 117 pounds. (*Id.*) Bickerstaff said, "That's very generous,

but no, Judge." (*Id.*) Respondent responded, "Well, I haven't assessed you for muscle mass yet." (*Id.*) During this conversation, Respondent looked Ciaffone up and down once and then looked Bickerstaff up and down once. (*Id.*)

Respondent contends that his actions under Count III are not misconduct because he uses height-related illustrations to demonstrate bias to the jury and, at the beginning of the subject homicide trial, he had used the example of his own height to illustrate bias for the jury. But Respondent admitted in his Answer that this dialogue about the APAs' physical characteristics was an immediate continuation of the inappropriate sexual discussion he initiated with the APAs in his chambers, (R's Ans. ¶ 30), and Respondent followed the women out of his chambers to their table in the courtroom for this continued discussion, now involving their height and weight. He did not give them any reason for his questions, professional or otherwise, let alone say that he was interested in learning their height and weight for purposes of future jury illustrations. Assessing their height and weight and muscle mass has nothing to do with bias, and his discussion with jurors about bias already took place at least a day earlier. In light of the other misconduct that occurred as detailed with respect to Counts I and II, it strains credulity that Respondent simply wanted to mentally bank away the information about the APAs' height and weight for future jury instruction to make a point that Respondent already knew how to make with his own height. The APAs both testified that Respondent looked their bodies up and down,[2] and he persisted in his questions even after Ciaffone tried to deflect them by saying he should not ask a woman about her weight.

Accordingly, the Commission adopts the Master's findings and conclusions as to Count III, including that Respondent committed misconduct by: (a) failing to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary

[2] The Commission has not been provided any evidence to substantiate Respondent's assertion that either the APAs' testimony or disciplinary counsel's description of what transpired is racially motivated in any way. Respondent's conduct in this case was misconduct regardless of race.

to Canon 3(A)(3); and (b) failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14).

In addition, the Commission finds and concludes that that Respondent's established misconduct in Count III also constitutes a failure to respect and observe the law, failure to act in a manner that promotes public confidence in the integrity of the judiciary, and failure to respect the APAs' gender, contrary to Canon 2(B), a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and that Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d). Little more need be said here than as already set forth under Counts I and II, as Respondent's misconduct under Count III was a continuation of his inappropriate conduct towards the APAs and targeted them specifically as women.

VII. Conclusions of Law

Respondent's conduct breached the standards of judicial conduct, and he is responsible for the following:

a. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.202;

b. Misconduct by failing to respect and observe the law, failing to act in a manner that promotes public confidence in the integrity of the judiciary, and failing to respect a person's gender, contrary to Canon 2(B);

c. Misconduct by failing to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3);

d. Misconduct by failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14);

e. Persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c); and

f. Unfair and discourteous treatment due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

VIII. Respondent's Other Contentions

Besides Respondent's contention that he committed no misconduct, which the Commission rejects as set forth above, Respondent, by counsel, offered additional legal arguments as to why this Commission is assertedly powerless to investigate his conduct and recommend discipline for his misconduct. The Commission finds no merit to Respondent's arguments.

A. <u>These Proceedings Are Constitutional</u>.

Respondent argues that Michigan's judicial discipline system is unconstitutional, relying on *Williams v Pennsylvania*, 136 S Ct 1889 (2016). Respondent acknowledges that the Commission cannot resolve the issue and that he is merely attempting to preserve this issue. (R's 3/9/21 Objections to Master's Report, p 26.) The Commission agrees that the issue is not for the Commission to decide, and therefore notes only that: (1) *Williams* is patently distinguishable, as it involved a prosecutor turned state supreme court justice presiding over a death penalty case he was previously involved with as a prosecutor; and (2) the Michigan Supreme Court has already considered and rejected Respondent's argument in holding Michigan's judicial discipline system is constitutional, including in ways that differentiate the system from the problems found in *Williams*. *See In re Chrzanowski*, 465 Mich 468, 483-86 (2001); *Matter of Del Rio*, 400 Mich 665, 682-84 (1977); *Matter of Mikesell*, 396 Mich 517 (1976); *see also Bruce Morrow v Judicial Tenure Commission*, Order No. 162130 & (4) (Oct. 30, 2020) (denying complaint for superintending control on this issue).

Nor does the Commission find merit in Respondent's argument, without citation to authority, that he had a First Amendment constitutional right to use profane language toward the APAs. The United States Supreme Court distinguishes between things a public employee says as a citizen, which get First Amendment protection, and those the employee says in his official capacity, which do not. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *Garcetti* establishes that "when public

employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id*. at 422. In fact, a case that Respondent relies upon heavily for other purposes, *Matter of Hocking*, 451 Mich 1, 13 (1996), held that "[a] judge's comments are not immune from censure . . . ." Respondent committed his misconduct, including making the sexually inappropriate statements to the APAs, in his capacity as a judge. Thus, he cannot rely on the First Amendment to protect his misconduct.

B. Conducting The Hearing Virtually Was Proper.

Respondent objected to the Master's decision to conduct the proceedings virtually rather than in person. The Commission concludes the Master had the discretion to choose whether the hearing would be by remote video, and it was a proper exercise of that discretion to opt for a virtual hearing on the facts of this case.

The Michigan Supreme Court has authorized, and even encouraged, courts to conduct virtual proceedings whenever possible, in order to best ensure the safety of all participants during the pandemic. The hearing in this case occurred in November and December 2020. Under Michigan Supreme Court Administrative Order 2020-19, June 26, 2020, the courts were mandated to "continue to expand the use of remote participation technology (video or telephone) as much as possible to reduce any backlog and to dispose of new cases efficiently and safely."

Notwithstanding this mandate, Respondent claimed that MCR 9.231(B), which states that "[t]he master shall set a time and a place for the hearing ...," implies that the hearing must be at a physical "place." He objected that the Master denied his motion for an in-person hearing without providing a reason, although he admits it was "ostensibly" because of the pandemic.

The Master properly chose to conduct the hearing virtually. Nothing in the rule requires that the hearing be held in person, as opposed to virtually. Respondent had full, fair, and ample

opportunity to present his evidence, respond to his opponent's evidence, and to question and cross examine witnesses. The Master was within her authority to hold the hearing remotely; especially in light of concerns about the health consequences of having an in-person hearing due to the ongoing pandemic.

IX. Disciplinary Analysis

The Commission concludes Respondent committed judicial misconduct by using inappropriate sexually graphic language to female assistant prosecutors on multiple occasions, questioning these female attorneys about their physical appearance, and mistreating them in these regards due to their gender. Based on its findings of misconduct, the Commission recommends Respondent be publicly censured and suspended without pay for a period of twelve months. This recommendation is based on the following evaluation of the factors set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999). The Commission is aware of MCR 9.244(B)(1), and has included its consideration in the recommendation as well, along with providing the information required under MCR 9.244(B)(1) under seal.

A. The *Brown* Factors.

(1) *Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.*

Respondent exhibited a pattern of saying sexually inappropriate things to women. In 2004, SCAO reprimanded Respondent for a variety of misconduct. With respect to his treatment of a female court employee, the SCAO letter stated:

> "You engaged in inappropriate personal conversation with a personnel staff person asking inappropriate questions and making inappropriate personal comments . . .
>
> It is inappropriate to discuss matters of a personal nature with staff unless that individual is an acquaintance or friend (in the instance described above, the staff person was new to you). . .

> You need to discontinue this pattern of behavior immediately. Specifically, you should . . . refrain from initiating or participating in inappropriate conversations with staff regarding topics of a personal nature."

(DC Exh. 11.)

The Commission conducted its own investigation and formally admonished Respondent for the same conduct that SCAO investigated. With respect to Respondent's treatment of women, the Commission's 2005 letter told Respondent:

> "The Commission is concerned about your practice of 'hugging' persons at the court, whether court personnel, attorneys or others. Your perception that individuals have no objection or consent may not be accurate. Many persons may feel they are in no position to object even if they consider the contact to be objectionable. . . . Similarly, the Commission cautions you against engaging in conversations with court staff which are of a personal or intimate nature and which may be regarded as offensive or embarrassing."

(DC Exh. 10). These letters show that Respondent has long been on notice that he should be cautious in his interactions with females, including no longer having intimate personal conversations that may be offensive or embarrassing.

There is evidence that Respondent said inappropriate intimate and sexual things to female prosecutors in 2018 and 2019 that are uncharged acts of misconduct. In 2018, when ruling on a motion to suppress evidence of cell phone records in a drug case – a case that had nothing to do with sex or sex crimes – Respondent posed a hypothetical question to a female prosecutor to the effect: "Would I have an expectation of privacy if I were to have sex with a man in the stall of a restroom?" In 2019, Respondent asked a female prosecutor who wears a hijab what color her armpit hair is, and he shared with her that he shaves his own armpits. The present case involves three more instances of sexually inappropriate language and conduct for two days. Between the early 2000s and June of 2019, Respondent used inappropriate, personal, sexual, and intimate language with at least five different women.

These other acts by Respondent are properly considered in determining an appropriate sanction. In *In re Moore*, 464 Mich 98 (2001), the Commission recommended that Judge Moore be suspended for nine months without pay, and explained that this recommendation was based on the *collective acts* of Judge Moore *throughout his judicial career*, noting that he had received *two admonitions and a public censure*. *Id* at 117. It was proper for the Commission, while limiting its findings of misconduct to the allegations of the complaint, to consider "past behavior in its sanction determination," as such "behavior is relevant." *Id* n16. The Commission's finding with respect to *Brown* factor number 1 was:

> "Respondent's misconduct is not an isolated instance. It represents a pattern of misconduct continuing throughout Respondent's career and resulting in admonitions, public censure, and repeated criticisms and reversals by reviewing courts. Respondent *was warned repeatedly that his conduct was improper*. He cannot justifiably assert ignorance of the error of his ways. He has failed to acknowledge the criticisms were valid and has *failed to alter conduct*."

Id at 119 (emphasis added).

As in *In re Moore*, Respondent's prior warnings about inappropriate intimate personal communications in his official capacity and his prior treatment of female lawyers demonstrate his propensity, knowledge of the criticisms of his conduct, and his failure to alter his conduct. Such failure warrants a determination under the first *Brown* factor that Respondent's misconduct is more serious because it "is not an isolated instance," rather it "represents a pattern of misconduct continuing throughout Respondent's career and resulting in admonitions, public censure, and repeated criticisms[.]" *See id*. Respondent was well aware that his first conversation with Ms. Bickerstaff – which was the subject of Count I – "may be offensive or embarrassing." He warned her that it might make her blush just before talking with her. He had an intimate conversation with her anyhow, despite the SCAO and Commission warnings that he not do so.

The comments Respondent made in the early 2000s and again in 2018 and 2019, to five women in total, show that his 2019 comments to Ms. Bickerstaff and Ms. Ciaffone were not isolated.

Rather, they were part of a long-standing pattern. This factor weighs heavily in favor of a severe sanction.

(2) ***Misconduct on the bench is usually more serious than the same misconduct off the bench.***

Respondent committed the misconduct described in Counts I and III in his courtroom. He committed the misconduct described in Count II in his chambers, during and in connection with a trial. The Michigan Supreme Court considers conduct that occurs in a judge's capacity as judge, but not literally "on the bench," to be "on the bench conduct." *In re Susan R. Chrzanowski*, 465 Mich 468, 490 (2001); *In re Barglind*, 482 Mich 1202 (2008); *In re Adams*, 494 Mich 162 (2013). This factor weighs in favor of a more severe sanction.

(3) ***Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.***

&

(4) ***Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.***

Respondent's conduct was not prejudicial to the actual administration of justice. However, one aspect of it created an appearance of impropriety. Respondent told Ms. Bickerstaff, in open court, that he had something to say to her, then came off the bench and had an intimate conversation while sitting close to her at the prosecution table. Defense counsel was not present. (Bickerstaff, 11-23-20, p 390/3-5) He did this during a five-minute break in the proceedings, when there were members of the public present. As the Michigan Supreme Court noted while suspending Respondent in 2014, a private meeting with one party during the proceedings, in a public place, creates the appearance of impropriety. *In re Morrow*, 496 Mich 291, 299 (2014).

(5) ***Misconduct that occurs spontaneously is less serious than misconduct that is premediated or deliberated.***

Respondent's conduct in all three counts was premeditated or deliberated, not merely

spontaneous. The facts the Master found with respect to Count I include that Respondent told Ms. Bickerstaff that what he had to say might make her blush. (Report at p 3; Bickerstaff, 11-23-20, p 385/4-7; Kurily, 11-24-20, p 700/2224; DC Exh. 2, ¶ 6; DC Exh.4, ¶ 9.) His words clearly reveal that he had thought about what he was going to say and about the effect it would have on Ms. Bickerstaff. He followed through on his thoughts by sitting very close to her and having the intimate conversation he knew might make her blush.

The facts the Master found with respect to Count II, which addressed the in-chambers discussion, also make clear that Respondent's sexually charged comments were premeditated or deliberated. The statements and their contents were:

- When Ms. Ciaffone explained why the DNA evidence was relevant, Respondent disagreed and said, "all that shows is that they fucked. Like that's all it shows, that they fucked" (Ciaffone, 11-13-20 at p 57/1-18; Bickerstaff, 11-23-20, p 400/2-8; *cf*. DC Exh. 2 ¶12b, 12c [Respondent "probably did use that word"]).

- After asking Ms. Ciaffone what her definition of "non-traditional sex" was, Respondent said that her view of the evidence was a product of her own bias and inexperience. (Ciaffone, 11-13-20, p 59/20-25; Bickerstaff, 11-23-20, p 403/8-12; Noakes, 11-24-20, p 919/6-22.)

- Respondent expressed his belief that the sexual encounter was done "doggy style." (Ciaffone, 11-13-20 at pp 60/1-6; Bickerstaff, 11-23-20, p 403/6-7; Noakes, 11-24-20, p 907/6-8.)

- While discussing defendant Matthews's testimony that he did not want to have sex in the traditional way because he may hurt the baby with whom the murdered woman was pregnant, Respondent laughed and stated words to the effect of "oh, so what –like he [is] saying that, like, what he's working with . . . was so big that it would cause a miscarriage[?]" (Ciaffone, 11-13-20 at pp 62/24-25; 63/1-7.)

- While criticizing Ms. Ciaffone's voir dire, respondent proposed the following sex-based voir dire questions to the attorneys: "if I want to have sex with someone on the first date, what do I ask them?" When no one responded, Respondent said, "I would ask them, 'Have you ever had sex on a first date?" What's the next question I would ask them?" When no one answered, Respondent said words to the effect of, "I'd ask, 'Would you have sex with me on a first date?" (Ciaffone, 11-13-20, pp 66/22-67/11; Bickerstaff, 11-23-20, pp 400/23-401/5; Noakes, 11-2420, p 922/1-11; *cf*. DC Exh. 2, ¶ 15; DC Exh. 4, ¶35.)

As Ms. Ciaffone testified, "it felt like every example that he gave always kept going back to sex or the way someone looked. It felt like they all kept—every example or teaching moment he maybe tried to have about anything always went back to a sexual explanation." (Ciaffone, 11-13-20, p 62/9-13.)

Whether or not Respondent's *first* sexual references in chambers were premeditated, at some point during those two hours, as he repeatedly spoke in sexually explicit ways in several different contexts, it became clear that his sexual references were quite deliberate. He controlled the conversation, and after each sexual reference, he had every opportunity to reassess his use of further sexual references. He purposely chose to continue making them.

Respondent's words and conduct that are the basis for Count III were also premeditated. After leaving his chambers, he could have taken the bench. Instead, he deliberately followed the women to the prosecution's table, to initiate a conversation that was *only* about the women's height, weight, and muscle mass. (Master's Report at p 10; R's Ans. ¶ 30.) The fact that he followed them to initiate just that conversation demonstrates his premeditation.

Respondent effectively admitted that this discussion was premeditated. He wrote in his Answer to Complaint that the exchange was:

> ". . . **part of a continuation of the in-chamber's discussion that was centered on bias.** APA [Bickerstaff] had earlier posed the question, 'Don't you think I'm tough enough' to be able to receive and accept a frank critique, right after asking for that critique. The questions were to communicate that Judge Morrow had his doubts that she was emotionally, spiritually, or physically able to accept an honest and thoughtful critique based on the experience during their discussions."

(R's Ans. ¶ 30) (emphasis added). Other than showing premeditation, the Commission does not accept Respondent's explanation. There is no record evidence of any logical nexus between Ms. Bickerstaff's ability to handle criticism and her height and weight. Whether or not his explanation is plausible, it does make clear that he planned his comments about the women's bodies. Between the time he left his chambers and entered the courtroom, Respondent had time to reconsider the sexual

words and analogies he used in his chambers so that he could avoid saying inappropriate things to the women in the courtroom. By his own admission, instead of changing course, he followed the women to continue the conversation he had begun in chambers.

Respondent continued to explore the women's height and weight even after Ms. Ciaffone reminded him that it is not polite to ask a woman what she weighs. (Ciaffone, 11-13-20, pp 70/25-71/1; Bickerstaff, 11-24-20, p 407/14.) Instead of heeding her advice, he next asked Ms. Bickerstaff about *her* height and weight, and still later, told her he had not yet assessed her muscle mass. (Ciaffone, 11-13-20, pp 70/14-71/25; Bickerstaff, 11-23-20, pp 406/18-20, 407/4-20; DC Exh. 2 ¶¶17a, 17b, 17c; DC Exh. 4 ¶¶37, 38, 39.) In light of Ms. Ciaffone's warning to Respondent, that part of the conversation was especially deliberate, rather than spontaneous.

Pursuant to *Brown*, the fact that a substantial part of Respondent's misconduct was deliberate weighs heavily in favor of a severe sanction.

(6) ***Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.***

There is no evidence that Respondent's conduct undermined the ability of the justice system to discover the truth. This factor is not an issue in this case.

(7) ***Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justices that do not disparage the integrity of the system on the basis of a class of citizenship.***

Respondent's misconduct toward Ms. Bickerstaff and Ms. Ciaffone was unequal treatment on the basis of gender. He used inappropriately graphic sexual language, sexual analogies, and sexual examples with them, while the evidence showed that he did not do so with male lawyers.

In addition to the support for finding gender bias set forth above as to each count above, the effect Respondent's misconduct had on the APAs is telling. Ms. Bickerstaff testified that she felt

"frozen" when Respondent used his explicitly sexual analogies while seated with her at the prosecution table. (Bickerstaff, 11-23-20 at p 388/1-16.) She had two nightmares following this incident. His actions made her feel uncomfortable coming to work because of the possibility she may see him in the common areas of the courthouse. She sometimes encountered him on her way into the building, and due to his conduct in court she did her best to avoid having contact with him on these occasions, including once exiting an elevator she was on because he had entered it. (*Id*. at pp 429/22-430/8, 430/18-431/7, 433/7-18.) A judge should not make a woman feel that way.

Respondent's conduct had a negative effect on Ms. Ciaffone as well, though in a different way. Although she believed his actions to have been inappropriate, she was afraid to report them for the following reasons:

- She was worried about her case.
- She was worried no one would believe her.
- She was worried about what impact this would have on her career and on Ms. Bickerstaff's career.
- She was concerned that "these types of things can follow you your whole entire life, and that you can end up being associated with things like this forever." (Ciaffone, 11-13-20, pps 78, l/09-14.)
- She was worried about what people of the courthouse would think of her.
- She was worried that she would become the subject of gossip.
- She was worried that defense attorneys would look at her differently.
- She was worried that officers on her cases would not want to joke around with her because they would think she could not take a joke.
- She was worried that no judges would invite her into their chambers to give her feedback.

(Ciaffone, 11-13-20, pps 78, l/33-25; p 79 l/1-6.)

Pursuant to *Brown*, Respondent's disparate treatment due to gender weighs in favor of a more severe sanction.

In sum, the Commission's consideration of the totality of all seven *Brown* factors weighs in support of the imposition of a more severe sanction, including the Commission's recommendation for public censure and suspension without pay for a period of twelve months.

B. Other Considerations.

The Commission has also considered other factors in past cases, as suggested by the American Judicature Society ("How Judicial Conduct Commissions Work," American Judicature Society 1999, pp. 15-16):

> **(1) The judge's conduct in response to the Commission's inquiry and disciplinary proceedings. Specifically, whether the judge showed remorse and made an effort to change his or her conduct and whether the judge was candid and cooperated with the Commission.**

The Michigan Supreme Court has endorsed this factor. *See In re Justin*, 490 Mich 394, 424; 809 NW2d 126 (2012); *see also In re Ryman*, 394 Mich 637, 642-643; 232 NW2d 178 (1975); *In re Loyd*, 424 Mich 514, 516; 535-536; 384 NW2d 9 (1986); *In re Ferrara*, 458 Mich at 372-373; *In re Noecker*, 472 Mich at 3; *In re Nettles-Nickerson*, 481 Mich 321, 322; 750 NW2d 560 (2008); *In re James*, 492 Mich 553, 568-570; 821 NW2d 144 (2012). Respondent has persistently refused to acknowledge that he committed any misconduct and contended Ms. Bickerstaff was lying. At the formal hearing, he repeatedly provided facts and explanations which were discredited by other witnesses and the great weight of the evidence. Respondent's lack of remorse and victim-blaming support the sanction of public censure and suspension without pay for a period of twelve months recommended by the Commission.

In *In re Adams*, 494 Mich at 181, the Court reasoned that a sanction may be less severe where a respondent acknowledges his or her misconduct, but "where a respondent is not repentant," a greater sanction may be warranted. (Quoting *In re Noecker*, 472 Mich 1, 18; 691 NW2d 440 (2005) (Young, J., concurring)). This principle further supports the Commission's conclusion that

Respondent's lack of remorse or ownership of responsibility for his misconduct warrants a more severe sanction, as the record shows Respondent has failed to take responsibility for his misconduct and has attempted to minimize his misconduct and blame the APAs throughout these proceedings notwithstanding that he had been on notice for at last fifteen years that such conduct is not appropriate.

(2) The effect the misconduct had upon the integrity of and respect for the judiciary.

Respondent's conduct has garnered a lot of negative publicity. A search of the internet reveals articles about his inappropriate comments to Ms. Ciaffone and Ms. Bickerstaff on the following news sources:

- ClickonDetroit.com
- The Detroit Free Press
- The Detroit News
- WXYZ.com
- Fox2Detroit.com
- Channel 7
- Abajournal.com
- Michiganradio.org
- You Tube
- You Tube – Judicial Tenure Commission hearing with 329-838 views of the five-day hearing.

Respondent's misconduct casts not only Respondent, but the judiciary as a whole, in a negative light.

3. Years of judicial experience.

This factor focuses on whether a judge's relevant experience is an aggravating or mitigating factor. Respondent committed his misconduct after many years on the bench, and notwithstanding previous discipline and an admonition for related misconduct years earlier. Respondent's length of relevant service and prior warnings and discipline only exacerbate his misconduct.

C. The Basis for the Level of Discipline and Proportionality.

The primary concern in determining an appropriate sanction is to "restore and maintain the dignity and impartiality of the judiciary and protect the public." *In re Ferrara*, 458 Mich at 372. In determining an appropriate sanction in this matter, the Commission is mindful of the Michigan Supreme Court's call for "proportionality" based on comparable conduct, as it set forth under MCR 9.244(B)(2). The Commission has undertaken to ensure that the action it is recommending is reasonably proportionate to the conduct of the Respondent and reasonably equivalent to the action that has been taken previously in equivalent cases. Based on the facts, the Commission concludes that public censure and suspension without pay for a period of twelve months is an appropriate and proportional sanction for Respondent's misconduct, and is reasonably equivalent to censure and suspension that has occurred previously in equivalent cases.

The preponderance of evidence establishes that Respondent committed misconduct as alleged under the counts of the amended complaint (Counts I, II, III). That misconduct included violations of the Canons, violations of the Michigan Court Rules, and disrespect of attorneys on account of their gender. *Brown* observed that "[t]he most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." 461 Mich at 1292. There have been only two prior Michigan Supreme Court opinions with facts somewhat similar to this case, in that a judge engaged in sexual harassment alone, with no other accompanying misconduct.

i. The *Iddings* Case.

In *In re Iddings*, 500 Mich 1026 (2017), the Court held Judge Iddings responsible for doing the following, despite objections from the victim:

> Sending after-hour[s] text messages to Ms. [*****],[3] in which he discussed his marital problems and his personal feelings.
>
> Making an offer to purchase expensive items for Ms. [*****] as Christmas gifts and inviting her to Rhianna/Eminem and other high-priced concerts.
> Suggesting that Ms. [*****] accompany him to exotic locations for court-related conferences where they could share a hotel room.
>
> Showing Ms. [*****] a sexually suggestive YouTube video of a high-priced lingerie website, Agent Provacateur.
>
> Making comments which he admits Ms. [*****] could have reasonably interpreted as an invitation to have an affair with him.
>
> In a letter of recommendation, while referring to Ms. [*****]'s professionalism and dependability, writing "besides, she is sexy as hell." Respondent deleted the language at the request of Ms. [*****].
>
> Writing "Seduce [*****]" on the court computerized calendar and then directing Ms. [*****] to look at that particular date on the calendar. Respondent deleted the language at the request of Ms. [*****].
>
> Telling Ms. [*****] that the outfits she wore to work were "too sexy."
>
> Telling Ms. [*****] that she "owed him" for allowing her to leave work early to attend her son's after-school activities.
>
> Reaching over her to edit documents which would have put him in physical contact with Ms. [*****].
>
> Staring down the front of Ms. [*****]'s blouse.
>
> While discussing his [t]riathlon training, sitting on Ms. [*****]'s desk and laying on it while she was sitting at her desk.

500 Mich at 1027.

The Court wrote:

[3] The name has been omitted to protect the victim's identity.

> "Here, the respondent, as found by the Commission, engaged in a course of conduct constituting sexual harassment from 2012 to 2015. Although his misconduct occurred while off the bench, it was serious and related to his administrative duties as a judge. The respondent's misconduct created an offensive and hostile work environment that directly affected the job performance of his judicial secretary in her dealings with the public and the court's business and affected the administration of justice. His actions implicated the appearance of impropriety and had a negative impact on the actual administration of justice. Further, his conduct was deliberate."

Id at 1030. The court imposed a public censure with a six-month suspension without pay. *Id* at 1030.

Respondent's conduct did not last as long as Judge Iddings's did, but it was bad in its own right. The violations named in two of the three counts took place in the courtroom, and involved two different women. The APAs were young female attorneys over whom Respondent had significant power, including contempt powers and the power to dismiss their case. He used sexually charged words with Ms. Bickerstaff that included "teasing," "foreplay," climax," and "crescendo," and he explicitly used the word "sex" (Bickerstaff, 11-23-20, p 386/14-15; DC Exh. 2, ¶7d; DC Exh. 4, ¶14). He made an analogy to an orgasm.

In chambers, Respondent commented on Ms. Ciaffone's inexperience with "non-traditional" sex and talked about her personal sexual biases. (Report pp 8, 9; Ciaffone, 11-13-20, p 59/20-25; Bickerstaff, 11-23-20, p 403/8-12; Noakes, 11-24- 20, p 919/6-22.) He created a sex-based voir dire question. (Ciaffone, 11-13-20, pp 66/22-67/11; Bickerstaff, 11-23-20, pp 400/23-401/5; Noakes, 11-24-20, p 922/1-11; cf. DC Exh. 2, ¶ 15; DC Exh. 4, ¶35.) He laughed at the size of defendant Matthews's penis and he described a sex act as "doggy style." (Ciaffone, 11-13-20 at pp 62/24-63/3; 60/1-6; Bickerstaff, 11-23-20, p 403/6-7; Noakes, 11-24-20, p 907/6¬8.) His comment on the evidence was that "it only shows they fucked!" (Ciaffone, 11-13-20 at p 57/1-18; Bickerstaff, 11-23-20, p 400/2-8; cf. DC Exh. 2 ¶12b, 12c [Respondent "probably did use that word"].) He asked the women prosecutors about their height and weight, eyed their bodies and announced his intention to assess Ms. Bickerstaff's muscle mass.

In *Iddings*, the victim reported Judge Iddings's behavior to the Equal Employment Opportunity (EEO). An EEO investigator determined that respondent's behavior "constituted, at a minimum, an offensive, and more probably a hostile working environment." 500 Mich at 1028. Similarly, Respondent created a hostile working environment for Ms. Bickerstaff and Ms. Ciaffone. Respondent's conduct potentially put the State of Michigan at risk for a civil lawsuit from the women, or at a minimum, a complaint with the Civil Rights Division for sexual harassment.

What really distinguishes Respondent from Judge Iddings is what each did after becoming aware that he was the subject of an investigation. Judge Iddings self-reported his misconduct to the Judicial Tenure Commission. In determining that a six-month suspension was adequate, the Michigan Supreme Court recognized that "Respondent is extremely remorseful over these matters, he has co-operated throughout the investigation, and he is desirous of resolving these grievances." *Id* at 1029. Unlike Judge Iddings, Respondent did not self-report his misconduct, and has not expressed an iota of remorse. Quite the opposite, he has argued that there was nothing wrong with what he said and/or did, and has never retracted that position.

The California Commission on Judicial Performance has recognized that "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (Inquiry Concerning Platt (2002) 48 Cal.4th CJP Supp. 227, 248; Ross, 49 Cal.4th CJP Supp. at p. 139.) Respondent's complete failure to appreciate or admit the impropriety of his words and conduct, coupled with the facts that he had been confronted in the past for similar misconduct and that he had been educated on how to behave in the future, suggests that he lacks the capacity to reform. It is a reason he deserves a stronger sanction than Judge Iddings received.

In addition, Judge Iddings did not have a history of misconduct. Respondent, on the other hand, has already been suspended for 60 days, in 2014, for multiple acts of varied misconduct that were unrelated to each other. Before that, he had been confronted and educated by both the SCAO

and the Commission about misconduct that is similar to conduct he committed in this case. He had been cautioned for still other, non-sexually related misconduct. It is clear Respondent is either incapable of conforming his behavior to the expectations of a judge, or is unwilling to do so. That, too, is a strong reason he deserves a more severe sanction than the six-month suspension imposed on Judge Iddings.

ii. The *Servaas* Case.

The other Michigan case that involved sexual harassment and no other misconduct was *In re Honorable Steven R. Servaas*, 484 Mich 63 (2009). On two different occasions, Judge Servaas drew sexually graphic pictures of breasts and of a penis and attached them to court files. He also commented to an employee, while they were at a retirement party, about the small chest size of another employee. The next day, he attempted to apologize to the employee about whose body he had commented. The Supreme Court rejected the Commission's recommendation of removal and instead censured Judge Servaas. In doing so, the Court noted that he had 37 years of unblemished service.

Respondent's conduct was much worse than what Judge Servaas did. His words and actions in face-to-face conversations with the female prosecutors were much more offensive, disrespectful, and discourteous than the pictures Judge Servaas drew and attached to the court files, which were not directed to any particular person. In addition, without anyone prompting him, Judge Servaas attempted to apologize to the female employee for his comment about her body. As already noted, not only has Respondent not apologized for his words and actions, he has doubled down by attempting to justify what he said and did while calling APA Bickerstaff a liar. And while Judge Servaas had 37 years of unblemished service, Respondent is at the other end of the misconduct spectrum. For these reasons, Respondent should be sanctioned much more harshly than was Judge Servaas.

iii. Cases From Outside Michigan.

Although *Iddings* and *Servaas* are the only two Michigan cases that are similar, cases in other states support a strong sanction for a judge's sexually offensive words when that judge has a prior disciplinary history involving similar conduct. In *In the Matter of the Hon. Paul H. Senzer v New York State Commission on Judicial Misconduct*, 35 NY 3d 216 (New York 2000), the State Commission on Judicial Conduct removed Judge Senzer, a part-time judge, from the bench. In his private practice Judge Senzer repeatedly used vulgar language in emails to his clients, in which he repeatedly insulted other participants in the legal process. He used vulgar and sexist terms and used "an intensely degrading and vile gendered slur" to describe opposing counsel. *Id* at p 220. The New York court held that "use of [the] gender-based slur was particularly concerning because such words denigrate a woman's worth and abilities and convey an appearance of gender bias." *Id* at p 219. Also, Judge Senzer had a history of making sarcastic and disrespectful comments, for which he had been cautioned in the past. The New York Court of Appeals concluded:

> "Such a pattern of conduct, engaged in over several months and combined with a prior caution by the Commission for making sarcastic and disrespectful comments to litigants during a court proceeding, constitutes an unacceptable and egregious pattern of injudicious behavior that warrants removal."

Id at 220.

Although the comments for which Respondent was charged did not take place over several months, they were at least as troubling as Judge Senzer's. Like Judge Senzer, Respondent has already been admonished for similar misconduct, and has been suspended for other, unrelated, misconduct. Senzer suggests that a sever sanction is appropriate for Respondent.

In *In the Matter of Robert A. Rand*, 332 P3d 115 (Colorado 2014), the Colorado Supreme Court imposed a public censure, along with the judge's agreement to resign. In that case, Judge Rand made inappropriate jokes and comments and engaged in an ex parte conversations. He stipulated that he had:

(1) joked about the physical weight of the court collection officer;

(2) joked with a female juror about dancing during a break in the trial;

(3) joked in private to his court clerk about the large breasts of a woman appearing before him in court;

(4) commented on the physical appearance of an attorney who appeared regularly in his courtroom;

(5) made comments from the bench about two attorneys appearing before him wearing "pearl necklaces," which one of the attorneys felt had a sexual connotation;

(6) invited a female public defender appearing in his courtroom to share pictures of her vacation with him and his staff in chambers;

(7) during an interview, told a female applicant for clerk about the time when a defendant in the courtroom speculated about the type of panties the clerk was wearing, and asked the applicant how she would handle that type of situation.

The parties also stipulated that, like Respondent has suggested in this case, Judge Rand believed he was attempting to create a friendly atmosphere in his courtroom. (cf. Fishman, 11-24-20, pp 793/25, 794/1-3, 15-16.) They also stipulated, as is demonstrably true in this case as well, that if this was Judge Rand's goal, his attempt was misinterpreted by some. 332 P.3d at p 115. Judge Rand also stipulated that he had committed some other acts of misconduct that were less serious than his inappropriate statements listed above. It is clear he resigned due to his inappropriate comments of a sexual nature, rather than for those less serious acts.

Respondent's comments to the APAs in this case are at least as inappropriate as the comments that resulted in removal of Judge Rand in Colorado and Judge Selzer in New York. Unlike both of those judges, Respondent has not accepted responsibility. In the course of removing a judge from the bench for inappropriate comments, among other things, the California Commission on Judicial Performance observed that "after 10 years on the bench, it can be expected that a judge's words and conduct will have conformed to the demands of the canons." (State of California, Before the Commission on Judicial Performance; Decision and Order Removing Judge John T. Laettner from

Office, p. 73, Case no. 203, November 6, 2019, https://cjp.ca.gov/pub_discipline_and_decisions). Respondent has been on the bench for more than 25 years, and therefore should be expected to adhere even more closely to the canons.

iv. *Hocking* Is Distinguishable.

Respondent relied heavily on *Matter of Hocking*, 451 Mich 1 (1996), to argue that his offensive words were not misconduct. The Commission finds *Hocking* distinguishable.

Hocking involved a judge's statements *on the record*, at a contentious sentencing hearing of a male lawyer, *to explain his reasoning for departure*. The lawyer had been convicted of criminal sexual conduct for assaulting his female client. Judge Hocking departed below the sentence recommended by the sentencing guidelines. The misconduct complaint against him alleged, in part, that his reasons for the downward departure were blatantly improper and sexist, and in part alleged that his treatment of the female prosecutor was rude. In a companion case, Judge Hocking was charged with treating another female attorney intemperately and abusively (not in a sexual manner), and he admitted to being rude and discourteous to her.

Like Respondent, Judge Hocking was accused of violating the canons by being rude and discourteous to one attorney, and persistently failing to treat two attorneys courteously. That is where the similarities end. The facts of *Hocking* were substantially different than the facts in this case, and did not include any of what Respondent did here. Judge Hocking was not alleged to have sexually harassed anyone. He engaged in dated stereotypes about women inviting sexual abuse in the course of explaining his reasons to depart from sentencing guidelines during a public sentence hearing. Although the stereotypes exposed the judiciary to national ridicule, the Court concluded that the inept effort to explain his decision was not misconduct. The Court was moved by the need for a judge to have latitude to explain his reaction to the facts of a case. 451 Mich at 9-14. And, of course, such reasoning for departure is subject to appellate review.

Respondent, on the other hand, directed sexually graphic language off the record at female attorneys appearing before him, in a close personal setting yet under the authority of his office. He deliberately injected sexual language into conversations that otherwise had nothing to do with sex and improperly questioned the female attorneys about their physical appearance. Respondent was not in Judge Hocking's situation. He was not explaining his decision from the bench on the record. What Judge Hocking said to fulfill his duty to explain his sentence is not similar to what Respondent said to APA Bickerstaff, privately, or what he said to APAs Bickerstaff and Ciaffone in chambers.

Likewise, Judge Hocking's remarks at the sentencing hearing did not address personal and private facts about the attorneys and did not involve Judge Hocking eyeing or discussing anyone's bodies or sexual experiences. While the Supreme Court found no misconduct in Judge Hocking's words, the Court made it clear that there are times when things a judge says can be misconduct, even when said in connection with a case: "A judge's comments are not immune from censure simply because they are based on facts adduced at trial or events occurring during trial." 451 Mich at 13. Respondent is not immune or insulated in this case.

The Commission finds this case to be much more similar to *Iddings* and *Servaas,* except worse in certain respects discussed below, and not like *Hocking*. Respondent had face-to-face conversations with and directed at Ms. Bickerstaff and Ms. Ciaffone, and his comments were much more offensive, disrespectful, and discourteous than were the statements in *Hocking* or the pictures that Judge Servaas drew and attached to files. Respondent has not apologized to the women, like Judge Servaas tried to do with one of the women he offended, rather Respondent denied misconduct and called APA Bickerstaff a liar. The Master found Bickerstaff credible, which the Commission adopts. Respondent has not expressed remorse like Judge Iddings did, and, instead, Respondent still believes that he did not do anything inappropriate. Respondent has not tried to correct his behavior nor did he self-report his behavior, like Judge Iddings did.

Thus, in consideration of all the *Brown* factors and additional factors considered by the Court, the Commission concludes public censure and suspension without pay for a period of twelve months is the appropriate and proportionate discipline for Respondent.

X. Conclusion and Recommendation

The Commission concludes Respondent committed misconduct in office by using inappropriate sexually graphic language to female assistant prosecutors on multiple occasions, questioning these female attorneys about their physical appearance, and mistreating them in these regards due to their gender. On the basis of his judicial misconduct, the Commission recommends that Respondent be publicly censured and suspended without pay for a period of twelve months. Respondent's misconduct is comparable to, or worse than, the misconduct in *Iddings* and *Servaas* that caused the Supreme Court to discipline them, and which resulted in the removal of a New York judge and the agreed resignation of a Colorado judge. Censuring and suspending Respondent without pay for a period of twelve months under the circumstances of this case is consistent and proportionate based upon the discipline other judges have received for similarly sexually-based misconduct.

JUDICIAL TENURE COMMISSION

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HON. KAREN FORT HOOD
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HON. JON H. HULSING
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