STATE OF MICHIGAN

IN THE SUPREME COURT

On Review of
the Judicial Tenure Commission

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
Brighton, MI 48116,

Respondent.
_____/

S Ct Docket No. 157930
JTC Formal Complaint No. 99

Lynn H. Helland, Esq. (P32192)
Casimir J. Swastek, Esq. (P42767)
Examiners
Michigan Judicial Tenure Commission
Suite 8-450
3034 W. Grand Boulevard
Detroit, Michigan 48202
(313) 875-5110
HellandL@courts.mi.gov

Dennis C. Kolenda, Esq. (P16129)
Attorney for Respondent
Dickinson Wright PLLC
Suite 1000
200 Ottawa Avenue, NW
Grand Rapids, MI 49503-2427
(616) 336-1034
DKolenda@dickinsonwright.com

BRIEF IN SUPPORT OF RESPONDENT'S PETITION TO REJECT TENURE COMMISSION'S RECOMMENDATION OF DISCIPLINE

(Corrected)

Oral Argument Requested

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On April 8, 2019, the Judicial Tenure Commission (the "Commission" or the "JTC") made written findings of fact and conclusions of law in this matter and, based on those findings and conclusions, recommended that the Honorable Theresa Brennan be removed from office. On April 11, 2019, the JTC complied with MCR 9.223. On May 9, 2019, Judge Brennan filed with this Court a petition to reject the JTC's recommendation. This is a corrected brief in support of that petition. MCR 9.224(A)(1)(d). (A reply brief is likely to also be filed once the JTC responds to this brief.)

I. BASIS FOR JURISDICTION

Subject to one condition, Art VI, § 30(2) of the Michigan Constitution confers on this Court jurisdiction to discipline the State's judges. That condition is that the Court act "[o]n recommendation" of the JTC. Section 30(2) also directs this Court to promulgate implementing rules, which it has done. As noted, the JTC has made a recommendation to discipline Judge Brennan and, in accordance with MCR 9.223, has filed and served that recommendation on her. As a result, this Court has jurisdiction over this matter. MCR 7.303(B)(6).

II. INTRODUCTION TO THE FACTS[1]

In July 2005, Theresa M. Brennan, then a lawyer residing and practicing in Brighton, Michigan, was appointed by then-Michigan Governor Jennifer Granholm to the 53rd District Court, which serves Livingston County, to fill a vacancy created by the resignation of longtime Judge Michael Hegarty. Judge Brennan ran successfully in 2006 for the unexpired portion of Judge Hegarty's term, and she was elected to full terms in 2008 and 2014. Despite vigorous opposition each time, Judge Brennan handily prevailed all three times (pp 1198, lines 20-23; 1199, lines 13-

[1] This brief will not contain an omnibus statement of facts and proceedings of the kind typically found at the beginning of briefs to this Court. Because claims and findings of judicial misconduct are so fact-specific and -intensive, any distance between the analysis of such findings and their underlying facts would likely dilute that analysis. Therefore, the facts should be stated with the analysis, which this brief will do.

15; 1206, lines 1-3).[2] She campaigned hard and was endorsed each time by the local newspaper, the Sheriff, the then-Prosecuting Attorneys and, in 2014, by her Chief Judge (pp 1202, lines 12-16; 1205, lines 2-5, 22-23; 1558, lines 12-15). (The considerable significance of those victories and endorsements will be discussed below.)

In 2007, this Court named Judge Brennan Chief Judge of the 53rd District Court (p 1221, lines 21-23). She had not sought the job (p 1222, lines 19-22). She was re-appointed twice. The first time was without controversy (p 1226, lines 4-7). Not the second time. Early in her second term as Chief Judge, Thomas J. Kizer, Jr., Esq., became, for reasons never revealed, Judge Brennan's nemesis. He sued her twice over how a fellow judge was running the County's drug court; he demanded that the State Court Administrative Office (SCAO) remove her as Chief Judge; and he pressed this Court to remove or at least not reappoint her (p 1228, lines 4-23). The lawsuits were dismissed; SCAO refused to remove her, finding that Judge Brennan "takes the job as Chief Judge seriously and has performed well (87a);" and this Court appointed her to another term as Chief Judge (pp 1229, lines 22-25; 1230, lines 1). At the end of that term, the job was abolished with the adoption of a concurrent jurisdiction plan.

Thereupon, Mr. Kizer turned to filing grievances with the JTC and to instigating others, both lawyers and civilians, to do the same. The first thirty grievances, yes, thirty, which Mr. Kizer filed were all dismissed by the JTC, as were all the grievances filed at his prompting (p 1254, lines 4-24). Those dismissals all recited that they were "pursuant to MCR 9.207(B)(1)" (p 1255, lines 4-7), which means that the dismissals were "outright" without any caution, imposition of conditions, admonition, or private censure. The JTC "deem[ed] [them all to be] without arguable

[2] Unless otherwise indicated, parenthetical references herein to "p(p) ___ lines ___" are to the transcript of the public hearing. Since the volumes are paginated sequentially, references to volumes are not necessary. When full pages are pertinent, lines will not be cited.

merit." JTC IOP 9.207(B-5). One letter of dismissal did, however, encourage Judge Brennan to be more generous with adjournments.

Mr. Kizer's thirty-first grievance led to this case. That grievance repeated allegations made in a letter he had had hand-delivered four years earlier to the new Livingston County Prosecuting Attorney. The grievance also contained allegations of supposed misconduct by Judge Brennan unearthed during her divorce case, which had been filed in December 2015. Mr. Kizer, who did not do divorce work, represented Judge Brennan's husband in that case and used discovery almost exclusively to build his later claims of misconduct. The Livingston County prosecutor had a few months earlier also filed a grievance against Judge Brennan; it was based primarily on a 2013 letter to him from Mr. Kizer. Curiously, Mr. Kizer and the Prosecuting Attorney were not called as witnesses by the Examiners -- it does not appear either was even interviewed -- and neither attended any part of the public hearing before the Master. Mr. Kizer did, however, show up to watch argument before the JTC.

In early March 2009, Judge Brennan had been assigned *People v Kowalski,* 44th Circuit Court Case No. 08-17643-FC ("*Kowalski*"), a double murder case (p 155, lines 14-20). It would be the first felony trial she would handle as either a practitioner or a judge (pp 1247, lines 24-25; 1248, lines 1-8). Judge Brennan was the third judge to handle *Kowalski*. Judge Latreille, the first, had retired on December 31, 2008. Judge David Reader took over until March 9, 2009, when he had reassigned the case to Judge Brennan. His objective was to equalize case loads, Judge Brennan's in particular. She did not have enough work and was anxious for more. She would handle the case through sentencing in March 2013.

Kowalski took so long because of an interlocutory appeal. Mr. Kowalski had confessed to MSP Det. Sgt. Sean Furlong ("Mr. Furlong" because he has since retired) and to another police

officer. Not surprisingly, his counsel tried to suppress the confession. Counsel's argument was, he thought, "excellent." According to him, "some case law" said that the so-called "advice of rights" to Mr. Kowalski was "not . . . good enough." The day before he confessed, Mr. Kowalski had been fully advised of his "*Miranda* rights." When questioned again the next day, Mr. Kowalski was told, "You got . . . the same rights we gave you . . . yesterday" (pp 954, lines 11-25; 955, lines 1-6). What Mr. Kowalski was told by Mr. Furlong, how, what he answered, and how were all indisputable. Their exchanges had been video recorded (pp 953, lines 16-25; 954, lines 1-10). Judge Brennan determined that *Miranda*-by-reference was good enough. That determination was not appealed, (p 960, lines 12-19). The case law turned out to not be favorable.[3]

In addition to a "*Walker* hearing," Judge Brennan also conducted a "*Daubert* hearing," both in July 2009. When Mr. Kowalski or, more precisely, his counsel had disclosed plans to call two experts to attack his confession, both to explain the supposed phenomenon of false confessions, and one of them to also opine on Mr. Kowalski's mental state when he confessed. The prosecution objected, and a lengthy evidentiary hearing followed. Mr. Furlong did not testify. He may have testified at the *Walker* hearing (pp 947, lines 15-16; 958, lines 16-17), but defense counsel did not remember. Judge Brennan excluded both proposed witnesses, as did the Court of Appeals. This Court affirmed the exclusion of the testimony about false confessions. It reversed and remanded for reconsideration by Judge Brennan of the proffered evaluation of Mr. Kowalski's mental state when he confessed. *People v Kowalski*, 492 Mich 105; 821 NW2d 14 (2012). On reconsideration, Judge Brennan allowed the testimony.

The case moved expeditiously once it returned from this Court. Trial was set for January 7, 2013. The Friday before, January 4, 2013, Mr. Kizer faxed a letter to the newly-elected

[3] See *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992), and *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986).

Prosecuting Attorney; it was his fourth day on the job. In that letter, Mr. Kizer asserted that Judge Brennan "has [had] a lengthy social relationship with [Mr.] Furlong and that [he] has even been a social guest in the [J]udge's home;" that "your staff may have been present" when Mr. Furlong "was with the [J]udge in a social setting" (84a); and that "there is the further perception that something more disturbing is involved beneath the surface" (85a). The letter did not specify "that something else." The Prosecuting Attorney turned the letter over to Ms. Pamela Maas, Esq., his chief assistant, who would be trying *Kowalski*. (Interesting, perhaps ironically, Ms. Maas had years earlier "grieved" a judge for discourtesy toward her. This Court rejected that complaint. *In re Hocking*, 451 Mich 1, 8, 14; 546 NW2d 234 [1996].).

Ms. Maas emailed a copy to defense counsel, who asked for a conference with Judge Brennan. Although Mr. Kizer's letter professed concern for Mr. Kowalski, his counsel had not been provided a copy. Copies had been sent only to the then-Chief Justice Robert P. Young, Jr., the Hon. David Reader, the 44th Circuit Court's Chief Judge, Mr. James P. Hughes, the SCAO Regional Administrator for Livingston County, and to the Commander of the Brighton State Police Post (86a). Not to Mr. Kowalski's counsel, however. Why not? Was Mr. Kizer's real motive something else? He was not asked; he never testified.

Judge Brennan made herself available for a conference. While both counsel would later insist that they were not forward enough to ask her if she and Mr. Furlong were having sex (pp 978, lines 24-25; 979, lines 1-6), somebody obviously brought up the subject. According to each iteration of the formal complaint against her, "[d]uring the January 4 conference in chambers," Judge Brennan, "in response" to Mr. Kizer's Letter, denied that she had ever had a sexual relationship with [Mr.] Furlong" (¶ 17[c]). In other words, Mr. Kizer's "perception that something more disturbing [than a social relationship] is involved beneath the surface" was understood by

somebody to refer to sexual relations. Judge Brennan denied the claim, and the Examiners would eventually concede that they had no evidence to the contrary. More about that later.

At his client's request, Mr. Kowalski's counsel asked to make an oral motion to disqualify Judge Brennan. The conference immediately moved to the courtroom; the conference had not been on the record. The basis for the motion was Judge Brennan's acknowledgment that she and Mr. Furlong were "social friends," not more. No actual prejudice was claimed, just an appearance of impropriety based on Mr. Kizer's letter. The motion was denied; the denial was appealed to Judge Reeder; and that "appeal" was heard as soon as counsel could get from Brighton to Howell, where Judge Reeder sat. Judge Reeder, too, refused to disqualify Judge Brennan. Her relationship with Mr. Furlong was "well known by the legal community," including by Judge Reeder, and was of no concern to him. The letter's "something more" was "gossip" (p 368, lines 10-14).

Trial began as scheduled on January 7, 2013.[4] Mr. Kowalski was convicted on January 28, 2013, and sentenced in March to concurrent mandatory terms of life imprisonment without possibility of parole. No post-trial motions were filed. The Court of Appeals affirmed, *People v. Kowalski*, Docket No. 315495, unpublished opinion issued December 2, 2014, and this Court denied leave to appeal. Supreme Court Docket No. 150918, order entered on June 30, 2015. Very early this year, though, the Prosecuting Attorney and Mr. Kowalski's counsel stipulated to vacate the convictions.

According to a press release he issued, the Prosecuting Attorney acted based solely on the Master's report, *The Livingston Post.com* (Dec 20, 2018), which, according to the Prosecutor (154a-155a) established a violation of MCR 2.003(C)(1)(b)(i), not a claim made by the JTC or its

[4] Although the principal claim against Judge Brennan arose out of *Kowalski*, the Examiners presented nothing from or about that case other than the transcripts of the arguments before Judge Brennan and Judge Reeder on Mr. Kowalski's motion to disqualify Judge Brennan.

examiners, or found by the Master. The Master had made one finding pertinent to Mr. Kowalski's case, specifically, that, for the duration of *Kowalski*, Judge Brennan and Mr. Furlong had had a romantic relationship, the "hottest part" of which fell on January 4, 2013 (40a), just days before trial had begun. Except the Examiners had acknowledged that there had been no such relationship until many months after the end of the case. Had the Prosecuting Attorney attended the public hearing, he would have known of the latter, and had he not acted precipitously, he would have learned that the JTC did not sustain the Master's finding of a romance. More about all that later. Suffice to ask now, why was the prosecutor so anxious to run away from Mr. Kowalski's prosecution?

As noted, the Prosecuting Attorney and Mr. Kizer filed grievances against Judge Brennan in February and March, respectively, of 2017. Why the 3-year delay? The JTC undertook an investigation. It sent a humongous inquiry to Judge Brennan on August 31, 2017. Then, multiple so-called 28-day letters followed. All were answered. Finally, a formal complaint was filed on May 4, 2018. The Honorable William J. Giovan was appointed master. A public hearing began on October 1, 2018, was adjourned on October 10, resumed on November 19, and concluded that day. A total of 16 witnesses testified, generating over 1,900 pages of transcript, and thousands of pages of exhibits were submitted. On December 5, 2018, the parties submitted written closing arguments. As noted, the Master filed a report with the JTC on December 20, 2018. The parties appeared before the Commission on March 4, 2019, and, on April 8, 2019, the JTC issued its recommendation to this Court.

III. THE JTC'S FINDINGS

The formal complaint filed against Judge Brennan was amended twice. While each amended complaint withdrew some claims of misconduct, both also added claims. The end result

was a total of 15 claims of misconduct. The Master bought them all. The JTC did not; it found the following misconduct:

- Judge Brennan failed to disclose, and failed to recuse herself because of, a "very close, personal relationship" she supposedly had with Mr. Furlong.
- Judge Brennan failed to disclose, and failed to recuse herself when asked because of, a supposedly "close personal relationship" she had with a local lawyer who occasionally appeared before her and whose colleagues in a small law firm also occasionally appeared before her.
- Judge Brennan destroyed evidence in her divorce case by transferring to another cellphone data from a cellphone one of her then-husband's businesses had provided her and which he insisted be returned to him.
- Judge Brennan made misrepresentations and false statements in some of her rulings, in her communications to the JTC, and in her testimony at the public hearing before the Master.
- Judge Brennan "was persistently impatient, undignified, and discourteous" to some of the attorneys who appeared before her.
- Judge Brennan "require[ed] her [judicial] staff members to perform personal tasks [for her] during work hours."
- Judge Brennan "allow[ed] her staff to work on her 2014 judicial campaign during work hours."
- Judge Brennan "improperly interrupted two depositions that she attended during her [own] divorce case."

Judge Brennan takes issue with all those findings.

While the JTC's decision does not state that any of its claims of misconduct had not been proven by its Examiners, the JTC effectively dismissed, by not making any recommendation regarding, *Simpson*, *infra*, although its decision mentioned, its Complaint's:

- Count VIII, which asserted that Judge Brennan had not been faithful to the law when she declined in *Brisson v Terlecky*, 44th Circuit Court Case No. 17-051753-DP, to enforce MRL 722.716(4).
- Count XVII(b)(i), which asserted a supposed misrepresentation to the JTC of her reason for not signing immediately upon presentation a disqualification order in her own divorce case;

- Count XVII(t), which asserted a misrepresentation by her about a gift by her husband of football tickets to Mr. Furlong.

- Count XVIII(o), which asserted a supposed lie under oath by Judge Brennan to an employee about that employee's job security.

Several other claims of misconduct were completely ignored by the JTC, so those claims, too, cannot now be pursued. What "are not part of the recommendation of the Commission … will not be considered." *In re Simpson*, 500 Mich 533, 551 fn 22; 902 NW2d 363 (2017), quoting *In re Mikesell*, 396 Mich 517, 524-526; 243 NW2d 186 (1976). Specifically:

- Although Count I was devoted overwhelmingly to a claim that Judge Brennan failed to fully disclose a very close relationship she had had during the pendency before her of *Kowalski* with Mr. Furlong, that count also accused Judge Brennan of failing to disclose a relationship she also had had with MSP Det. Sgt. Christopher Corriveau. The JTC's decision contained not one word about that latter relationship.

- Count IV accused Judge Brennan of failing to recuse herself fast enough -- she did recuse herself, just not fast enough, according to the JTC -- from her own divorce case when an ex parte motion to preserve evidence was filed on behalf of her then-husband. (The motion would be denied.) The JTC made no finding or recommendation regarding that claim.

- Count IX accused Judge Brennan of failing in *Brisson v Terlecky* to treat Mr. Brisson's counsel fairly and with courtesy and respect. While, as just noted above, the JTC effectively dismissed Count VIII, which also arose out of that case, its decision makes no mention anywhere of the claim in Count IX of poor treatment of counsel in *Brisson*.

- Count XIII accused Judge Brennan of an in-court misrepresentation to counsel in *Sullivan v Sullivan*, 44th Circuit Court Case No. 14-006162-DO, about the inability of her court to accommodate witness appearances by telephone. The JTC's decision did not address that allegation.

- In Counts IV and XVI, but primarily in Count XVI, Judge Brennan was accused of destroying evidence in violation of the above-mentioned motion in her divorce case to preserve evidence and in violation of MCL 750.483a(5)(a). The JTC's only finding was of the latter.

- After the public hearing, the JTC added to its Second Amended Complaint a Count XV which claimed that Judge Brennan was "unfair and discourteous" to several named court employees. While the Master found that Judge Brennan had been "[conspicuously and] continually abusive to her own staff," the JTC

made no comparable finding and made no recommendation for discipline for her treatment of any staff members.

- Finally, attached to the Examiners' written closing argument to the Master, which he preferred over traditional oral closing arguments, was an appendix in which they claimed multiple false statements by Judge Brennan. The Master also added a supposed misrepresentation. The JTC's decision does not mention that "addition[]" or any other misrepresentation. The JTC adopted the appendix as its own.

MCR 9.215 authorizes both the Examiners and Judge Brennan to lodge objections to the Masters report. She did. They did not. MCR 9.224(A) authorizes a respondent judge to petition this Court to reject or modify the Commission's recommendation, which Judge Brennan has done. In response, the Commission must support its findings, presumably the ones challenged by the respondent judge. Necessarily, therefore, the only matters now before the Court are and can be what are itemized above in the first of the three just-stated lists. The JTC cannot ask the Court to reject or modify any of its findings.

IV. STANDARD OF REVIEW

JTC findings of fact, conclusions of law and recommendations, and its interpretation and application of statutes, court rules and canons of ethics are all subject to de novo review. Such review means "anew; afresh; [or] again," *Dept of Civil Rights ex rel Johnson v Civil Dollar Café*, 441 Mich 110, 116; 490 NW2d 333 (1992), "giv[ing] no deference", with just one inapplicable exception, to the tribunal being reviewed. *Buchanan v Flint City Council*, 231 Mich App 536, 542 fn 3; 586 NW2d 573 (1978). The proscription on deference follows necessarily from the nature of de novo review.

In almost all of its judicial discipline opinions, this Court has held that any discipline recommended by the JTC and the findings of fact and conclusions of law underlying such recommendations are to be assessed "de novo." See, e.g., *In re Gorcyca*, 500 Mich 588, 613; 902 NW2d 827 (2017). But, occasionally, the Court has also said that it "generally will defer to the

JTC's recommendations when they are adequately supported," *In re Chrzanowski*, 465 Mich 468, 488; 636 NW2d 758 (2001), and *In re Brown*, 461 Mich 1291, 1293; 625 NW2d 744 (1999), which is not de novo review. As noted, such review "gives no deference." *Buchanan*, 231 Mich App at 542 fn 3.

What, then, is the standard of review? It cannot be both. De novo is the answer. First, this Court has regularly overturned JTC findings and recommendations,[5] which is the essence of de novo review. Presumably, the Court does not regularly do what it cannot. Of greater significance, though, would be the deleterious effect of deferential review. What saves the constitutionality of combining in the JTC investigative, prosecutorial and adjudicative functions are "three levels of review [by three different decision-makers] . . .: (1) the Master's findings and conclusions . . . (2) the JTC's de novo findings and recommendations, and (3) this Court's de novo review." *Chrzanowski*, 465 Mich at 487 fn 17. Were this Court to defer to the JTC, not only is one level of review eradicated, that one level is the most independent. Therefore, unless and until the judicial discipline process is restructured along the lines of the attorney discipline process, deferential review here would undercut its validity.

That said, in one instance deference by this Court can be different enough to be acceptable. De novo review "does not prevent [the Court] from according proper deference to [a] [M]aster's ability to observe witnesses' demeanor and [to] comment on their credibility." *In re Loyd*, 424 Mich 514, 535; 384 NW2d 9 (1986). Until relatively recently, but decreasingly so, all review, including de novo review, "had necessarily [to] give considerable weight [i.e., deference] to

[5] See *In re Iddings*, 500 Mich 1026; 897 NW2d 169 (2017); *Simpson*, 500 Mich at 533; *In re Gibson*, 497 Mich 858; 852 NW2d 891 (2014); *In re Morrow*, 496 Mich 291; 854 NW2d 89 (2014); *In re Adams*, 494 Mich 162; 494 NW2d 162 (2013); *In re Morrow*, 493 Mich 878; 821 NW2d 677 (2012); *In re Logan*, 486 Mich 1050; 783 NW2d 705 (2010); *In re Gilbert*, 469 Mich 1224; 668 NW2d 892 (2013); *In re Halloran*, 466 Mich 1219; 647 NW2d 505 (2002); *In re Hathaway*, 464 Mich 67; 630 NW2d 850 (2001); *In re Moore*, 464 Mich at 98; 26 NW2d 374 (2001); *In re Bennett*, 403 Mich 178; 267 NW2d 924 (1978); and *In re Mikesell*, 396 Mich 517; 243 NW2d 186 (1976).

credibility determinations" based on assessments of demeanor. *Hathaway*, 464 Mich at 687. Until recently, no such assessments could be reviewed, so review was out of the question.

Except when video-recorded, which is becoming increasingly common, only trial judges and hearing officers, such as masters, experience witness demeanor, so, except when video-recorded, review of such assessments is not possible. ". . . [A] record written in cold type" is not sufficiently revealing. *Roy Constr Co v McCann*, 356 Mich 305, 307; 96 NW2d 757 (1959). See also *Silver Dollar Café*, 441 Mich at 124 (op per Boyle J.). The public hearing in this case was not video-recorded. Therefore, were any of the Master's credibility determinations based on an assessment of demeanor, "considerable" deference would have to be accorded to them. But no such determinations were made by the Master. All his credibility determinations were based on assessments of matters of record, so there need be no deference to them.

V. PRESERVATION OF ISSUES

It is a rule of near-universal applicability that, to be reviewed at all by whatever standard, an issue must have been raised in the tribunal being reviewed and must be supported by the record presented there. *Amorella v Mansanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Regular order and judicial economy require, because they can and often do succeed, efforts at resolving an issue ahead of a time-consuming appeal, and they also require a sufficient record in the tribunal being reviewed, rather than going back to build one.

Review of recommended judicial discipline is different. Such review does not involve either consideration. As noted, such review must be de novo to preserve the validity of the process, *Chrzanowski*, 465 Mich at 487 fn 17, and de novo requires giving no deference to what was previously decided. In other words, what the preservation requirement is designed to avoid must occur in discipline cases. As a result, traditional issue preservation is not only pointless, which should never be required, requiring issue preservation is incompatible with the necessary structure

of our judicial discipline process. Things would be different if judicial discipline were bifurcated as is the attorney discipline process, but this Court consistently refuses to do that. And supplementation here, if need be, of the record in a discipline case is explicitly allowed. See MCR 9.218 and MCR 9.224(E).

VI. ARGUMENT

For reasons explained in detail below, each of the JTC's findings of misconduct by Judge Brennan are erroneous. First to be discussed, however, will be how and why the JTC forfeited its ability to make any recommendations to this Court. Therefore, that body must be reconstituted, and new findings of fact, conclusions of law and recommendations must be made.

A. Because It Very Publicly Prejudged This Case, the JTC Should Have Granted Judge Brennan's Request to Disqualify Itself.

MCR 9.204(A) disqualifies the judge members of the JTC from participating in any proceedings before it when required "for any reason set forth in MCR 2.003(C),"[6] and the JTC's IOP 9.204(A-4) extends the requirement of and the bases for disqualification to its non-judge members. A pre-de-novo-review very public statement that a respondent judge is guilty of serious misconduct "amount[s] to a prejudgment," which always "requires disqualification." *People v Gibson* (on rem), 90 Mich App 792, 796-797; 282 NW2d 483 (1979), *lv den* 401 Mich 868 (1980). "There is perhaps no more basic precept pertaining to the judiciary [of which the JTC is an adjunct] than the one . . . that judges should be . . . free from predisposition in their decision-making," Geyh,

[6] MCR 9.204(A) actually cross-references MCR 2.003(B), but that subsection addresses only who may raise the issue of disqualification; the grounds or reasons for disqualification are itemized in MCR 9.204(C). They were originally listed in subsection (B), but, some years ago, MCR 2.003 was reorganized. To date, however, the cross-reference to MCR 2.003(B) has not been changed to reflect that reorganization. The JTC, first, and, now, this Court may, however, effectively recognize the reorganization. Even the staunchest strict constructionists agree that a statutory or court rule provision may be judicially corrected (1) when the correction is textually simple, (2) the particular text at issue "has no semblance of plausibility," and (3) failing to correct it "would result in a disposition that no reasonable person could approve." Scalia & Garner, *infra*, at pp 234-236.

et al., *Judicial Conduct and Ethics* (5th ed), §4.01, p 4-2, which is why public expressions of prejudgment require disqualification. *Gibson, supra*.

Each member of the Commission, other than Judge Cortes and Mr. Burdick, who had recused themselves for other reasons, very publicly announced before hearing Judge Brennan's objections to the Master's Report that she was guilty. On November 21, 2018, the Examiners filed a motion with the JTC asking it to petition this Court for Judge Brennan's immediate suspension without pay. Citing to and quoting from the transcript of that hearing,[7] the Examiners contended that Judge Brennan had tampered with evidence and had perjured herself. Judge Brennan responded that petitioning for her immediate suspension "will be [the JTC] telling the Master [who would not issue his report for nearly another month] . . . that it considers Judge Brennan guilty …[,] thereby removing the Master's [essential] independence [*Chrzanowski* 465 Mich at 487, fn 17] from the process."

On December 11, 2018, the JTC denied the Examiners' motion. The effectuating order did not explain why, but a subsequent order did. On December 20, 2018, the Master issued his report. At its meeting on January 7, 2009, the JTC *sua sponte* reconsidered its denial of the Examiners' motion and, on reconsideration, granted the motion. But the JTC declined to itself file a petition, so as not to be seen as expressing any opinion about evidence yet to be reviewed by it. Indeed, the JTC took pains to "express no opinion regarding the Master's report or the substance and/or merits of the Examiners' motion for interim suspension." Doing so would conflict with its role "as an adjudicative body that will hear arguments on the Master's report."

A petition was filed with this Court on January 15, 2019, by the Commission's Deputy Executive Director. For some unstated reason, he, not the Examiners, had been directed to do so.

[7] There had been a month's hiatus in the hearing before it concluded on November 19, giving the court reporter time to prepare transcripts.

Perhaps, they were too busy. In large part, that petition tracked what the Examiners' motion to the JTC had asserted about Judge Brennan's supposed tampering with evidence and perjury about that supposed tampering. The petition also made, although not included in the authorization by the JTC, claims that evidence at the public hearing had also proven a pattern of lies, misrepresentations and concealment by her regarding her relationship with Mr. Furlong during the pendency of *Kowalski*.

The JTC's petition was denied by this Court on January 25, 2019. Its jurisdiction had not been properly invoked, ruled the Court. Because the JTC had eschewed having the petition filed on its behalf and had expressed no opinion about its substance, there was "no recommendation from the [C]omission." Disciplinary action can be taken against a judge by this Court only "on recommendation" of the JTC. On February 4, 2019, another petition was filed, with two changes. The re-filed petition was signed by the Chairperson of the Commission, and, by doing so, the Commission asserted that the petition had merit. MCR 2.114(D)(2). Earlier in the day, the Commission, sans Judge Cortes, had "unanimously resolve[d] to file a petition, a copy of which had been attached," so it necessarily follows that all the other commissioners had read the petition and concurred with its substance.

The JTC's petition, especially in the context of the events leading up to its filing, compels the conclusion that, just as had the trial judge in *Gibson*, all the commissioners who would sit in judgment of her a month later prejudged the case against Judge Brennan. *Gibson* was one of two cases brought against the perpetrators of an armed robbery. One was convicted after a bench trial. Explaining his verdict, the judge stated, "There is no question in the Court's mind that this was done by Mr. Peete and Mr. Gibson, his companion . . ." 90 Mich App at 795. Mr. Gibson was then

tried by the same judge?[8] His just-quoted statement "amounted to a prejudgment" of Mr. Gibson's case, ruled the Court of Appeals, which prejudgment required the judge to have *sua sponte* disqualified himself and, because he did not, required a new trial.

This matter is indistinguishable from *Gibson*. The JTC's petition to this Court began with a declaration that a formal hearing had just concluded. Then, the petition asserted, multiple times, that the evidence at that hearing had "established" very serious misconduct by Judge Brennan. Its words reflected findings of fact by the JTC which can only be made after de novo review. Using those words in a very public filing, which the state's media picked up and reported, before de novo review "amount[ed] to a [*Gibson*-style] prejudgment" of that review. Those reports were fully anticipatable because of the media's incessant coverage of this case. Because the petition had been read and approved by all the Commissioners, the words of prejudgment are theirs.

At first glance, two things about this matter are unique and appear to distinguish it from *Gibson*. Both are just apparent, however, not real, so neither is a significant distinction. In law, as in all other endeavors, first appearances can be deceiving. First, this Court told the Commission that, if it wished to proceed, not only did it have to refile a petition in its own name, it had to itself express an opinion on the petition's merits, which had not been done. This Court did not, however, require the JTC to prejudge the claims of misconduct by Judge Brennan. To refile, the Commission had to express an opinion regarding "the substance and/or the merits," but it was not required to file another petition doing so. The JTC chose to file again, so it chose to prejudge what it would have to later adjudicate.

Second, replacing the JTC would have been more cumbersome than replacing the trial judge in *Gibson*. Assigning a visiting judge would have been inconvenient, but not very.

[8] The cases were pursued separately because the other defendant had confessed. Stricter severance requirements applied back then.

Requiring all but two of the Commissioners to resign and be replaced would be cumbersome, admittedly, but only mechanically, not substantively, and is specifically authorized by MCR 9.202(C)(2). Therefore, the Rule of Necessity does not apply. That rule allows a tribunal to hear a matter from which it would otherwise be disqualified when, but only when, the necessity is "imperative" because "there are no other means or tribunal to hear and determine the matter." *Higer v Hansen*, 67 Idaho 45; 170 P2d 411, 413 (1946). See also *United States v Will*, 449 US 200, 213-215; 101 S Ct 471; 66 L Ed 2d 392 (1980). There is no such imperative in this case. The Commissioners could have resigned and been replaced, MCR 9.202(C), and a reconstituted Commission could then have acted. That is what Judge Brennan requested.

Nor, finally, does MCR 9.219's authorizing the JTC to petition this Court for an interim suspension mean that doing so cannot ever be a disqualifying prejudgment because every such petition will entail a pre-review assessment of the evidence. That argument was made to the Commission, so it can be expected here. Petitions for interim suspension are typically filed and interim suspensions are ordered, when they are ordered, at the very beginning of cases, well before a formal hearing, not afterwards. Filing a petition then cannot be deemed a pre-judgment of de novo review by the JTC because there is not yet anything to review. In that situation, it cannot be contended in support of a petition, as the JTC did in this case, that "misconduct [has been] established." At most, misconduct is only alleged, far from even arguably proven, which is much different.

Furthermore, in the usual situation of an early petition for interim suspension, it is realistic, not just a legal fiction, to believe that, after a yet-to-happen formal hearing, the JTC might conclude that things developed differently than had been anticipated, so that what was said might be misconduct did not turn out to be or was not as serious as thought. In other words, it is realistic to

believe that an early petition for interim suspension is not a prejudgment, but just a preliminary call, not unlike an early preliminary injunction which does not pan out on further development. Such a perception is not realistic, however, when an interim suspension is sought after proofs have been presented and very shortly before de novo review by the JTC. Such an appearance is the essence of prejudgment.

Something else unique about this particular case should preclude invocation of the Rule of Necessity. When that rule has been triggered, the disqualifying circumstance was not of the judge's or the tribunal's creation. It was a status which the judge(s) happened to hold, nothing any of them did. In *Will*, for example, the Congress "adjusted" downward the salaries of all Federal judges, so that, by deciding the case, the justices would decide their own salaries. In *Higer*, the Idaho Supreme Court was asked to determine the validity of slowing a pay raise for the State's judges, including them. The members of those courts just happened to find themselves, by no doing of theirs, affected because they were in office. In this matter, the situation which disqualified the JTC was not only created by the JTC, it was created after the JTC had been warned by Judge Brennan. It is axiomatic that a problem cannot be created and then used to sidestep that problem.

B. The JTC Erred by Ignoring How Its Charges and the Evidence Against Judge Brennan May Have Been Affected by Sexism.

In her brief in support of her objections to the Master's report, Judge Brennan asked the JTC to consider the very real prospect that its claims of misconduct and the evidence presented by the Examiners were infected by sexism yet prevailing in our customs and institutions, including in the practice of law and even in the courts. Specifically:

a. What is accepted, and even complimented, as zealous advocacy by male attorneys is regularly seen as abrasive and criticized in women attorneys. ABA Commission on Women in

the Profession, *The Unfinished Agenda* (2001), pp 6, 15, 16.[9] It follows that women judges tend to be criticized for strong and decisive actions for which male judges garner praise. *ABA*, at p 27. Does that explain the complaints about Judge Brennan's demeanor? Wasn't she suitably feminine and lady-like?

b. The performance of female judges is also commonly held to higher standards, with the result that their competence is "weighted consistently lower than their male counterparts." *ABA*, at 15, 27. Does that explain, or at least call into question, the testimony accepted by the JTC that Judge Brennan did not care enough to do her job as well as other judges?

c. The credibility of female judges "is often discounted," and what they say is ignored or is trivialized. *ABA*, at 9, 21. Does that explain why so much of what Judge Brennan said was found, almost reflexively, to be untrue?

d. Because the women justices of the United States Supreme Court are consistently interrupted during argument because of their gender "far more often" than are the men, Jacobi, "Justice Interrupted: The Effect Of Gender, Ideology, and Seniority at Supreme Court Oral Arguments," 103 Va L Rev 1379, 1390, 1462-1463 (October 2017), female trial judges are more likely to be interrupted even more often. If gender bias is strong enough, which it is, to persist in the most august of settings in front of the most accomplished of women, *Id.*, at pp 1391, 1405, it is more likely to manifest itself in lesser settings, like Judge Brennan's small town courtroom. Are not frequent interruptions likely to prompt reactions and attempts to assert control which provoke complaints about demeanor?

e. Care must also be taken to avoid maintaining any vestige of the medieval notion which once precluded women from even practicing law because they had no legal existence

[9] See also Elsesser, "Female Lawyers Face Widespread Gender Bias, According To New Study," *Forbes* (Oct 1, 2018); and "Female Lawyers Still See Sexism in the Courtroom," *The Atlantic* (Sept 2018).

separate from their husbands, *Bradwell v Illinois*, 83 US (16 Wall) 130, 141; 21 L Ed 442 (1873), quoted in *Adair v Dept of Education*, 474 Mich 1027, 1052; 709 NW2d 567, 588-589 (op per Corrigan, J.). Specifically, married judges, most often wives, cannot be saddled with a disqualifying disability arising out of their husbands' business activities when, as in this case, the judge had no involvement with those activities?

f. Finally, the courts of this State have rejected the long-enduring belief that sexual assaults and sexual advances were either invited or not unwanted if the recipient did not fight back, maintained contact with the aggressor afterwards, or stayed on good terms with the aggressor. That belief is, we now know, a demeaning excuse, not fact. *People v Christel*, 449 Mich 508; 537 NW2d 857 (1995); and *People v Peterson*, 450 Mich 349, 373-374; 537 NW2d 857 (1995). See also Dewan, "Why Women Can Take Years To Come Forward With Sexual Assault Allegations," *The New York Times* (09/18/2018).

Not only did it give short shrift to the prospect of sexism in this case, the JTC trivialized Judge Brennan's arguments, which is itself misogynistic. She had complained that the Master, using multiple tropes of sexism, had treated an unwanted rejected advance as proof of a sexual relationship. The JTC's only response was to characterize as "unfortunate" the Master's choice of one word in describing what he found, not why he made that choice, and to sidestep as irrelevant whether Judge Brennan's relationship during *Kowalski* with Mr. Furlong was "romantic" or "simply a close friendship." Hardly, as will soon be demonstrated. The one is disqualifying; the other is not.

Supposedly, the Michigan judiciary is "committed to eradicating sexual stereotypes," *In re Hocking*, 451 Mich at 12, so that possible manifestations must be roundly rejected. If not rejected and fully reconsidered, the JTC's dodging the issue might be taken as a "pusillanimous showing

on the field of battle," to borrow a phrase from Hamilton, *The Mantle of Command*, *FDR at War*, *1941-1942* (2016 ed), p 207, which will make a mockery of that commitment. This Court must show leadership on the issue. As a result, this matter must be remanded to the JTC for reconsideration of its recommendation after an honest explanation of why, if that is the case, gender bias did not occur in the case. Until that is done, the JTC's recommendation is too tainted to be considered, and, without an untainted recommendation, this Court has nothing to review.

C. Judge Brennan Did Not Have a Relationship With a Police Detective Involved In *Kowalski* Which She Failed to Adequately Disclose.

The JTC's first finding of misconduct by Judge Brennan is that, when assigned the *Kowalski* case in early March 2009, Judge Brennan failed to inform counsel in the case that, before then, she "had [been] persuaded" by one of the police detectives involved in the case "of Mr. Kowalski's guilt" (p 6). Then, the JTC found that, throughout *Kowalski*, Judge Brennan had had "a very close, personal relationship," which might well have been sexual, which it concededly was not, with that detective, which relationship she did not adequately disclose. She disclosed it, the JTC concedes, but not adequately, it found.

1. What Really Happened.

It is demeaning of the judicial discipline process that the JTC is intransigent, refusing to let go of the unfounded belief that Judge Brennan and Mr. Furlong had a sexual affair throughout *Kowalski*. All three of the JTC's complaints, including the one filed after the public hearing, assert that Judge Brennan denied on January 4, 2013, the day the issue was first raised and just a few days before trial began in *Kowalski*, an allegation in a letter delivered to the prosecutor of "ever [having] had a sexual relationship" with Mr. Furlong (¶ 17[c]). Why include that denial if the JTC thought it to be true, which the Examiners would eventually concede it was, except to intimate otherwise? Everything else the JTC alleged in those complaints was critical of Judge Brennan.

The JTC appears to want to taint review of this case with innuendo of what it cannot prove. Yes, Mr. Furlong kissed Judge Brennan back in 2007, but that encounter not only "startled" her, it "freak [her] out" to the extent that she did not talk to Mr. Furlong for weeks (pp 495, lines 11-20; 496, line 1). Obviously, therefore, the kiss "didn't [reflect or] mean ... a start of a relationship, or anything of the sort" (p 495, lines 21-25). It was an unwanted advance, pure and simple, said the key JTC witness. Likewise, how could the JTC ignore that a month before the public hearing its Examiners acknowledged "not claiming that we will offer [which they never did] evidence of a sexual relationship between Judge Brennan and Mr. Furlong before the time that matters", which was during *Kowalski*]? (Hrg Tr 9/19/2018, p 52, lines 22-25)

Judge Brennan and Mr. Furlong did not have a sexual relationship until well after her involvement with *Kowalski* had ended, which was in early March 2013. Judge Brennan and Mr. Furlong did not have their first romantic kiss until 2014. They did not have sex until later that year (90a). The Examiners did not dispute that testimony. In fact, the testimony was in a deposition they submitted at the public hearing. Therefore, if "clearly a very close, personal relationship with [Mr.] Furlong" is code, which it looks in context to be, for a sexual relationship, the Commission is not only dead wrong, it is deliberately so. Tough words, to be sure, but that is what it looks like.

Even if "a clearly very close, personal relationship" was not meant by the JTC to insinuate a sexual relationship, that finding is still incorrect. In 2007 and 2008, well before *Kowalski* was assigned to Judge Brennan, and in 2009, when she was tasked with determining the admissibility of Mr. Kowalski's confession and proposed evidence challenging its veracity, Mr. Furlong was in a sexual relationship with Ms. Shawn Ryan, one of the JTC's principal witnesses (pp 523, lines 24-25; 524, lines 1-3; 1809, lines 8-12).[10] Unless he was a Lothario and a cad, which no one ever

[10] Ms. Ryan admitted the sex, but denied it was a sexual "relationship." She bizarrely insisted that to qualify as a sexual relationship, sex must be open and notorious, not secret, as was her two years of sex with Mr. Furlong.

claimed, that relationship likely precludes finding a simultaneous very close, personal relationship between Judge Brennan and Mr. Furlong, which means that a latter such relationship was not proven by a preponderance.

Further undermining, if not outright rebutting, the JTC's finding of a very close, personal relationship between Judge Brennan and Mr. Furlong before her ruling on Mr. Kowalski's confession is Ms. Ryan's testimony that, late in of 2009, the Judge was trying to set Mr. Furlong up, first with her sister, and, then, with Ms. Ryan herself (pp 1764, lines 19-25; 1765, lines 1-11, 18-20; 1803, lines 12-19; 1804, lines 17-19). Those efforts at matchmaking are far from indicative of a very close Brennan-Furlong relationship. Those efforts bespoke a lack of any interest beyond at most a casual friendship by Judge Brennan in Mr. Furlong.

Furthermore, as late as May 2011, Ms. Ryan still harbored a significant sexual interest in Mr. Furlong. That was evident when she exposed herself to him (p 561, lines 12-23) and danced naked "for his benefit" (pp 1430, lines 19-22; 1431, lines 23-24). At first, Ms. Ryan adamantly denied any such behavior (p 519, lines 13-22), but, soon, she "clarifi[ed]" her testimony by splitting hairs about when and where precisely the shimmying incident had occurred, not that it had occurred (p 561, line 15). Whether Ms. Ryan had lied initially or had just been imprecise, the question remains, Who was then very close to Mr. Furlong? Ms. Ryan or Judge Brennan? So, it cannot be concluded by a preponderance that, even in mid-2011, Judge Brennan and Mr. Furlong also were in very close, personal relationship.

What relationship, then, was proven during the time, which was the summer of 2009, Judge Brennan presided over and decided pre-trial motions in *Kowalski*? A purely professional relationship at first; then, an ordinary social friendship, not more. Early in her tenure, Mr. Furlong came to Judge Brennan's chambers to apply for warrants. But so did officers from several other

police departments near Brighton. She was the only judge in Brighton. In 2007, Judge Brennan got invited by Ms. Ryan, an assistant prosecutor, to meet her and others after work for a drink. Thereafter, a fluid group would get together on an ad hoc basis, mostly for a drink after work (p 480, lines 9-11). The group might be sizeable, consisting of Ms. Ryan, other prosecutors and multiple police officers, both state and federal. The attendees might be few, just Ms. Ryan, the Judge, Mr. Furlong and Mr. Corriveau, or some combination. (pp 476, lines 1-14; 477, lines 7-8, 17-21; 480, lines 8-14; 482, lines 23-25).

In time, venues were added. As the Master found, Mr. Furlong was "a dinner guest at Judge Brennan's home" and went Christmas shopping with Judge Brennan and Ms. Ryan. Both findings were not inaccurate, but neither were completely accurate. Prior to 2013, Mr. Furlong had never been, as intimated, alone in the Judge's home. Judge Brennan liked to cook and entertain. Occasionally, with the assistance of Ms. Kim Morrison, another judge's recorder, who had been a professional chef, the Judge would host dinner parties for several. Mr. Furlong tended to be included, as did Mr. Corriveau, Ms. Ryan and others. Mr. Furlong never visited the judge's home alone with her until well after *Kowalski*.

The Christmas shopping trips were to Somsert Mall with Ms. Ryan. The first trip was planned by Ms. Ryan. She, not Judge Brennan, invited Mr. Furlong. Because the trio had a good time, the trips were repeated a couple more times. Also, beginning in 2009, Judge Brennan and her husband allowed Mr. Furlong to use their cottage for a week each year. Judge Brennan was not present. Mr. Furlong brought his sons. Mr. Furlong did visit the cottage once when the Judge was there, but so were several others, including her husband. The Judge never visited his apartment until after *Kowalski*.

None of the above establishes, or even suggests, a close personal relationship, let alone a romance or even a budding romance. Only one-on-one encounters can do that. It was not until late 2012 that Ms. Ryan saw "for the first time" what she characterized as "a look of affection" by Judge Brennan toward Mr. Furlong (pp 497, lines 18-25; 498, lines 1-18). Although Ms. Ryan remained a close friend of the Judge's until May 2013 (pp 498, lines 21-25; 499; 500, lines 1-14), she did not testify to seeing anything else possibly indicative of feelings for Mr. Furlong until May 2013. That was well after *Kowalski*. Isn't the most likely explanation that there was nothing to see, so that there was no relationship to deduce, other than a casual friendship?

After her involvement with *Kowalski*, Judge Brennan did get emotional once when told by her husband that "he didn't want her to talk with [Mr.] Furlong anymore" (pp 595, lines 24-25; 596, lines 1-10) or by Mr. Furlong that "he had decided that they can't be friends anymore" (pp 1401, lines 23-25; 1402, line 1). Memories differed. According to her secretary, the Judge "was curled up in a ball on the floor of her office ... very, very upset" (p 593, lines 18-21). According to a local lawyer, who was a friend of the Judge's, she was "tearful" that day, but had not "[lost] her composure" (p 1401, lines 16-22). The JTC found that Judge Brennan was "so severely [distressed] that she was unable to take the bench ..." (p 7), even though the testimony about her being "very, very upset" had been withdrawn by the secretary. Judge Brennan just looked like she had been "crying" (p 1852, lines 15-21).

Neither of the just-described occurrences -- the late 2012 look of affection, or Judge Brennan's and Mr. Furlong's April 2013 tears -- do more than slightly suggest, hence, proving nothing by a preponderance, a close, personal relationship during a relevant time period. Unless modified by "deep," "intense," or some like adjective, "affection" is "a gentle feeling of fondness

or liking."[11] *The Oxford English Dictionary* (2d ed), p 213. That is not a relationship likely to be very close. Maybe, Ms. Ryan meant something else, but it is unprincipled speculation to contend, let alone conclude, that she spoke in idiosyncratic English. And it is more unprincipled speculation to conclude that the first-time look in late 2012 of supposed fondness had blossomed into very close relationship in just a matter of days, by January 4, 2013, when trial in *Kowalski* had started.

Nor does whatever happened on April 22, 2013, prove "severe[] distress" as described by Ms. Cox -- Ms. Cox claimed to have lied to Judge Brennan for ten years, so why should she be believed in 2018? Or why should the moist eyes seen by Ms. Pollesh prove "a very close personal relationship with [Mr.] Furlong during the relevant time period", March 2009 into early March 2013. The incident proves some kind of a relationship on April 22, 2013, but what kind and when? The incident was likely probative of a relationship before then, but when did it begin? Again, we can only speculate. Judge Brennan testified that she fell in love with Mr. Furlong only months later. So did he. No one testified otherwise. Ms. Ryan was then still very close with Judge Brennan, but she said nothing about an intense relationship. Why not? Because there was none? The JTC concluded, nonetheless, that Judge Brennan and Mr. Furlong were in love on April 22, 2013, and for months beforehand. That was speculative.

That leaves to be discussed and analyzed Judge Brennan's cell phone records. Yes, Judge Brennan and Mr. Furlong exchanged some 1500 phone calls, the JTC found (6a), but that happened

[11] During her decade with Judge Brennan, Ms. Cox routinely sent the Judge cards with pleasant sentiments and, sometimes, with laudatory handwritten notes (Ex 34-42A, 45, 46, 54, 57, 60). For example, "Congratulation. That'll teach you to worry so much" (p 638, lines 19-21). "Hang in there. Every flower that ever bloomed had to go through a whole lot of dirt to get there" (p 639, lines 11-18). "Don't worry. Everything will pan out. Feel better soon. You'll kick his ass" (p 642, lines 2-7). "Fondly, your friend Kristy" (p 642, lines 20-24). And "The world is a better place because of you" (p 644, lines 7-16). Every year for the Judge's birthday, Ms. Cox decorated the office and brought a dessert. For Boss's Day, Ms. Cox took the Judge out to lunch. Every Christmas, Ms. Cox gave the Judge multiple gifts (p 1264, lies 4-25). When asked about those gestures of good will, Ms. Cox characterized them as "B.S." intended to keep a lousy boss content (pp 638, lines 22-24; 639, lines 24-25; 640, lines 1-2, 14-16; 643, line 1). Is that testimony why the JTC did not believe that Ms. Cox had been mistreated?

between July 2008 and January 2013 (*Id.*), a period of 54 months, a span the JTC glosses over. That number of calls over that length of time works out to less than one call a day. Also, the approximately 400 texts exchanged from 2010 until the start of trial in *Kowalski* in 2013 (6a) were of even lesser frequency. No evidence was presented that either frequency is at all unusual. No evidence is not proof of anything, so, once again the JTC speculated.

"[S]everal thousand communications [both phone calls and texts]" were proven in *Simpson*, 500 Mich at 539, to have been exchanged over just five months, many times more than were proven in this case and at a much greater frequency. Yet the JTC did not contend in *Simpson* and this Court did not find that that avalanche of communications proved any relationship between Judge Simpson and an intern in his office other than a personal relationship, nothing more precise. *Id.*, at 554, fn 25. This Court and the JTC may have had suspicions, but neither acted on those suspicions. Suspicions are not proofs, let alone proof by preponderance. Why should far fewer calls over a far longer time in this case prove more?

At the public hearing, the Examiners submitted an exhibit which purported to summarize Judge Brennan's cell phone records and to demonstrate that she exchanged far more calls with Mr. Furlong than with anyone else for more time total, establishing, supposedly, "a very close, personal relationship" with him. But when Judge Brennan testified why the summary was misleadingly incomplete (pp 172-173), the Examiners re-examined the underlying records and significantly revised their summary. It turned out that Judge Brennan had exchanged fewer phone calls with Mr. Furlong than she had with her sister and virtually as many as she had exchanged with Ms. Ryan and for comparable durations (151a).

Even if Judge Brennan had a very close relationship with her sister, it was not of the kind the JTC claimed she had with Mr. Furlong, diluting the probity of comparing her phone traffic

with him. Unquestionably, however, Judge Brennan's relationship with Ms. Ryan was much less. The two "were friends" who "share[d] a social circle" (p 476, lines 11-13), not more. Therefore, the frequency of calls between Judge Brennan and Mr. Furlong didn't prove more than a comparable friendship, just as Judge Brennan had disclosed to counsel in *Kowalski*, except to those who want it more to prove.

The revised summary also revealed that the frequency of calls between Judge Brennan and her then-husband was greater, even though their relationship had long been strained. Mr. Root had asked for a divorce on the honeymoon (p 1288, lines 3-9) and repeatedly left Judge Brennan, demanding as the condition of his return that she be a "submissive wife who stayed in her place" (p 1291, lines 13-21). That behavior hardly nurtured a "very close relationship", so the large number of calls to Mr. Root by the Judge cannot have indicated such a relationship. So, how can a lesser number of calls to Mr. Furlong have indicated such a relationship with him? The most significant revelation was that Judge Brennan talked a lot on the phone to a lot of people, so that her phone calls to Mr. Furlong reveal nothing really unique. He really was not other than another person she frequently called.

2. Judge Brennan's Relationship With Mr. Furlong Need Not Have Been Disclosed Any Sooner or Any More Particularly.

Had Judge Brennan been engaged in a sexual relationship with Mr. Furlong during *Kowalski*, she would have had to inform counsel and to have recused herself on request. *In re McCree*, 495 Mich 51; 845 NW2d 458 (2014); *Chrzanowski*, *supra*; and *In re Templin*, 432 Mich 1220; 436 NW2d 663 (1989). See also *In re Mazur*, 498 Mich 923; 871 NW2d 526 (2015). (Only once, however, has the sanction of removal been imposed. *McCree*. Public censure and suspicion were deemed sufficient the other times.) But, the Examiners conceded in the run-up to the public hearing that they had no evidence of such a relationship during *Kowalski*, and the Master accepted

that concession. So that fact is settled. *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 277 (1963).

Despite so much ink keeping alive the non-issue of sex, the JTC didn't bother to explain its finding of a disclosure requirement. All it did was consign to a footnote a ruling that an independent appearance of impropriety standard had been added to MCR 2.003(C) in 2009. Presumably, therefore, the JTC is recommending that Judge Brennan be found guilty of creating such an appearance by not disclosing her well known, but not sexual relationship with Mr. Furlong. By citing to no other provision of MCR 2.003, it is compelling that no other provision was considered to have been violated. As noted earlier, this Court can evaluate only findings and recommendations which the JTC has "adequately articulat[ed]." *Simpson*, 500 Mich at 558. Since only the appearance of impropriety standard was mentioned, only it can be considered to have been articulated, and, frankly, it does not apply.

In the case of *In re Haley*, 476 Mich 180, 194; 720 NW 2d 246 (2006), this Court, relying on *Adair v Michigan*, 474 Mich 1027; 709 NW2d 567 (2006), "decline[d] to create an independent 'appearance of impropriety' standard to judge [a] respondent's behavior when there is an express, controlling a judicial canon [or court rule]," which there is in this case. It is MCR 2.003. That standard can apply, ruled this Court, only "where there are no specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct." There is a rule, namely: MCR 2.003, which pertains to the subject of disqualification. It delineates a host of situations which work a disqualification, and, by necessary inference, when disqualification is not required. *People v Kimble*, 470 Mich 305, 311; 684 NW2d 699 (2004). No provision of MCR 2.003 applies to Mr. Furlong's situation, so that silence has meaning and is not to be

"countermanded by the vagaries of an 'appearance of impropriety' standard." *Adair*, 474 Mich at 1039.

The JTC sidestepped *Haley* and *Adair* by holding that a 2009 amendment to MCR 2.003(C), by adding an appearance of impropriety standard, overruled those cases. Of course, this Court can overrule prior decisions, including by court rule. But it does so openly. The order adopting MCR 2.003(C)(1)(b)(ii) does not say a word about *Haley* or *Adair*. The justices who decided those cases (Justices Taylor, Young, Markman and Corrigan) would not have adopted without a word of explanation, a rule which they had recently excoriated as "vague," as setting "an ethical snare," as "draconian," with results against which "no [judge or] justice could effectively defend himself or herself," as "politiciz[ing] and introduc[ing] gamesmanship into the judicial process," as leading to a "deepening paralysis" of the courts, *Adair*, 474 Mich at 1029-1030, and as "standardless and amorphous." *Haley*, 476 Mich at 197. Therefore, until this Court says so explicitly, the new rule cannot be read to erase *Adair* and *Haley*.

Were MCR 2.003(C)(1)(b)(ii) utterly incompatible with *Adair* and *Haley*, their silent repeal would have to be inferred. But that subrule is not incompatible with those cases. When nothing else in the subrule pertains to potential disqualification, the new subrule fills in. But, when some portions of the rule address a subject in general, but not a specifically, traditional construction says that the situation was excluded, so that looking to MCR 2.003(C)(1)(b)(ii) goes too far by overruling another subpart. When there is complete silence, not silence which in context results in an applicable necessary corollary, looking to MCR 2.003(C)(1)(b)(ii) overturns nothing, so looking to it is acceptable. Multiple subparts of MCR 2.003(C) address judges' relations with others. Judge Brennan's relationship with Mr. Furlong is not included. Therefore, it cannot be added by the amorphous appearance standard.

And even if the standard is available, there was no appearance-of-impropriety. As just noted, the JTC's multiple complaints never claimed, the Examiners never argued, and, in the end, the JTC did not find that any other provision of MCR 2.003(C) was offended. Had Judge Brennan and Mr. Furlong been having sex during *Kowalski*, there likely would have been a forbidden appearance. *Chrzanowski*, 465 Mich at 468. But that that did not happen. Their sexual relationship did not begin until long after *Kowalski*. At the time she dealt in July 2009 with Mr. Kowalski's confession, Judge Brennan and Mr. Furlong had just become social friends in a group setting, not individually.

While *Kowalski* worked its way through the appellate courts and back to Judge Brennan, which took three-plus years, her relationship with Mr. Furlong remained social, not more. There was talk about Judge Brennan and Mr. Furlong going to lunch together (p 484, lines 11-12), but always with others (p 484, lines 13-17). While the two attended a few sporting events, it was always with others, not as a couple. The Examiners conceded that no evidence showed them dining together and that the evidence "does not show" that the two of them "were alone at a sporting event before the *Kowalski* trial" (134a, fn 7). Dinner remained group events (pp 486-487; 491, lines 8-15). And their phone traffic did not prove an "intensely close" relationship.

Tellingly, Judge Reader did not consider the former disqualifying. When asked to take Judge Brennan off *Kowalski* because she had acknowledged that she was "in fact . . . [a] social friend[]" with Mr. Furlong (lines 24-25; lines 1-4, lines 1-4), which supposedly created an appearance of impropriety (lines 5-6), Judge Reader declined, explaining:

> "I've had people that I've known that are on the witness stand. I have, uh, a Friend of the Court officer, I have probation agents I see all the time that I've been in social settings with. They'll testify regarding probation violations by defendants. That's, judges cannot live in a crystal enclosed glass and be totally cloistered. We're not

> monks. We're not, we're judges. And we, you know, are involved in the community.
>
> . . . The only allegations with respect to Judge Brennan . . . is that she has a social friendship with two officers, two state police officers who will be witnesses . . . She acknowledged that on the record. She freely admitted that . . . She addressed that the heart of the complaint was of her being friends with two of the witnesses . . . I've got to say that *those friendships are really, really not hidden to the community*. I think it is well known by the legal community here in this, in this area. I would indicate that, uh, perhaps myself, *I was personally aware of that and quite frankly, didn't think anything of it*.
>
> . . . Given the fact that it, it is and has been no secret in the legal community here of a friendship . . . with several of the officers -- and there are other officers there are attorneys that, uh, she has socialized with. And again, that is well known within this community. I have to agree with . . . Judge Brennan." [emphasis added]. (Ex 1-8, pp 8, lines 23-24; 9, lines 1-5; 11, lines 23-25; 12, lines 1-2, 25; 13, lines 1-8; 15, lines 5-12).

True, Judge Brennan did not tell counsel in *Kowalski* that she sometimes "grab[bed] a drink" with Detective Furlong and others, had a meal with him along with others, had occasional dinner parties at her house to which he, along with others, was invited, and, three times over three years, went Christmas shopping with him and Ms. Ryan. But not being so specific did not hide their social relationship. That information would have only confirmed a social friendship, which she had acknowledged and which, said Judge Reader, "was well known." More specifics would have revealed nothing more, so not revealing more hid nothing.

Judge Reader did not know of the phone calls between Judge Brennan and Mr. Furlong, but he was unwilling to say that such knowledge would have made a difference to his assessment. He would say only that such information would have been considered and maybe would have persuaded him (pp 386, lines 24-25; 387, lines 1-5). In sum, the Judge most responsible for knowing his legal community, so he could do his duty as a Chief Judge, was not willing to conclude that Judge Brennan's relationship with Mr. Furlong would have been of concern to that community

(p 388, lines 12-21). "[The appearance of impropriety inquiry is an objective one, made from the perspective of a reasonable observer who is informed of the surrounding facts and circumstances." *Adair*, 474 Mich at 1039.

3. Judge Brennan Did Not Improperly Prejudge the *Kowalski* Case.

If, before *Kowalski* was assigned to her, Judge Brennan had told her secretary, Ms. Cox that Mr. Furlong "had told her about the case" and that "she was sure Mr. Kowalski had done it" (pp 591; 592, lines 1-12) -- which he did not tell her -- the Judge not so informing counsel once the case was assigned to her was not misconduct. So holding would open wide a Pandora's Box. Virtually every judge who handles criminal cases often comes to an opinion about the defendant's guilt or innocence. And they often comment to their staff, but not publicly. If such comments in chambers require disclosure and disqualification, most judges are scofflaws.

And the JTC finding that Judge Brennan had engaged in misconduct was hypocritical, to say the least. Even though it had announced before it heard out counsel that the charges against her had been proven, the JTC denied her motion to recuse itself because, it ruled, it could always change its mind. Such a prospect was real when Judge Brennan supposedly talked with Mr. Furlong back in 2008 or early 2009, months before the first proceeding in *Kowalski* and years before trial. But the JTC had asked for an interim suspension, which required a stated belief that Judge Brennan was guilty, only a month before it found her guilty. That was a disqualifying prejudgment. Judge Brennan's supposed comments to her secretary were not, or, if they were, the JTC's findings and recommendations as currently constituted are irrevocably tainted and must be rejected.

D. Judge Brennan Did Not Fail to Properly Disclose Her Friendship with Ms. Shari Pollesch, Esq.

The JTC found that Judge Brennan had "failed to disclose her close, personal relationship with Ms. [Shari] Pollesch [Esq.,] to the parties in the cases [a total of 10] in which Ms. Pollesch or her law firm appeared [before her] as counsel," and that she "[improperly] denied motions for disqualification" in the two of those cases. Neither finding is sustainable.

1. What Happened?

The JTC correctly found that Judge Brennan and Ms. Pollesch had known each other for some 25 years, becoming good friends during that time. The JTC also found, again correctly, that the two had been on trips together, participated in a book club, took walks in good, warm weather during their lunch breaks, were occasional guests at each other's cottages, that Judge Brennan had allowed her home to be used for Ms. Pollesch's wedding, and that Ms. Pollesch had submitted a statement to the JTC on Judge Brennan's behalf in opposition to one of Mr. Kizer's multiple grievances. So what, with all due respect?

None of those findings are incorrect, but all are significantly incomplete. Ms. Pollesch and friends went skiing annually. Judge Brennan joined them 3-5 times over 20 years, which meant Judge Brennan went very infrequently, hardly indicative of an unusually close personal relationship, and, as just noted, the ski trips never involved just Judge Brennan and Ms. Pollesch. A group always went. Judge Brennan and Ms. Pollesch did not have lunch together. When out walking, they sometimes stopped at a local deli to buy carry-out to take back to their respective offices to eat alone at their desks. The book club had 11 members and met all of monthly. Did that make all eleven close friends? The visits to each other's cottages were, with just an exception or two, which included their husbands, summer meetings of the book club, and Ms. Pollesch's

wedding was way back in 2000.[12] Does a very dated act of friendship prove anything other than a very dated such act? Not after 2 years, cf, MCR 2.003(C)(1)(e), if at all.

The JTC also found that "Ms. Pollesch 'provided legal services'" to Judge Brennan's husband's business, to him personally once, and to one of her sisters, which was not disclosed. But the JTC did not find any impropriety in not disclosing, or recusing herself because of, her husband's business dealings with Ms. Pollesch. It noted those dealings, but found only a failure "to disclose her close, personal relationship with Ms. Pollesch."[13] As for Judge Brennan's sister, all Ms. Pollesch did was file an appearance in the event she was needed, which she never was. Before coming to Ms. Pollesch, the sister and her then-husband had negotiated, through a mediation service, a full settlement and had had the necessary papers drafted by that service. They went to court on their own. In the end, Ms. Pollesch did nothing (p 1397, lines 7-19).

2. The Law

No provision of MCR 2.003(C) addresses Ms. Pollesch's situation with Judge Brennan. Judge Brennan was never a member of Ms. Pollesch's law firm, let alone within the two years preceding any of the 10 cases at issue. MCR 2.003(C)(1)(e). None of those cases involved any interest of the Judge or her husband. MCR 2.003(C)(1)(f). Nor was any aspect of MCR 2.003(C)(1)(g) satisfied. Sisters are within the third-degree of consanguinity, but that subrule is triggered only when one relative appears before the other as a party to a proceeding, as an officer, etc., of a party, as counsel or a material witness, or has more than a de minimis interest which could be affected, which never happened. Therefore, the appearance of impropriety standard does not apply. See *Haley* and *Adair*.

[12] The JTC had alleged multiple other contacts (¶ 68[e], [f], [g], [i], [j], [k], [l], [o] and [p]), but offered no supporting evidence, which is, presumably, why the JTC's decision does not mention any of them.

[13] If the Examiners contend that the JTC did make a finding, Judge Brennan will respond in her reply brief.

And, even if available for consideration as a supplement, the appearance-of-impropriety standard was not breached. In their seminal treatise, Professor Geyh and his colleagues, based on a survey of court and discipline decisions across the country regarding the potential impact on judges of their social relationships, noted what must be practical limitations on what the appearance-of-impropriety standard can demand:

> "In the real world, judges do not live in ivory towers. They have relatives and friends. They have professional acquaintances who may have been their law school classmates, their professional associates and even their partners. They hold memberships in clubs and other organizations, and they have political affiliations. They own property, make financial investments, and engage in other business activities. Even though judges may be influenced by one of these connections, we cannot expect them to sever their ties with society upon taking the bench, and we would not want them to. Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions." *Geyh, et al.*, at § 4.01, p 4-3.
>
> * * *
>
> Of particular concern is the dilemma introduced when a judge has a social relationship with a party or witness in a proceeding. On the one hand, a judge should not be discouraged from having social or other extrajudicial relationships; in fact, they can enhance a judge's effectiveness. Moreover, in smaller communities, judges cannot avoid being familiar with a substantial percentage of the lawyers and other parties who appear before them. To require that those judges disqualify themselves from every case in which an acquaintance appears in their court would impose an unreasonable burden on the justice system of those communities. *Geyh et al.*, at § 4.07[4], pp 4-25 and 4-26.

Other problems come to mind in jurisdictions like Livingston County with few lawyers. Not only will visiting judges regularly be necessary, which is administratively cumbersome, the community will be deprived, more significantly, of the judge or judges it has chosen and who is or are familiar with the county. More significantly, lawyers will be discouraged from seeking judicial office. Knowing that they will have to walk away from their friendships, why seek to serve? And there can be malcontents who will argue that abandoned friendships will always linger.

Ms. Kurtzweil did (p 1065, lines 9-11). Of course, somebody will always seek election or appointment, but only loners, who are likely to be poor judges with idiosyncratic ideas and who will be difficult to work with.

How and "[w]here, then, should we draw the line?," becomes the obvious question. *Geyh*, at § 4.01, pp 4-3. Cautiously has be how. Where is when reasonable observers, not an affected party or lawyer, would find a likelihood of bias. *In re Hocking*, 451 Mich at 12; and *Haley*, 476 Mich at 192, fn 17. This court can hypothesize about what reasonable people would conclude, but isn't it more likely to be accurate to look at what the community itself did. Actions do usually speak loudly. Ms. Pollesch's friendship with Judge Brennan was "absolutely" common knowledge in the Livingston County legal community (p 433, lines 3-6). Yet no one complained until Mr. Kizer started agitating. Likewise, other judges were known to be particularly "close" to judges and to have "good friends" appear in front of them (pp 1433, lines 7-12; 1434, lines 1-10; 1435, lines 6-12). Disclosures were not considered necessary, recusals were not sought, and grievances were not filed.

Nor did anything known or presented about the Brennan-Pollesch relationship trigger MCR 2.003(C)(1)(b)(i). Neither the Examiners nor the JTC have ever cited that subrule. To the contrary, both the Examiners and the JTC have used only the distinct terminology of MCR 2.003(C)(1)(b)(ii).[14] Presumably, they did not consider that that subrule even arguably satisfied that subrule, which it does not. That subrule requires proof that, objectively assessed, the Brennan-Pollesch relationship was "extreme," "exceptional," or "extraordinary," *Caperton v. AJ Massey Coal Co, Inc.*, 556 US 868, 887, 888; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), such that "under a realistic appraisal of psychological tendencies and human weakness," *Id.*, 556 U.S. at

[14] If the Examiners do cite in MCR 2.003(C)(1)(b)(i), Judge Brennan will deal further, if need be, in her reply with this issue.

884, experience teaches that there would a substantial temptation "not to hold the balance nice, clear and true." *Id.*, 558 US at 883, 884.

Nothing of the sort has been established in this case. What is extraordinary, especially here in the Winter-Wonderland, about 3-5 times ski trips over 20 years (p 1388, lines 10-18), with a group of other women? What is extraordinary about belonging to a book club which meets monthly, and, in the summer, has a couple of meetings at members' cottages? What is extraordinary about additional trips, once or twice a year, to each other's cottages with husbands in tow? Nothing. Why was it extraordinary for Judge Brennan to give Ms. Pollesch use back in 2000 of her home, because it was suitably large, as a venue for her wedding (p 1388, lines 6-9; p 1447, lines 12-16), especially, since Ms. Pollesch foot the bill (p 1388, lines 6-9)?

E. Judge Brennan Did Not Tamper With Evidence in Violation of MCL 750.483a(5)(a).

The JTC's next finding was that "it is more likely than not that Respondent's conduct constituted tampering with evidence in violation of MCL 750.483a(5)(a)." Judge Brennan did nothing of the sort. Not only did the JTC ignore key, dispositive aspects of what the witness on whom it relied the most had said, the JTC actually found that Judge Brennan had not "tamper[ed]," as that term is used in MCL 750.483a(5)(a), with any evidence, let alone with any evidence of the kind protected by that statutory subsection.

1. The Undisputed Evidence

Until Judge Brennan's then-husband (Mr. Don Root) filed for divorce, which he did on December 2, 2015, her cell phone and the service contract for that phone were provided by one of his two businesses. The company had paid for the phone, the service contract was in its name, and the company was billed for and paid for the phone usage. Sprint was the service provider. When he filed for divorce, Mr. Root made it clear to Judge Brennan that he wanted the phone returned

to him immediately and that he intended to immediately remove her phone number from the service contract (pp 1335, lines 22-25; 1336, 1337, lines 11-16). In his one act of decency, Mr. Root agreed to wait a few days to "shut off my [Judge Brennan's] phone" (p 1337, lines 17-19), but just a few days.

With the help of her staff -- Judge Brennan was ignorant of all things cell phone except how to use them -- she determined that the best deal for her, specifically, the least expensive, was from AT&T. Unfortunately, the particular phone she wanted was not in stock, so she had to wait a couple of days. When the phone arrived, she picked it up, and an AT&T employee "*transferred* the data from her original phone to her new phone" [emphasis added] (11a). The Examiners stipulated that when a cell phone "is replaced with a new phone," it is "common practice for the contents of the phone being replaced [the 'old phone'] to be copied onto the new phone," what is known "in the trade [as] 'a content transfer'" (128a). Then, also with the help of the AT&T employee, Judge Brennan "had her original phone reset to its factory settings," which means wiped clean of all data. Doing that is also common practice (129a).

2. The Meaning of MCR 750.483a(5)(a)

With each of its constituent components, commonly known as elements when discussing criminal statutes, numbered for ease of reference, but leaving its text substantively untouched, MCL 750.483a(5)(a) reads as follows:

> A person shall not *** [1] [k]nowingly and intentionally [2] remove, [3] alter, [4] conceal, [5] destroy, or [6] otherwise tamper [8] with evidence [9] to be offered [10] in a present or future official proceeding.

It goes without saying that statutes are to be interpreted and applied whenever used, including in judicial discipline proceedings, according to the principles of statutory construction. *Haley*, 476 Mich at 198. Three of those principles establish and reinforce the conclusion that

Judge Brennan's transfer or copying of data from her old phone to her new phone did not violate the cited statute: (i) statutes are to be interpreted in accordance with their plain meaning, *Chrzanowski*, 465 Mich at 482; (ii) noscitur a sociis, Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012 ed), p 95; and (iii) ejusdem generis. *Id.*, at 99.

The presence in multiple well-regarded dictionaries of similar definitions reveals the common usage and general understanding of the word "tamper," *State v Harlston*, 565 SW2d 773, 778 (Mo App 1978), to be: "to interfere with so as to weaken or change for the worse," *Webster's Third Int'l Dictionary*, p 2336; "to meddle so as to alter a thing, esp., to make corrupt or perverse changes," or "to meddle so as to alter a thing, esp., to make changes that are illegal, corrupting or perverting," *Black's Law Dictionary* (10th ed), p 1683. Judge Brennan did not do, and did not cause, anything of the sort to be done.

A diluted meaning of "tamper" is precluded by the principle of *ejusdem generis*. Because it appears at the end of a list and is immediately preceded by the word "other[]" ("remove, alter, conceal, destroy, or otherwise tamper"), that word has to be understood as of a kind with the other words in the list. As will be noted momentarily, each of those other words is a variation of to make corrupting or perverting changes, requiring that the word "tamper" be comparably defined. Just moving data from one phone to another phone is hardly perverting, changing, or corrupting the data. There is absolutely no evidence that any data was altered in any way. Data was moved, that is all. The Examiners never claimed otherwise, and the Commission never found otherwise.

"Remove" can mean "change location," but it also means to "get rid of." *Webster's Third Int'l Dictionary*, at p 1921. The principles of *noscitur a sociis* and *ejusdem generis* require the latter understanding. The former principle "especially holds that 'words grouped in a list should be given related meanings.'" *Scalia & Garner*, at 195. All the other words in the statute's list

involve varying degrees of substantive alteration. Therefore, "remove" must mean the same thing. The latter principle says that the words in a list are to be given complementary meanings, so that ending the list with "otherwise tamper" means that "remove" is itself some form of tampering, the common meaning of which centers on making a perverting change. Hence, the list's word "remove" cannot be interpreted as simply changing the location of data from one phone to another.

"Alter" means "to cause to become different in some characteristic without changing into something else," *Webster's*, at 63, or "to change or modify." *People v Versaggi*, 83 NY2d 123, 129; 629 NE2d 1034 (1994). Transferring data does not do that. Quite the contrary, a transfer leaves the data the same. Being in a different place does not make it anything else. "Conceal" means "to hide [or] to keep secret", *III Oxford Dictionary of the English Language*, at 646. The undisputed fact is that Judge Brennan did neither. She just moved her old phone's contents to another phone, which both Mr. Kizer and the JTC could have inspected, but never asked to. What they didn't look for cannot be said to have been concealed, just ignored, which is much different. Finally, transferring data from one phone to another is not remotely "destroy[ing]" that data. The plain meaning of that word is to ruin something completely and thereby render it beyond restoration or use, *People v Hill*, 58 Cal App 4th 1078, 1089; 68 Cal Rptr 2d 375, 382 (1998), citing *Webster's Third Int'l Dictionary* (1980), p 615.

3. More Facts

Judge Brennan did not do any of the above. In sum, she did not engage in any of the behavior itemized in the statute. Nor did Judge Brennan ask anyone else, Ms. Felica Milhouse in particular, to engage in any conduct which would have violated the statute. The Examiners and the Master very much wanted Ms. Milhouse to say that Judge Brennan had asked her to delete the contents of her old phone, but Ms. Milhouse would not say that. Although she testified that Judge Brennan had asked for assistance "delet[ing]" her Hotmail account, she unequivocally

answered, "Yes," when asked, "[D]o [you] distinctly recall her saying that she wasn't interested in getting rid of the contents? She wanted to remove the account?" (p 554, lines 9-12).

Then, Ms. Milhouse unequivocally responded, "I do," when asked if she recalled telling a state trooper that Judge Brennan "was not necessarily [interested in deleting] the contents of the phone . . . just . . . the account" (p 555, lines 4-11). Ms. Milhouse also recounted telling the trooper, when he asked, "Did she want to get rid of the account or the contents?" "The request of me was [to] remove the account" (p 555, lines 16-20). Finally, when the Master asked "The account from the phone[,] not the entire contents?" Ms. Milhouse answered twice, "That's correct" (pp 555, line 25; 556, lines 1-6). Testimony cannot be cherrypicked, which effectively alters what was said. The entire record must be considered.

Because no one asked her to explain, we do not know what distinction Ms. Milhouse was drawing between account and contents. Nor do we know what was the difference between account and contents drawn by the police officer who interviewed Ms. Milhouse and by the Master when he quizzed her at the public hearing. We do not know because they did not explain, and no one asked them to explain. But we do know that all of them understood there to be a difference. Otherwise, why did each repeatedly distinguish "account" from "contents?" In sum, therefore, no one, especially Ms. Milhouse, understood Judge Brennan to have wanted to remove the text, e-mails, etc., what were among its contents, from the phone. Instead, Ms. Milhouse corroborated Judge Brennan's "I wanted to take [data] from Don's phone [her 'old 'phone] and put [it] on my]new] phone" (p 1339, line 24).

Nor was the statute violated by Judge Brennan having an AT&T technician return her old phone, the one she was replacing, to factory settings after he had transferred per common practice to her new phone the contents of the phone being replaced, even if some of the data on the old

phone was not transferred, so that that remaining data, if any, was lost when the phone was returned to factory settings. When the parties stipulated that that can happen, they also stipulated that it can happen "even if the owner of the old phone makes an effort to copy all data from the old phone to the new phone" (129a). Data lost in that situation would be lost contrary to the phone owner's intentions, which means unintentionally.

When the Examiners asked the JTC for permission to petition for Judge Brennan's interim suspension, they explicitly acknowledged that resetting the old phone after transferring its data to a new phone can destroy data "deliberately *or* inadvertently" [emphasis added] (139a). Which is impossible to tell. Conduct with inadvertent or unexpected consequences is not a violation of the statute. "[R]emov[ing], alter[ing]," etc., must be undertaken, says the statute, "[k]nowingly and intentionally." "Knowingly" means aware or with an understanding that the social harm a law is designed to prevent is practically certain to occur or result. *Black's*, at 1003. "Intentionally" means, not just purposefully doing an act which itself causes harm, but undertaking that act for the purpose of causing the proscribed harm. *Black's*, at 932-933. See also *American Alternative Ins Co v York*, 470 Mich 28, 32-33; 679 NW2d 306 (2004); and *Hicks v Vaught*, 162 Mich App 438, 440; 413 NW2d 28 (1987).

There is no evidence whatsoever in the record that Judge Brennan appreciated, or that she should have known, that transferring data off her old phone might have left some data which could have been recovered had that phone not been returned to factory settings. Perhaps, the Examiners have argued persistently, transferring data from her old phone to her new phone might have left so-called "metadata" on the former. Metadata are digital footprints of what had been present from which that what can be deduced. But "perhaps" or "might have" are not proof of anything; they are just speculation. Most significantly, for purpose of the issue at hand, no evidence was offered

that Judge Brennan knew anything about metadata. As noted earlier, doing something with unexpected consequences is not acting "knowingly and intentionally." In sum, even if some of the contents of Judge Brennan's old phone ended up being destroyed one way or another, she did not violate MCL 750.483a(5)(a).

The Examiners' insistence on arguing that the possible erasure of metadata violated MCL 750.483(5)(a) begs two nearly-identical questions: Why didn't Mr. Kizer ask to have Judge Brennan's new phone inspected? Why didn't the JTC or its Examiners? Just a month after she got her new phone, Mr. Kizer was asking about it and about the transfer of data to it, about wiping clean her old phone clean and he had hired a digital forensic expert. Examining the new phone would have confirmed or put the lie to her testimony that she had transferred or copied data from the old phone to the new one. Then, we would all know what had happened. Not asking for the new phone, just asking about the phones, says either that Messrs. Root and Kizer knew the Judge was telling the truth, or that they didn't want to know.

4. More Law

Element 9's "offered" means, standing alone, to have been formally presented to a judicial officer. But that word does not stand alone. It is introduced by "to be," as well as by "[k]knowingly." Ordinary rules of grammar say that that latter word modifies not only the verbs which come immediately after it: "remove, alter," etc., but also the later phrase "to be offered." *United States ex rel Harper v Muskingun Watershed*, 842 F3d 430, 439 (CA6 2016), quoting and citing *Flores-Figueroa v United States*, 556 US 646, 650-651; 129 S Ct 1886; 173 L Ed 2d 853 (2009). And, the seemingly very ordinary words "to," which indicates inclusion, *Webster's Third Int'l Dictionary*, at 2401, and "be," which means to exist, happen or occur, *Id.*, at 189, change "offered" to a statement of the future which is not contingent, conditional, or potential, like "may

be used", or "could be used," but a settled plan or intention. *United States ex rel Kasowitz Benson Torres, LLP v BAS Corp,* 285 F Supp 3d 44, 55 (D DC 2017).

In other words, when any data on her old phone was "remove[d], alter[ed], conceal[ed], destroy[ed] or otherwise tamper[ed] with," if any of that happened, somebody had to then and there have had fixed plans, and Judge Brennan had to know of those plans, to offer that data at an upcoming proceeding the data. Absolutely no such evidence was offered at the formal hearing or even alluded to. The only people in a position to have such a plan were Mr. Kizer and Mr. Root. Mr. Kizer never testified, and Mr. Root was not asked about the subject when he did testify. Mr. Kizer's questions of Judge Brennan at her deposition show an interest in the subject likely to suggest that he was thinking about using the data on the old phone, but that is the contingent or conditional, which is not sufficient, *Id.,* but speculation only. In sum, MCL 750.483a(5)(a) was not shown to have been violated.

F. Judge Brennan Did Make Some Inaccurate Statements in Various Proceedings, to the JTC, and Before the Master, But None Were Knowingly and Deliberately False.

While it refused to use the Master's characterization of them as "breathtaking" (12a), the JTC found that Judge Brennan made some intentional misrepresentations and false statements, most under oath. She vehemently disagrees. Not all of her hundreds of statements during the JTC's lengthy investigation and prosecution were accurate, but none were knowingly false or intended to deceive as required to be considered misconduct. *In re Gorcya*, 500 Mich 588, 637; 902 NW2d 868 (2017). But, to start, finding Judge Brennan to have engaged in such misconduct is constitutionally forbidden.

1. The JTC's Findings Are Irreparably Tainted.

In Part VII of its decision (32a), and in the final sentence of the conclusion to its decision (33a), the JTC recommends that Judge Brennan be assessed costs, fees and expenses (hereinafter

"costs") totaling $35,570.36. That recommendation was made, as it had to be, solely "on the basis of" the JTC's findings that Judge Brennan "made intentional misrepresentations and misleading statements." That is the only basis on which costs can be assessed. MCR 9.205(B). That authorization was a long time coming; it was not added until 2005.

That authorization is unconstitutional. Justice Weaver took that position back in 2005, but as a matter of the Michigan Constitution. Judge Brennan does not necessarily agree; she is inclined to concur with Judge Corrigan. The amendment does, however, violate the Constitution of the United States. Conditioning the assessment of costs on a finding that a judge engaged made misleading statements to the JTC, the Master or this Court, gives the JTC a direct pecuniary interest in its recommendation, which has been recognized since *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 91 L Ed 749 (1927), as so compromising the process as to deny due process. See also *Ward v Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972); *Gibson v Berryhill*, 411 US 564; 93 S Ct 1689; 36 L Ed 2d 488 (1973); and *Caperton*, 556 US at 877-879.

Just eschewing here the JTC's recommended assessment of costs cannot fix the *Tumey-Ward* problem. Judge Brennan was entitled to an uncompromised JTC "in the first instance," which means when the findings of prevarication were initially considered. *Ward*, 409 US at 62-63. Vacating an already-made recommendation of costs and remanding for consideration anew of claims of misrepresentation without an assessment of costs, can fix the problem only if the JTC is also replaced. This Court must have before it an untainted recommendation, which requires untainted findings. Unless and until then, not only must the assessment of costs be vacated, Counts XIII, XIV and XVII must be put on hold.

2. The JTC Acted Improperly.

In *Simpson*, 500 Mich at 553, this Court rejected a recommendation for removal from office. What it found to have been false statements were not made under oath. Removal, it noted,

is reserved for perjury. None of Judge Brennan's supposedly "[f]alse [s]tatements during [c]ourt proceedings" were under oath. They were made in the course of rulings, which are never sworn. Her responses to the JTC's multiple letters were under oath, but they should not have been. The JTC inappropriately insisted on that. It should not be allowed to bootstrap those responses into perjury.

Judge Brennan's response to the JTC's first inquiry to her, a monstrously-long letter dated August 31, 2017, was sent back by the JTC with instructions to be reformatted and answered under oath. She complied. Call that gullible or respectful, the JTC had no authority to so order. When, thereafter, the JTC sent so-called 28-day letters making the same demands, Judge Brennan. Her answer to the letter of August 31, 2017, had been answered without counsel. By the time of the 28-day letters, she had retained counsel, and he informed the JTC of the following:

> ". . . [T]he Supreme Court has chosen to not require her to sign it or notarize it. Nothing in MCR 9.207(D)(1) and (D)(2) requires either. Silence is the withholding of authorization. *Kimble, supra*. A comparison of those subrules with others confirms that conclusion. For example, MCR 9.113(A) requires that an attorney's answer to an RI be "signed by [the] respondent [attorney]." MCR 9.207(A) dictates that an RI pertaining to a judge "must be verified on oath;" and MCR 9.209(B)(1) requires that a judge's answer to a formal complaint be "verified." The lack of comparable requirements in MCR 9.207(D)(1) and (D)(2) must be read as deliberately differing. *Farrington* [*v. Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993)]. But the lack of a verification requirement need not be inferred. MCR 2.114(D)(1) declares that "[e]xcept when otherwise specifically provided by rule or statute [which, as just noted, MCR 9.207(D)(1) and (D)(2) do not do], a document [governed by the Michigan Court Rules, which responses per those subrules are, MCR 2.113(A)] need not be verified or accompanied by an affidavit."

It follows that Judge Brennan's answer to the JTC's initial inquiry of August 31, 2017, can be used only to impeach her subsequent testimony, which the JTC has not done, not as substantive

proof, cf. *Michigan v Harvey*, 494 US 344; 110 S Ct 1176; 108 LEd2d 293 (1990); and *People v Reed*, 393 Mich 342; 224 NW2d 807 (1975), which is what it is attempting to do.

3. Intentional Misrepresentations Must be Proven.

Nearly two years ago, which jurisprudentially-speaking was just yesterday, in *Gorcyca*, 500 Mich at 637, the JTC first and then this Court by quoting the JTC with approval accepted Justice Frankfurter's caution against simplistically inferring deception. *Dennis v United States*, 344 US 494, 539; 71 S Ct 857; 95 L Ed 1137 (1951) (separate op per Frankfurter, J.). Specifically, both the JTC and this Court held:

> ". . . [A] false statement requires the speaker's knowledge that the statement is false and intended to deceive. The fact that a statement may be incorrect does not, by itself, render the statement 'false' within the context of a legal proceeding. It may be discredited, or deemed unworthy of belief, but given the limits of human memory and perception, as well as the limitations of language, it would be unfair to impute motives of deception or falsehood to everyone who says something that someone else finds incredible, or that proves to be incorrect.
>
> Selective memory does not equal falsehood; incorrect memory does not equal falsehood; imprecision in expression does not equal falsehood; even an answer that one chooses to disbelieve does not equal a falsehood."

Just a few days later, in *Simpson*, 500 Mich at 553, 571, this Court also said twice that, while the burden of proof on all issues in judicial proceedings is by a preponderance, to prove a lie, a statement must "clear[ly]" be shown to have been both misleading and intentionally so. The Court did not pronounce such a requirement in so many words, but it twice applied such a requirement. Presumably, this Court does not use a standard which it does not consider required.

Also in *Simpson*, 500 Mich at 571, this Court noted, "We have not yet addressed, . . . whether materiality . . . [is] necessary to prove that a judge testified falsely under oath." Surely, the Court was not unaware of *People v Lively*, 470 Mich 248; 680 NW2d 878 (2004), which had

held that materiality is not an element of the statutory offense of perjury. Necessarily, therefore, it looks like the Court might consider disciplinary proceedings different enough from criminal prosecutions to require consideration of a different rule. They are different. The question is, Different enough? Yes.

Underlying *Lively* was the doctrine of separation of powers. Because a statute was at issue, its plain words, or, more precisely, the lack of words, chosen by the Legislature have to be honored. The courts also have to defer to prosecutorial discretion, which is an aspect of the executive function. In matters of judicial discipline, on the other hand, the 1963 Constitution assigns exclusive jurisdiction to this Court to utilize its understanding of how judges should operate. Requiring a showing of materiality facilitates the exercise of that jurisdiction much more than does ignoring materiality. In sum, any under-oath incorrect statement by a judge must clearly be proven to have been known to be false when uttered, must clearly be proven to have been intended to deceive, and must clearly have been material.

4. Intentional Misrepresentations Were Not Proven

Neither the Master nor the JTC bothered to explain how Judge Brennan lied persistently, as they found, or at all for that matter, and that her supposed misstatements were material. Both merely yielded without analysis to an oversimplistic and inaccurate reading of the record:

1. Yes, Judge Brennan did testify at her divorce deposition that she first became aware of Mr. Kizer's ex parte motion "[o]nce I spoke with my attorney" (pp 116, lines 17-25; 117, lines 5-13). Yes, Ms. Jeanine Pratt, Judge Reader's secretary had talked to and e-mailed Judge Brennan about the motion before then (pp 320, lines 8-17; 321, lines 1-8, 25; 322, lines 1-20). The difference was not a lie, however, but a mistake. At her deposition, the Judge had no memory of her phone call with Ms. Pratt, or of having opened the e-mail from her (p 120, lines 6-9; p 136,

lines 15-17; 137, lines 1-10). She still has no memory of either (p 140, lines 22-23). A lack of memory "does not equal falsehood." *Gorcyca*, 500 Mich at 637.

2. Nowhere in her deposition did Judge Brennan testify that she told Ms. Pratt that "she was too busy to sign the disqualification order." She testified that she told Ms. Pratt, first, that "I would take care of it when I had time the next day" (Ex 1-13, p 46, lines 7-8). That didn't say that she didn't have time the day she spoke, just that she would deal with the matter the next day at an available time. Then, the Judge testified, "I said I would sign it [the proposed order] the next day" (*Id.*, p 52, lines 9-10). No reason for waiting was given (*Id.*). Her reason was, "I was busy" (*Id.* p 52, lines 19-20), but that reason was not stated to Ms. Pratt. An unstated thought cannot be a lie. Most significantly, Judge Brennan explained at the deposition, "I don't remember exactly what I said [to Ms. Pratt]. I remember the circumstances" (*Id.*, p 52, lines 24-25). That was not a lie. *Gorcyca*, 500 Mich at 637-638.

3. At her deposition, Judge Brennan did say, "Jokingly, I did," when asked if she had said to her staff, "I need to know how to delete stuff from this phone" (Ex 1-3, p 59, lines 7-13). The Examiners incorrectly claimed, and the Master erroneously found, that she "admitted at the formal hearing that [what she said] was not a joke." Yes, she testified, "I did seriously want to take [sic] off my phone . . ." (p 1705, lines 11-14), but she said more, too. She told her staff that her husband apparently thought that her old phone would contain "big information," which it would not, and that might find recipes (Ex 1-13, pp 59, lines 23-25; 60, lines 1-6). In other words, because sarcasm is a form of humor, Judge Brennan had been both joking and serious, making her "Yes and no" (p 1704, lines 19-20) truthful.

4. At her deposition, Judge Brennan did deny having "reset" her old phone, (p 151, lines 11-15). She did, however, just a few lines earlier, acknowledge having "delete[d] messages

from that phone" (pp 150, lines 19-24; 151, lines 4-10), so she was not denying that those messages were no longer on that phone. Then, when asked, "[D]o you know the difference between deleting and resetting the phone?," Judge Brennan answered, "No" (pp 151, lines 12-15), what no witness is obligated to do. Finally, admitting at the public hearing that, "I wasn't going to make Mr. Kizer's job easy" (p 154, line 16), was not an admission of having lied during her deposition. In context, that was no more than a statement she had not volunteered to Mr. Kizer that he was not asking the correct question.

5. Any discrepancy by Judge Brennan in her "vomit" testimony is insignificant, immaterial, and not a prevarication. Ms. Jessica Sharpe[15] did vomit in a bed the Judge was kind enough to let her use one evening when she did not feel well, ruined expensive sheets (p 745, lines 23-25), and left without cleaning up or telling the Judge (p 709, lines 15-17). Later, Ms. Sharpe sent Judge Brennan an e-mail apologizing and offering to pay for the sheets (Ex 11-1). When asked 18 months later at her divorce deposition about the incident -- of what possible relevance to the divorce was that incident, by the way? – Judge Brennan expressed annoyance that Ms. Sharpe had left without apologizing (pp 263, lines 10-25; 264-266; 267, lines 1-2). When shown Ms. Sharpe's e-mail of later that day, Judge Brennan did not dispute it (pp 262, lines 24-25; 267, line 4-6), that she had apologized. Judge Brennan had no memory, however, of Ms. Sharpe's e-mail apology (pp 262, lines 24-25; 267, lines 11-16, 20-21). Failed memory is not a falsehood.

6. That Judge Brennan had told Ms. Sharpe to take advantage of favorable weather to stain her deck, as Ms. Sharpe had volunteered to do, on a weekday does not establish that the Judge knew that that work had been done on County time. Ms. Sharpe was a part-time employee who

[15] Until the very last day of the formal hearing, Ms. Sharpe responded to Ms. Yakel-Sharpe. That day, for the first time, she said she preferred to be addressed as Ms. "Sharpe" (p 1859, lines 12-16). Hence, she will be shown that courtesy throughout this brief.

started working 2.5 days per week, i.e., with 2.5 days off per week (p 1872, lines 15-24). Even as her workload increased, she "still had a day or two off a week" (p 1878, line 5). If Ms. Sharpe recorded working for the court those days, she was defrauding the County unbeknownst to Judge Brennan (pp 1577, lines 11-21), who was then out of town and who did not have access to her time records (p 1576, lines 15-25). Ms. Sharpe was recalled as a witness a month later to take issue with some of what Judge Brennan had testified, but not with what she had said about the time available to stain the deck (pp 1862-1863).

7. Not disclosing on January 4, 2013, in greater detail her contacts with Mr. Furlong was at worst incomplete. It was not false. She did not deny, which would have been false, phone calls, texts and socializing with him. She did deny, correctly the Examiners conceded (pp 12-13, above), having a sexual relationship with Mr. Furlong. Silence is not untruthful, nor is not volunteering. To say she and Mr. Furlong were friends was not a lie, especially as distinct from not being lovers, which had been alleged and was the topic on the table. "Just friends" did not falsely deny a close personal friendship; it accurately denied a sexual relationship. It was Ms. Ryan who falsely denied, she later admitted, being a "friend with benefits."

8. And how is it either relevant or material that, when acknowledging accurately that Ms. Pollesch was then representing her husband and his businesses, Judge Brennan may have stated incorrectly when she learned of that representation? Significant was her acknowledgment of the representation when asked by counsel in pending cases and when asked by the Commission. She told the truth.

9. Judge Brennan did not mislead, let alone intend to deceive, Bruce Sage, Esq., when she told him, "We don't have a system that would allow" telephonic testimony. Judge Brennan's courtroom had two mechanisms for taking testimony by telephone, but neither worked

satisfactorily. Putting one of the courtroom phones on speaker, which was tried (pp 651, lines 22-25; 652, lines 1-4), "didn't really work" and "was not terribly effective," acknowledged Ms. Cox (p 652, lines 4-5). There was also a device which was part of the courtroom recording system (p 652, lines 6-8), but, the one time it was tried, its use "was difficult" and "wasn't satisfactory," also per Ms. Cox (pp 652, lines 11-13, 17-19; 689, lines 3-7). Those problems were not fixed until "long after" the statement to Mr. Sage (p 1360, lines 14-20). Therefore, whether the equipment was defective or had not been used properly, what Judge Brennan told Mr. Sage was not a lie; it appeared to her to be true.

10. How was "overstat[ing], to a large degree, her friendship with [Shawn] Ryan" (143a) a false statement as *Gorcyca*, 500 Mich at 637, explained what is a falsehood? Isn't an "overstate[ment] to a large degree" also partially true? If so, it is not a falsehood. More significantly, it was Ms. Ryan who misstated her relationship with Mr. Furlong in order to inflate Judge Brennan's relationship with him. Ms. Ryan testified that she and Mr. Furlong did not have a "relationship," so it could not be that he came to social occasions because of her, not to see the Judge, because their sexual encounters were not "a relationship." According to Ms. Ryan, to reflect a relationship, sex has to be publicly known (pp 1761, lines 3-11; 1783, lines 20-25), which theirs was not. Nonsense. A sexual relationship is having sex, secret or broadcast.

11. Of what possible materiality is a false denial, if there was one, by Judge Brennan of different or preferential treatment by her of Mr. Furlong's and Det. Corriveau's warrant requests? Treating preferentially threes MSP troopers -- including a Mr. Singleton (p 585, lines 19-21) -- is showing a preference, if any, to the MSP, which does not support the claim of a romance or a close friendship with Mr. Furlong unless this case involved a menage a troix on steroids. Also, no witnesses testified that only those officers' warrant requests were reviewed in

chambers behind closed doors. Ms. Bove testified, "I don't know if any other officers went that way [behind closed doors]" (pp 786, lines 22-25; 787, lines 3-7). During the 3-plus years she worked for Judge Brennan (pp 693, lines 24-25; 694, lines 18-19), Ms. Sharpe saw the Judge take officers into chambers only beginning in 2017 (p 721, lines 8-13). Was she oblivious to the practice for 3 years, or was there nothing to be seen until 2017. In sum, the Examiners did not prove that Judge Brennan falsely denied preferential treatment.

12. The Examiners' Appendix appears correct that neither Ms. Cox or Ms. Sharpe testified at the public hearing that, using those very words, either had "volunteered or insisted" on paying Judge Brennan's bills (not using their money, but using her checks). The Appendix is also likely correct that, although neither witness used that very word, the Judge "directed" them sometimes to pay the bills. Neither can be acknowledged with certainty, however, because the Appendix contains no citations to the record. But what is known is that neither employee was dragooned into helping. Ms. Cox handling of the Judge's bills began with her "ask[ing] me to pay the bills" (p 611, lines 18-20). Likewise, Ms. Sharpe testified, "Initially[,] I want to say she did ask;" then, she would say "these need to be paid" (p 711, lines 15-18), which Ms. Sharpe did without objection.

13. The final claim in the Appendix contains two glaring omissions. Ms. Cox testified that in 2006 and 2008 Judge Brennan "was indeed" "extremely cautious about intertwining office and campaign work" (p 625, lines 11-18) and that in 2014 she again told her staff to stay off the County computer system, to instead use their personal computers and publicly-available WiFi (pp 625, lines 21-25; p 626, line 1). Ms. Cox was of the opinion that in 2014 Judge Brennan "was more cautious about not appearing to intertwine them [office and campaign work]" (p 625, lines 18-19). Ms. Cox offered no basis for that opinion, however, so its accuracy cannot be assessed.

At a minimum, she never disputed that the Judge repeated in 2014 her 2006 and 2008 cautions about not mixing office and campaign work. The Appendix also ignored that, when supposedly shown unspecified contrary documents, she acknowledged her error. Having been unquestionably adamant in 2006 and 2008 supports having believed, albeit incorrectly, that she was similarly consistent in 2014.

G. The Examiners Did Not Prove that Judge Brennan Persistently Mistreated Lawyers Who Appeared Before Her

A sizable share of the public hearing was consumed by the Examiners attempting to prove -- with multiple witnesses, videos and transcripts -- claims that Judge Brennan had been "consistently abusive to attorneys, litigants and witnesses." The Master bought everything presented by the Examiners about Judge Brennan's alleged treatment of attorneys. Not the JTC, however. It refused to adopt his finding that it was "the universal opinion" of those who testified that Judge Brennan "was persistently impatient, undignified, and discourteous" to those appearing before her (p 17). It found, instead, that some attorneys, whom it did not name, described her demeanor on the bench as "appalling and abusive" and as "routinely interrupting" and not caring. Finally, the JTC, instead of evaluating the record, relied on a description by the Court of Appeals of her handling of one lawyer and his client.

1. What Happened

Ms. Margaret Kurtzweil, Esq., had testified that Judge Brennan "was appalling" (p 1076, lines 1-2), so, presumably, she is one of the unnamed attorneys mentioned by the JTC, but that appears to have been an churlish retort, not a considered analysis. "She thought I was appalling. She's appalling" (*Id.*). Ms. Kurtzweil acted as if still in high school. Judge Brennan had told Ms. Kurtzweil that she, the Judge, was appalled -- which by the way is not characterizing anyone as appalling -- how she appeared to be "best buds" with a receiver appointed by the Court. Receivers

are supposed to be neutral, explained the Judge. She did not shout at Ms. Kurtzweil, or the like. Watch the video. And Ms. Kurtzweil admitted having no basis to disparage Judge Brennan's assessment. She had never worked with a receiver, and "d[id]n't know what laws apply to [a] receiver," not even whether they could take money from estates being managed (pp 1039, lines 3-5; 1074, lines 5-12).

Nor did Ms. Kurtzweil have any basis for characterizing Judge Brennan as "an outlier," as she did, by which she meant "outside of the norm" (p 1046, lines 22-25). The norm for Ms. Kurtzweil is one particular judge with what she considers to be "an exceptional temperament" and to whom she compares "every [other] judge" (pp 1079, lines 6-8; 1083, lines 4-8, 16-21; 1084, lines 1-4). Since few judges have an exceptional temperament, that judge is the outlier. Far less than stellar judges are the norm. Finally, what Ms. Kurtzweil said she saw in the one case she handled before Judge Brennan (p 1050, lines 8-10) was a judge who was "not necessarily rude[,] but testy," (p 1024, lines 17-19), although, when reminded of having drawn that distinction, she insisted "rude" and "testy" mean the same thing (pp 1081, lines 22-25; 1082, lines 1-3). What isn't even rude is not demeaning.

Although not named in the JTC's decision as having done so, a Ms. Carol Lathrop-Roberts, Esq., had testified that Judge Brennan's court-room behavior was "appalling" and "abusive" (p 1128, lines 12-15), that she "routinely interrupt[ed]" counsel, and that she didn't care enough to have "the information she needed to make her best decision" (p 1132, lines 18-22). Presumably, therefore, Ms. Lathrop-Roberts was the other unnamed attorney quoted by the JTC. But neither the Master nor the JTC found her credible on related matters, so how can she have been worthy of belief on these matters.

Her testimony about "abusive" pertained to Judge Brennan's treatment of her staff (p 1128, lines 14-17). As noted near the beginning of this brief, the JTC did not find that she had abused her staff. Ms. Lathrop-Roberts was also insistent that Judge Brennan would not let her make her argument in *Bresson v Terlecky* (pp 1135, lines 11-21; 1136, lines 1-4; 1139, lines 12-13; 1146, lines 15-17), even when shown a transcript of her doing just that multiple times (pp 1147, lines 13-23; 1148, lines 21-25). And, after exasperating evasion, the Master interrupted, "I accept . . . that she had made a record" (p 1150, lines 4-10).

2. The Law

Judges have been disciplined for a lack of judicial temperament in their in-court dealings with attorneys, but only for a "gross [such] lack." *In the Matter of Del Rio*, 400 Mich 665, 716; 256 NW2d 727 (1997), and *In the Matter of Bennett*, 403 Mich 178, 192; 267 NW2d 914 (1978). See, e.g., *In re Mikesell*, 396 Mich 517, 537, 540, 541; 243 NW2d 186 (1976) ("Shut your big mouth"); *Del Rio*, 400 Mich at 719, fn 23, 720, 722 fn 27 ("You're pissed off because a black man got a little white pussy." "Mother-fucking white liberal." "This honkie bitch." "He told me to get my ass out of his court"); *Bennett*, 403 Mich at 189-191 ("[B]ullshit." "Son of a bitch," and ''bastards"); *In the Matter of Probert*, 411 Mich 210, 236; 411 NW2d 210 (1981) ("Fresh meat" and "little bastard"); *In the Matter of Franklel*, 414 Mich 1109, 1110; 323 NW2d 911 (1982) ("You're a despicable son of a bitch"); and *Gorcyca*, 902 NW2d at 615 (telling children that they were "crazy" and "brainwashed"). Judge Brennan is not accused of having said anything remotely comparable.

That leaves only the Court of Appeals opinion in *Sullivan* which, after reversing one of Judge Brennan's several decisions in the case, remanded the case to a different judge. In the case of *In re Kapcia*, 389 Mich 306, 311, 314, 205 NW2d 436 (1973), this Court held, and has not yet held otherwise, that the JTC "is prohibited from relying on, or adopting, another entity's factual

findings and conclusions as a basis for recommending that this Court impose a sanction for judicial misconduct; rather, the JTC must make independent factual findings in this regard." *In re Servaas*, 484 Mich 634, 667-668; 774 NW2d 46 (2009) (op per Markman, J).

Also, a finding in one case cannot be used against someone who was not a party to that prior case and had no opportunity to defend the finding. *Monat v State Farm Ins Co*, 469 Mich 679; 677 NW2d 843 (2004). True, judges whose decisions are appealed never participate in defending those decisions. That does not mean, however, that decisions on appeal can be used against the judge personally. Reversing on appeal a ruling does not impose personal consequences on the judge, other than, perhaps, a bruised ego. Using the *Sullivan* opinion as a finding of misconduct would directly, significantly, and unfairly affect Judge Brennan. Besides, and most simply, the Court of appeals did not find misconduct by Judge Brennan. Had it, all of her rulings would have been reversed, not just one.

3. Community Assessment

". . . [P]opular election [does not] insulate or immunize a judge from the consequences of his or her misconduct . . ." *McCree*, 495 Mich at fn 39. That does not mean, however, that a judge's re-election is necessarily irrelevant. Quite the contrary. Judge Brennan's reelection in 2014 is highly irrelevant to establishing the lack of misconduct. Alleged misconduct, in particular, the alleged offensive treatment of others, must be assessed objectively, *In re Hocking*, 451 Mich at 12, which means "from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Adair*, 474 Mich at 1039. The electorate who returned Judge Brennan to office in 2014 provided that perspective.

In 2006 and 2008, Judge Brennan's opponent, the same attorney both times, ran a single issue campaign: "She's a Democrat" (p 1200, lines 12-15), and we don't elect Democrats in Livingston County. As noted earlier, Judge Brennan won handily both times, even though, until

her, a Democrat had never been elected countywide. Only one township trustee had ever prevailed as a Democrat. In 2014, a different opponent ran a different one-issue campaign: Judge Brennan "was a bully" and "was demeaning" (p 1205, lines 13-16). That claim was asserted "everywhere" (p 1205, lines 20-21). She prevailed again, however, not in every precinct as before, but still handily (p 1206, lines 2-9). Unless, therefore, Judge Brennan's Irish surname or the incumbency designation distracted the electorate, thousands did not consider her to be a demeaning bully.

Neither did others in the know. Her then-Chief Judge supported her in 2014 for re-election (p 1558, lines 14-15). He would not have done that if she had "the worst judicial temperament." He would have welcomed her defeat. So would have the local prosecutor, but he, too, endorsed her, as did his immediate predecessor (p 1558, lines 12-15). In addition, surely the local newspaper would not have again endorsed her, which it did (pp 1202, lines 12-16; 1205, lines 22-23). In addition, for her entire tenure, jurors in Livingston County have been asked to complete exit questionnaires, about their experiences in its courts (pp 1248, lines 21-25; 1249, lines 4-7). Jurors tend to be quite perceptive, and those who sat on cases before Judge Brennan were impressed with, among other things, how efficient she was, how well she controlled the courtroom, and how "respectful," yes, respectful, she was (p 1253, lines 13-18).

H. Judge Brennan Did Not Violate MCL 169.257(1), Or Any Violation Was Not Actionable Misconduct

The Commission found that Judge Brennan had also "engaged in misconduct by allowing her staff to work on her 2014 judicial campaign during work hours" (p 18). Specifically, her secretary and her law clerk assisted Judge Brennan "on one occasion," during work hours "respond[] to questionnaires from news outlets," her secretary "modified [documents] [15 times] during work hours," and "[o]n another occasion," her staff "conducted online research" into "what

kind of swag" to use at an upcoming campaign event. "Swag" are items such as pens, candy, etc., given to attendees of an event.

1. What Really Happened

The JTC's findings about campaign conduct are not themselves incorrect. Those findings are, however, significantly incomplete and misleading as such. The JTC's decision does not mention that, according to Ms. Cox herself, much of the document modification she undertook was done at her home after work or on her lunch hour, meaning they were done on her own time. Also, records maintained by Ms. Cox established that the modifications were simply filling in blanks on forms or revising documents used before, so that the efforts took only moments, no longer than a typical coffee break, and, when done at the courthouse, occurred at times during the day typical for employee breaks.

Admittedly, Ms. Cox testified that Judge Brennan's staff "did not take breaks" (p 1844, lines 5-7), but that is unlikely to the point of being incredible. It is true that staff did not take so-called "coffee breaks" when doing so would have interrupted an ongoing in-court proceeding, but they had breaks otherwise (pp 1882, lines 19-25; 1883; 1884). And it is simply incredible to contend, especially when the Examiners offered no supporting evidence, that clerical staff were not entitled to breaks. Such a ban was either illegal, or was in their collective bargaining agreement, which was never produced. In other words, many of the campaign activities recorded by Ms. Cox as having occurred during a typical work day necessarily occurred when the employees were entitled to a few minutes to take a break. And if Ms. Cox did not take breaks, the time was still hers to do with as she wished.

While the online search for "swag . . . [to] bring to" a campaign event "was done in the court room" (pp 713, lines 20-25; 714, lines 1-5), that could not have been done, as intimated, during an ongoing court proceeding. No one said so, first of all, and everybody would have been

otherwise occupied. There were computer terminals in the court room, so Ms. Yakel could have sat there, rather than going elsewhere, to do the search, but that does not make her search during court activities, but when court was not in session and "on her own time." Or, the search involved a minimal use of work time and there is no reason to believe, just as there was no claim by anyone, that the activity intruded into the court activity and impaired the functioning of the court. Hence, it was not the improper use of court employees aside from any prohibition by the Campaign Finance Act. But there is no such prohibition, as will be discussed next.

2. The Meaning of MCL 169.257(1)

The Michigan Campaign Finance Act prohibits "[a]ny public body or a person acting for a public body" from using or authorizing the use of public resources, including personnel, office space, computer hardware or software, etc., to make a campaign contribution, including in-kind contributions. MCL 169.257(1). Somewhat surprisingly, there is only one appellate decision which interprets and applies the Act, and the provision interpreted by that opinion is of no moment to this case. Fortunately, there is nothing obtuse about the words of the Act which do apply to this case. They say the Act is plainly inapplicable.

Judge Brennan is not "[a] public body." She is not an entity, pure and simple. During her 2014 campaign, Judge Brennan was plainly "a person," but she plainly was not then "acting for a public body." The phrase "acting for" connotes "being an agent of . . . [an]other," *Owosso Independent School District No. 1-011 v Falvo*, 534 US 426, 433; 122 S Ct 934; 151 L Ed 2d 896 (2002), being an agent authorized to act in place of another, *Black's, supra* at 75-76; or acting for the benefit of another. VI *The Oxford Dictionary*, at 23-25. A judge acting on behalf of her own election campaign is acting for herself, not for the benefit of someone else, in particular, not for the benefit of the court to which she is seeking election or re-election.

The Commission is correct that the 53rd District Court is a "public body" as defined by the Campaign Finance Act, by MCL 169.211(7) in particular. But that term is necessarily limited to entities, which conclusion follows inexorably from its words "created by state or local authority or is primarily funded by or through state or local authority." Only entities can satisfy that definition. No individual can. But there was absolutely no evidence presented at the public hearing that the 53rd District Court as an entity had authorized Judge Brennan's staff to assist her with her 2014 campaign.

Much as the judges of a court might want the re-election of a colleague, it is unimaginable that they, acting as the court, not as individuals, would authorize assistance with a campaign. Besides, the Examiners offered no evidence, and the JTC points to none, of action by the 53rd District Court. Hence, because Judge Brennan is an individual, not an entity, only the prohibition of "a person acting for a public body" using or authorizing public resources, including public employees, is arguably applicable and, again, there is no evidence of such authorization or use because Judge Brennan was acting on her own behalf, not on behalf of her court. Hence, MCL 169.257(1) was not violated by Judge Brennan.

3. Not Misconduct

A violation of MCL 169.257(1) is a misdemeanor. MCL 169.257(4). If they ever were, misdemeanors are not actionable judicial misconduct. Until January 21, 2003, when the rules governing the JTC were revised for the first time in more than 30 years, 467 Mich at cxxxviii, MCR 9.205(B), as had its predecessor: GCR 1963, 932.4(b)(i) provided that a judge "shall be deemed guilty of misconduct in office if: he [or she] is hereafter convicted of conduct which is punishable as a felony . . ." Those words, said this Court in *State Bar v Gillis*, 402 Mich 286, 291-292; 262 NW2d 646 (1978), did "not preclude" finding misdemeanor behavior to justify discipline. What "shall be" is different from, and does not preclude, what may be. The revision of MCR

9.205(B) replaced the words "shall be deemed" with the words "is subject to" discipline for conviction of a felony. A necessary corollary of "is subject to" discipline "for conviction of a felony" is that a judge is not subject to discipline for misdemeanors. *Kimble,* 470 Mich at 311. Finally, it is another tenet of construction that amendments are presumed to work a change.

I. Judge Brennan Did Not Improperly Obtain or Accept From Her Judicial Staff Assistance With Personal Tasks.

The JTC adopted the Master's finding that Judge Brennan had improperly "require[ed] her staff members [Ms. Cox, her secretary, and Ms. Sharpe, her law clerk, in particular] to perform personal tasks [for her] during work hours . . . such as taking her car to the dealership [for warranty work], refueling her car, paying her utility bills" and the like. Judge Brennan's staff did undertake some such personal tasks for her, but were never required to do so -- they volunteered or, when asked, agreed to do so -- and none of the tasks interfered with doing their jobs. Hence, Judge Brennan did not engage in misconduct.

1. What Is And Is Not Misconduct In Obtaining Staff Assistance With Personal Tasks?

There are remarkably few discipline decisions which address judges supposedly misusing their staff to perform personal tasks. See *Geyh*, *et al.,* at § 6.06, pp 6-36-39. First of all, most of the decisions discussed or cited in that section relate to judges themselves misusing computers, government credit cards, etc. While Judge Brennan doubts that the treatise includes all decisions on the subject, there is no reason to believe that all sections in the treatise do not address essentially the same proportion of decisions on a subject. If so, the few decisions addressed in § 6.06 relating to use of staff for personal tasks suggest that few judges have been disciplined for doing so. Why? Either discipline authorities have turned a blind eye to such behavior if it is misconduct, or staff helping their judges with personal tasks is commonly accepted to be everyday human courtesies.

Fortunately, the discipline decisions which do address the subject consistently state a singular template for evaluating the propriety of a judge accepting help from staff with personal tasks. That consistency commends that template. The template was best stated in *Matter of Neely*, 364 SE2d 250, 252-253 (W Va 1987):

> "A judge or justice may, without creating the appearance of impropriety, occasionally ask members of [her or] his personal staff to voluntarily perform personal tasks that interfere only minimally with performance of their other duties, but this court will not condone the actions of a judge who requires extensive personal tasks as a condition of employment."

Justice Neely was admonished -- two partial dissenters would have censured him – not only for telling his secretary, when he hired her, that her job could include caring for his infant son and that not doing so when asked could result in dismissal, but also for requiring her to care for the boy on 11 occasions, once for more than seven days, and for firing her when she declined to do it again. It would have been acceptable, said the Court, for Justice Neely to have had his secretary do things akin to completing tax forms or to typing a teenage child's term papers while in the office during working hours, but requiring her on penalty of discharge to care for his son on her own time for extended durations was not acceptable; it was akin to having her help operate a ranch or a construction project in which the judge had a commercial interest. Nothing like that behavior or Justice Neely's occurred in this case.

In the case of *In re Gallagher*, 326 Or 267; 951 P2d 705 (1998), not only did a judge's judicial assistant type personal documents, book airline flights, and the like, which did not violate *Neely*, she spent days out of the office assisting with a fundraising golf tournament. In the case of *In re Decuir*, 654 So2d 687 (1995), a judge had his secretary provide eight months of secretarial services to his former law partner. And in *In re Davis*, 113 Nev 1204; 946 P2d 1033 (1997), a judge had court employees accompany him several times a week on excursions outside the

courthouse lasting up to two hours to search for antiques, and he sent court employees to his mother's commercial nursery to provide translation services for customers.

In sum, a judge is guilty of misconduct when he or she orders a staff member on penalty of discharge for noncompliance to provide any personal, nonjudicial assistance to the judge. Whether any threat of a lesser sanction for non-compliance would also be misconduct has never been addressed. It probably would be, unless, perhaps, the threatened sanction were only de minimis. The help must be voluntary. A judge is also guilty of misconduct when he or she asks for or accepts from court personnel voluntary personal assistance which significantly interferes with their duties to the court. But it is not misconduct, it follows, for a judge to ask for and to accept voluntary personal assistance given during work hours so long as it does not significantly interfere with court functions.

Nor should it be deemed misconduct for a judge to accept personal assistance, however extensive, voluntarily provided by a staff member on his or her own time. Disallowing such assistance would infringe on staff's freedom to live their lives and manage their time. And if compensated by the judge, disallowing such services would also impose an inappropriate burden on being a public employee: an inability to earn extra income on their own time. Not only did Ms. Cox and Ms. Sharpe voluntarily assist Judge Brennan, Ms. Cox got paid to do it. It should not be the place of disciplinary authorities to tell staff that they cannot do favors on their own time for a well-regarded base.

In their brief to the JTC, the Examiners contended, so presumably they will again contend here, that this Court has adopted a different standard. The Examiners contended that in the case of *In re Cooley*, 454 Mich 1215; 563 NW2d 645 (1997), this Court censured a judge for using her staff for non-work-related tasks even though there was, they read the opinion to say, no hint that

she threatened them with termination or other significant retaliation if they did not. Seemingly, therefore, the Examiners contended that here in Michigan there is an absolute ban on staff assistance, even voluntary assistance with personal tasks, at least when done during work hours. That is the conclusion which follows from their contention.

Cooley did not adopt any such rule. Judge Cooley "appropriated [for over three years] the services of court personnel whom she requested to perform 'non-work-related tasks . . .'" "Appropriat[ed]" is, even when used along with the word "requested," a strong hint of compulsion. At least it is far from a statement of voluntary assistance. In addition, *Cooley* involved a consent order of discipline, which are more sui generis than precedent-setting. They do not entail the kind of analysis involved in the resolution of a contested case. Besides, this Court is free to overturn any ruling. If *Cooley* did what the Examiners contend, the holding should be revisited and revised. A rule prohibiting judges from requesting and/or accepting any voluntary staff assistance with personal tasks would be impractical, would stultify the judicial workplace, and, frankly, would look silly to the public.

2. What Did Judge Brennan Do?

Not only was no evidence presented at the public hearing that Judge Brennan required any member of her staff to perform tasks for her, there was much evidence to the contrary, that she did not do so. To start, the Examiners never asked Ms. Cox if Judge Brennan had ordered or required her to perform personal tasks. Their questions to her were all variations of "Did Judge Brennan *ask* you to do . . . various personal tasks . . .?" [emphasis added] (pp 606, lines 9-10; 610, lines 24-25; 615, lines 13-15; 617, lines 10-20; 620, lines 18-19; 707, lines 9-10). The words "ordered," "required," etc. were never used (pp 697, lines 23-24; 702, lines 11-12; 706, lines 24-25; 707, line 4; 711, line 14; 712, lines 10-12; 754, line 22). If Ms. Cox and Ms. Sharpe were required to perform personal tasks, would they not have said so at some time when interviewed ahead of their

testimony, and would not the Examiner have used those terms rather than repeatedly use "ask," instead?

But we need not infer what Judge Brennan said. Her staff told us. Ms. Cox answered, "Yes," to the question, "[D]id [Judge Brennan] ask you to do anything outside of your official duties?" (p 606, lines 9-12). Although Ms. Cox said, "I had to . . . pick up lunch," she immediately added, "I would offer to do that" (p 607, lines 1-4). In the morning, Judge Brennan "sometimes . . . would . . . ask me" to get her coffee and a muffin (p 607, lines 6-9), and "[s]he'd . . . ask me to pay her bills" (p 611, lines 18-20). Also, Ms. Cox acknowledged having "step[ped] forward and volunteer[ed] to do 'personal things for Judge Brennan,'" "not 100%," but "on occasion" (pp 682, lines 21-25; 683, lines 1-2).

We know also for sure that Ms. Yakel volunteered to stain Judge Brennan's deck. She testified, "She [Judge Brennan] asked me if I knew anyone who stained decks . . . I said not off the top of my head, but *I can do it*, . . . so she asked [me] . . . [and] I *said sure*" [emphasis added] (p 698, lines 12-21). That is the antithesis of being dragooned into the task. And, as had Ms. Cox, Ms. Yakel also testified with regularity that Judge Brennan "asked me" (p 711, lines 7-8; 754, lines 3-4, 19-20; 1860, lines 21-25; 1861, line 2), or "request[ed]," or "wanted me to take care of." None of that testimony supports the conclusion that Judge Brennan required her staff to perform personal tasks for her, let alone did so as a condition of employment. Finally, at other times, Judge Brennan offered a "$100 finder's fee" to any staff member who could find certain items for her online, which challenges were readily accepted (p 614, lines 21-25; 615, lines 1-12), hoping to earn the $100 (p 661, lines 11-12).

Ms. Cox claimed "always fe[eling] a sense of being compelled" (p 613, lines 19-20). But when asked in the same colloquy with the Master, "[D]id you consider those things done at her

direction voluntarily done . . .?," Ms. Cox answered, "[I]t depends what it is, Judge. That's a tough one" (p 683, lines 7-12), which is hardly anything close to "always fe[eling] a sense of being compelled," as claimed. And, as noted earlier, Ms. Cox testified to having "offer[ed]" to pick up lunch, having "step[ped] forward and volunteer[ed]" to do personal tasks, and having accepted the offers of a finder's fee to look online for clothes for the judge. Those, too, are not claims of compulsion, but their antithesis.

Also, Ms. Sharpe did respond, "[a]bsolutely not" when asked, " . . . [D]id you feel free to say, I don't think so. I'd rather not do that?" (p 707, lines 13-15). Just a few pages earlier, however, she had admitted having volunteered, not even being asked, to stain Judge Brennan's deck (p 698, lines 17-20). And just a few months later, Ms. Yakel wrote that Judge Brennan's treatment of her (p 732, lines 16-19) was 'just awesome' and that the judge was 'for the most part, the perfect boss'" (p 734, lines 7-11), "a good mentor" (pp 731, line 23; 732, lines 6-7), and someone to be emulated (p 733, lines 15-16). Is that how an intimidating boss is described? By the way, while Ms. Cox reneged at the public hearing on her years of praising Judge Brennan (note 11, above), Ms. Sharpe never did.

All the assistance Judge Brennan requested and obtained from her staff was with truly personal matters: canceling appointments when she was stuck on the bench in the midst of a proceeding, making hairdressing appointments, getting coffee and a muffin, dropping off mail or packages on the way home, making an ATM withdrawal at a nearby bank, purchasing online a parking pass for an upcoming baseball game, getting water samples from her home for testing, and programming Netflix there, taking her car in for repairs, and staining her deck. None were in aid of any side business, as had occurred in *Cooley*, *Davis* and *Gallagher*. And all but the latter two took only moments, too little time to even arguably interfere with work.

One day, Ms. Sharpe did spend a couple of hours waiting at a nearby car dealership for warranty work to be done on the Judge's car, but the Judge's secretary remained at the courthouse to handle phone calls, visitors, etc. while Ms. Sharpe off-site, so the worksite was manned. Ms. Sharpe took drafting work with her (p 1868, lines 1-15), and since the Judge was traveling out-of-state to a family wedding (p 1861, lines 16-17), Ms. Sharpe's absence did not interfere with anything which needed to be done at the courthouse, and she could do the needed research and drafting online and off-site, albeit distracted by background noise (*Id.).*

Apparently, for two of the three days Ms. Sharpe stained the deck at Judge Brennan's home she was on the clock at the courthouse doing nothing there, obviously for the court. The third day was a Saturday, plainly Ms. Sharpe's own time and when the court was closed. Unquestionably, accepting the latter cannot have been improper. Ms. Sharpe had volunteered to do the task, and she was doing it on her own time. Under other circumstances, but not the circumstances of this case, accepting the former would have been improper. Ms. Sharpe had volunteered to do the work. No question about that. She admitted it.

As for the staining which occurred while Ms. Sharpe was on the clock, Judge Brennan did not know of that and had no reason to know of it. Ms. Sharpe was then a part-time employee who worked 2.5 days/week. In other words, she did not work 2.5 days/week, and her schedule was flexible. The two days she worked on the deck could have been off the clock, which is what Judge Brennan expected and which it was reasonable to expect. Yes, she wanted the work done right away to take advantage of favorable dry weather, but she did not direct Ms. Sharpe to lie to the county. Ms. Yakel could have clocked in truthfully on other days. And the judge being out of town, she did not know what Ms. Sharpe had done and she did not have access to Ms. Sharpe's time records.

J. Judge Brennan Did Not Engage in Any Misconduct During Any of the Depositions Taken in Her Divorce Case

The JTC's final finding was that Judge Brennan "improperly interrupted two depositions that she attended during her divorce case" (p 21). Curiously, the JTC's decision did not use the word misconduct, but only the word "improper[]." Judge Brennan assumes that the JTC used those words synonymously. If not, this section need not be reviewed.

1. What Happened

During the Root-Brennan divorce case, Mr. Kizer, who was representing Mr. Root, took several depositions. Very little attention was directed during those depositions to matters pertinent to divorce proceedings. Mr. Kizer spent virtually all of his time addressing what would be in the 31st grievance he filed against Judge Brennan. That, frankly, was misconduct, but Judge Brennan's divorce lawyers did not object, which they should have done. Their silence does not transform Judge Brennan's two interruptions into misconduct.

Very early in the divorce case, Mr. Kizer took the deposition of Mr. Furlong. When, in response to a question by Mr. Kizer, Mr. Furlong testified that he and Judge Brennan had not exchanged texts or telephone messages during the *Kowalski* trial, Judge Brennan interjected, "We did once." Six or so weeks later, when Ms. Francine Zysk began to answer a question in her deposition, Judge Brennan interrupted, stating "Okay, okay, you need to stop for a minute. You are lying. You are such a liar." Neither witness was the least bit affected by Judge Brennan's comments. Neither lost their train of thought, was the least bit flummoxed or confused, or altered in the least their testimony. Nor did either even complain about, the interruptions. Mr. Kizer did, but they didn't.

2. Not Misconduct

The JTC's decision does not explain in any fashion why Judge Brennan's interruptions were improper. Nor does its decision cite to any authority whatsoever which she supposedly violated. Instead, the JTC merely made the bald assertion that Judge Brennan had acted "improperly." That lack of specificity should be enough to absolve Judge Brennan of any obligation to even attempt to rebut the assertion. As noted earlier, JTC findings and recommendations must be "adequately supported," *In re Chrzanowski, 465 Mich at 488*, and what is "not part of the [JTC's] recommendation . . . will not be considered by this Court." *Simpson*, 500 Mich at 551 fn 22.

In each iteration of the formal complaint it filed, the JTC asserted that Judge Brennan had engaged in "[i]mproper conduct during deposition[s] contrary to MCR 2.306(C)." In her brief to the JTC, Judge Brennan and her counsel discussed explicitly why MCR 2.306(C) did not apply, nor why MCR 2.306(D), which more likely was applicable, was not violated. Hence, it simply is not credible to conclude that the JTC's silence on the issue was sloppy or inadvertent. Almost surely, is silence resulted from it having no basis to articulate in support of its finding of improper conduct at other's depositions.

MCR 2.306(C) is very long, addressing many subjects. Unfortunately, the Complaint does not specify which part of the rule is at issue. Presumably, the JTC relied on MCR 2.306(C)(5) because that is the only place where anything is said about interactions with deponents. Only two types of interactions are mentioned, and neither kind remotely happened in this case. Specifically, except to assert a privilege or some other legal protection, "a person" may not instruct a deponent to not answer a question, MCR 2.306(C)(5)(a), and a "deponent may not confer with another person while a question is pending." MCR 2.306(C)(5)(b). Neither happened.

MCR 2.306(D)(2), which has never been asserted, authorizes sanctions "on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates this rule." There is no claim, nor was there any proof, that the examination of either Mr. Furlong or Ms. Zysk was adversely affected, and it was apparent that neither examination was. As noted earlier, neither witness balked at answering, changed an answer, lost their train of thought, complained, or asked for a break before continuing (Exhibit 1-4, p 56; Exhibit 3-2, pp 27-28). In sum, Judge Brennan did not violate MCR 2.306(D)(2) either.

VII. PRAYER FOR RELIEF

WHEREFORE, for the above reasons, Judge Brennan prays this Honorable Court reject the Tenure Commission's recommendation.

Respectfully submitted,

By:*/s/ Dennis C. Kolenda*
Dennis C. Kolenda, Esq. (P16129)

DICKINSON WRIGHT PLLC
Attorneys for Hon. Theresa M. Brennan

Suite 1000
200 Ottawa Avenue NW
Grand Rapids, MI 49503
(616) 458-1300
dkolenda@dickinsonwright.com