STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

MSC Case No. 157930

Hon. Theresa M. Brennan
Formal Complaint No. 99

_____/

RESPONSE TO PETITION TO REJECT JUDICIAL TENURE COMMISSION'S RECOMMENDATION OF DISCIPLINE

For the reasons stated below the Judicial Tenure Commission, by its examiner, Lynn Helland, and co-examiner, Casimir Swastek, asks that this Court deny respondent's petition to reject the Commission's recommendation to remove her from the Michigan judiciary, and further asks that this Court adopt the recommendation in its entirety:

1. The Commission did not improperly "prejudge" respondent's conduct and did not err by denying respondent's motion to disqualify itself from these proceedings.
2. There is no evidence that "lingering sexism" played any part in the Commission's recommendation.
3. The Commission correctly found that respondent had a very close, long-lasting relationship with Michigan State Police Detective Sean Furlong, the main witness in *People v. Kowalski*, that the Code of Judicial Conduct required her to fairly and honestly disclose to the parties.
4. The Commission correctly found that the Code of Judicial Conduct required respondent either to disclose her relationship with attorney Shari Pollesch or disqualify herself from cases in which Ms. Pollesch or her firm appeared, due to the business relationship

between Ms. Pollesch and respondent's husband, and also due to the very close personal relationship between Ms. Pollesch and respondent.

5. The Commission correctly found that respondent tampered with evidence in her own divorce case. The Commission also correctly found that respondent committed serious other misconduct in connection with her divorce case.

6. The Commission correctly found that respondent knowingly and intentionally made the numerous false statements, most of which were under oath, that she challenges in her petition to this Court. The Commission also correctly determined respondent made the false statements with an intent to deceive. In addition, the Commission correctly found that respondent knowingly and intentionally made additional false statements, which findings respondent does not challenge in her petition.

7. The Commission correctly found that respondent was persistently disrespectful and discourteous to others, including attorneys appearing before her and her staff.

8. The Commission did not substitute the Court of Appeals opinion in *Sullivan v Sullivan* for its own finding that respondent abused an attorney in that case.

9. The Commission correctly found that respondent's use of court staff, during the work day, for her 2014 campaign violated MCL 169.257(1). In addition, the Commission correctly found that respondent's use of her court staff for her campaign, during the work day, was misconduct whether or not her doing so violated the statute.

10. The Commission correctly found that respondent's directing her court staff to do personal tasks for her during the work day was so extensive that it constituted a violation of the Code of Judicial Conduct.

11. The Commission correctly found that respondent improperly interrupted two depositions by challenging the testimony of the witnesses.

12. The Commission correctly found that respondent improperly delayed disqualifying herself from her own divorce case.

13. This Court has removed judges from the bench for lesser misconduct than that committed by respondent.

For these reasons, and based on the supporting facts and argument in the accompanying brief, the Commission asks that this Court reject respondent's petition, and instead accept in full the Commission's recommendation to remove respondent from the Michigan judiciary.

/s/
LYNN HELLAND (P32192)
Examiner

/s/
CASIMIR J. SWASTEK (P42767)
Associate Examiner

3034 W. Grand Blvd. Suite 8-450
Detroit, Michigan 48202
(313) 875-5110

Date: May 30, 2019

STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
_____/

MSC Case No. 157930
Formal Complaint No. 99

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

ORAL ARGUMENT REQUESTED

STATE OF MICHIGAN
JUDICIAL TENURE COMMISSION

LYNN A. HELLAND (P 32192)
Examiner

CASIMIR J. SWASTEK (P 427676)
Associate Examiner

3034 West Grand Boulevard
Suite 8-450
Detroit, Michigan 48202
(313) 875-5110

May 30, 2019

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JURISDICTION

At all material times Hon. Theresa Brennan ("respondent") was a judge of the 53d District Court in Livingston County, Michigan, subject to all the duties and responsibilities imposed on her by this Court, and to the standards for discipline set forth in MCR 9.104, MCR 9.205, and the Michigan Code of Judicial Conduct. The Court has authority to act upon the recommendation of the Judicial Tenure Commission. Const. 1963, Art 6, §30; MCR 9.223 through 9.225.

STANDARD OF PROOF

The standard of proof in judicial disciplinary proceedings is preponderance of the evidence. *In re Haley*, 476 Mich 180 (2006); *In re Morrow*, 496 Mich 291, 298 (2014); MCR 9.211(A).

STANDARD OF REVIEW

This Court reviews the Commission's findings of fact and recommendation *de novo*. *In re Jenkins*, 437 Mich 15 (1991); *In re Hathaway*, 464 Mich 672 (2001); *In re Morrow*.

COUNTERSTATEMENT OF PROCEEDINGS

On June 11, 2018, the Commission authorized Formal Complaint No. 99 (FC 99) against respondent, and on July 23 authorized an amended complaint. The hearing on the amended complaint took place over nine days in October and November 2018. The master heard testimony from 21 witnesses, including respondent, and received more than 175 exhibits.

On October 15 the examiners moved to amend the complaint to add charges supported by the evidence already admitted and by the anticipated remaining evidence. Respondent did not object, and on November 20 the master granted the motion.[1] The master issued his report on

[1] The examiners filed a Corrected Second Amended Complaint on November 26, which corrected typographical errors in the complaint the examiners had submitted with the motion to amend.

December 20. (R: 57 as corrected) The Commission heard objections to the master's report on March 4, 2019, and issued its Decision and Recommendation for Discipline on April 12. (R: 86)

COUNTERSTATEMENT OF ISSUES PRESENTED

I. WHETHER THE COMMISSION PROPERLY DETERMINED THAT IT DID NOT "PREJUDGE" RESPONDENT'S CONDUCT AND PROPERLY DENIED RESPONDENT'S MOTION FOR DISQUALIFICATION OF THE ENTIRE COMMISSION?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

II. WHETHER THE COMMISSION PROPERLY DETERMINED THAT THERE WAS NO SIGNIFICANT EVIDENCE OF SEXISM BY THE MASTER?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

III. WHETHER THE COMMISSION CORRECTLY CONCLUDED THAT RESPONDENT WAS REQUIRED TO DISCLOSE HER RELATIONSHIP WITH SEAN FURLONG TO MORE FULLY AND HONESTLY THAN SHE DID IN *PEOPLE V KOWALSKI,* OR IN THE ALTERNATIVE TO DISQUALIFY HERSELF FROM THE PROCEEDINGS?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

IV. WHETHER THE COMMISSION CORRECTLY CONCLUDED THAT RESPONDENT WAS REQUIRED TO DISCLOSE HER RELATIONSHIP WITH HER HUSBAND'S ATTORNEY AND HER BEST FRIEND SHARI POLLESCH, OR IN THE ALTERNATIVE TO DISQUALIFY HERSELF FROM COURT PROCEEDINGS INVOLVING POLLESCH OR HER FIRM?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

V. WHETHER THE COMMISSION CORRECTLY CONCLUDED THAT RESPONDENT FAILED TO PROMPTLY DISQUALIFY HERSELF FROM HER OWN DIVORCE CASE AND TAMPERED WITH EVIDENCE IN THAT CASE?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

VI. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT RESPONDENT WAS PERSISTENTLY DISRESPECTFUL TO ATTORNEYS, LITIGANTS, AND HER COURT STAFF?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

VII. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT RESPONDENT IMPROPERLY REQUIRED HER COURT STAFF TO PERFORM PERSONAL TASKS FOR HER DURING COURT WORK HOURS?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

VIII. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT RESPONDENT AND HER COURT STAFF IMPROPERLY ENGAGED IN CAMPAIGN ACTIVITIES DURING COURT WORK HOURS?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

IX. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT RESPONDENT IMPROPERLY INTERFERED WITH DEPOSITIONS RELATING TO HER DIVORCE PROCEEDINGS?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

X. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT RESPONDENT ENGAGED IN NUMEROUS MATERIAL AND INTENTIONAL MISREPRESENTATIONS, FALSE STATEMENTS AND PERJURY?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

XI. WHETHER THE COMMISSION'S RECOMMENDATION FOR THE REMOVAL OF RESPONDENT FROM JUDICIAL OFFICE, INCLUDING AN EXTENSION THROUGH THE NEXT JUDICIAL TERM, IS WARRANTED BASED ON RESPONDENT'S ACTS OF MISCONDUCT?

The Commission answers: **"Yes."**

Respondent answered: **"No."**

XII. WHETHER THE COMMISSION'S REQUEST FOR COSTS PURSUANT TO MCR 9.205(B) IS WARRANTED BASED ON RESPONDENT'S INTENTIONAL AND MATERIAL MISREPRESENTATIONS?

The Commission answers: **"Yes."**

Respondent answered: **"No.**

FACTS AND ARGUMENT

Introduction

The Commission determined that respondent engaged in the misconduct that was charged in fourteen of the fifteen counts in the second amended complaint, comprising seven different types of misconduct.[1] Because each type has its own history, it is most helpful to discuss the facts separately with respect to each rather than in one all-inclusive statement, and to then consider the cumulative impact of the misconduct when determining the appropriate sanction.[2]

Respondent essentially objects to the Commission's findings in their entirety. Her objections rest on mistakes of law, misunderstanding the Commission's findings, selective use of facts, and omission of critical context.[3] The Commission's conclusions are fully supported by the evidence, and it urges this Court to adopt its decision and recommendation in full.

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[1] Respondent claims the Commission "effectively dismissed" four counts of the complaint by not making any recommendation concerning them. (Brief pp 8-9) This characterization is incomplete. The master did not address Count VIII; the examiners did not object to the master's lack of a finding; and like the master, the Commission made no finding with respect to this count. Count XVII consisted of many separate false statements charged as subcounts. The examiners *withdrew* Counts XVII(b)(i) and XVII(k) before the master issued his report, and the examiners simply neglected to include Count XVII(o) or facts related to Count XVII(p) in an appendix they provided to the master that purported to include all false statements, and on which the master relied as a catalogue of the false statements. It was because these five counts were withdrawn or omitted that the master and Commission made no finding with respect to them. (D&R at p. 4 fn2)

[2] The separate types of misconduct are: failure to disclose/disqualify; false statements; tampering with evidence; abusive treatment of others; using court resources for campaign purposes; using court employees for personal tasks; and inappropriate behavior during depositions.

[3] Respondent's factual introduction, at pp 1-3 of her brief, appears designed to color the Court's view of the Commission's report by casting aspersions on one of the grievants. The aspersions have nothing to do with any issue before the Court, so this brief will not address them except in one way: the allegations on which respondent relies are part of the record due only to respondent's testimony, the particulars of which were irrelevant to the proceedings and as a result was never challenged for accuracy. An example is respondent's claim that one grievant has filed 31 grievances against her. (Brief at p 2) The Commission asks that the Court view respondent's first few pages of her brief with these points in mind, and to the extent any part of this introduction relies on respondent's testimony, and therefore, her credibility, the Commission asks that the Court evaluate her trustworthiness after reviewing the false statements section of this brief.

I. The Commission Did Not Impermissibly "Prejudge" Respondent's Misconduct

After the master issued his report finding, among other things, that respondent had tampered with evidence and committed perjury in connection with her own divorce case, and after the attorney general charged respondent with three felonies for doing so, the Commission petitioned this Court to suspend respondent without pay pending the outcome of the proceedings. (R: 65)[4] Respondent seized on the Commission's filing the petition to ask it to disqualify itself en masse from this case. (R: 71) The Commission refused; respondent renews her argument here. She claims the Commission's petition for interim suspension means it prejudged the merits of the case, so was required to disqualify itself by MCR 2.003. (Brief at pp 13-18)

A small bit of procedural history is relevant. Initially the Commission authorized the deputy executive director to petition for respondent's suspension if he thought it appropriate.[5] The deputy filed a petition on January 15. (R: 59) On January 25 this Court denied the petition because it had not been approved by the Commission itself. (R: 62) The Court observed that the Commission's order authorizing the petition had "expresse[d] no opinion regarding . . . the substance and/or merits of the examiner's motion for interim suspension . . . ." On February 4 the Commission responded by filing its own petition for interim suspension, in which it did express its opinion that the evidence adduced warranted the suspension sought. (R: 65)

In the main, respondent's argument that the Commission "prejudged" her case rests on language at several places in the Commission's petition to the effect that the evidence "established"

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[4] Citations in this brief are as follows: "Ex __" to formal hearing exhibit number; "___ Tr _/_/_, p _/_" to formal hearing transcript with the name of the witness, date, page, and line reference; "R: __" to record item number as listed in the index to the pleadings; "D&R at p __" to the Commission's Decision and Recommendation, and "Brief at p __" to respondent's corrected brief in support of her petition.

[5] The executive director was then acting as examiner for the case, so it was considered inappropriate to authorize him to file the petition.

whatever assertion followed the use of that word. She claims the Commission's use of "established" indicated that it had made its own finding regarding each such assertion.

Respondent rests entirely too much weight on the inference she chooses to draw from this one word. The Commission rejected her chosen inference when it denied respondent's motion to disqualify itself, clarifying that when it used "established" in the petition, it meant only that the particular assertions associated with that word had been "established in the mind of the master." (R: 82 at p 2). The Commission also explicitly stated that it had *not* yet made any findings on the merits, having not yet heard respondent's objections to the master's report. (Id.)

In light of this Court's suggestion that the Commission was required to express an opinion on the merits of the petition, the Commission's clarification of the petition's language, and the Commission's own statement that no commissioner had prejudged any fact by filing the petition, there is no merit to respondent's argument that the petition showed the Commission was impermissibly tainted.

Respondent also faults the Commission for seeking her suspension *after* the master issued his report, not before. To the contrary, the court rules are clear that the Commission has authority to petition for interim suspension either before a complaint is filed, per MCR 9.219(A)(2), or after it is filed, per MCR 9.219(A)(1). Nothing in the court rules suggests there is some point after a complaint is filed beyond which the Commission may no longer petition for interim suspension. *See, e.g.*, *In re Chrzanowski*, 465 Mich 468 (2001) (petition for interim suspension filed, and granted by this Court, three months after complaint filed).

Nor *should* the rules make such a distinction. To the extent "prejudging" is respondent's concern, there is no meaningful prejudging difference between a petition filed 1) before the complaint is issued; 2) simultaneously with filing the complaint; 3) between filing complaint and

the hearing, as in *Chrzanowski*; and 4) after the hearing, as in this case. In each situation the Commission makes a preliminary assessment whether the evidence is strong enough and serious enough to warrant seeking interim suspension. In none of them does the Commission's preliminary assessment disqualify it from later reviewing the case on the merits.

The fallacy of respondent's argument is further demonstrated by the fact that it applies equally to this Court. The Court has to rule on the Commission's petitions for interim suspension. By respondent's logic, if the Court grants a petition it has "prejudged" the evidence on which the petition relies and is disqualified from further proceedings.

In a larger sense, respondent judges have repeatedly argued that the Commission cannot fairly judge the merits of their case after it has investigated and approved the complaint. This Court has consistently rejected those arguments. *See, e.g., Chrzanowski,* 465 Mich at 483-487; *In re Mikesell,* 396 Mich 517, 528-529 (1976). Just as the Commission can properly investigate, charge, and adjudicate, it can also properly assess whether the evidence supports interim suspension, and still assess the evidence on the merits.

The facts of this case demonstrate the wisdom of there being no deadline for filing a petition for interim suspension. The primary bases for the petition were unknown to the Commission when it filed the complaint: i.e., the evidence that respondent deleted data from her cell phone and the fact that she was charged with three felonies. It would be a poor judicial discipline system that lacked the ability to continually monitor the evidence and seek suspension whenever appropriate.

The sole authority respondent cites for disqualifying the Commission is *People v Gibson,* 90 Mich App 792 (1979). *Gibson* was concerned with a very different question: a judge presided over two separate trials of codefendants, and during the first trial stated that he believed the evidence from that trial established the guilt of the second defendant. *Gibson* is a departure from

the normal rules concerning bias, so should be confined to its facts. Normally a judge need not recuse himself simply because he acquired knowledge of facts during a prior proceeding. "In order to disqualify a judge under MCR 2.003(B)(2), actual bias or prejudice must be shown." *People v. Upshaw*, 172 Mich App 386, 388-89 (1988). The fact that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias for purposes of disqualification. *People v. White*, 411 Mich. 366, 386, 308 N.W.2d 128 (1981); *Emerson v. Arnold*, 92 Mich App 345, 353, 285 N.W.2d 45 (1979). As the United States Supreme Court said in *Liteky v United States*, 510 U.S. 540, 551 (1994):

> Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

See also, United States v Carlton, 534 F.3d 97, 100 (2d Cir. 2008) ("Opinions held by judges as a result of what they learned in earlier proceedings in a particular case are not ordinarily a basis for recusal"); *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976) ("[W]hat a judge learns in his judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification"); *United States v. Thirion*, 813 F.2d 146, 155 (8th Cir. 1987) (no bias although judge sentenced defendant after having stated, while sentencing codefendants, that they were less culpable than defendant); *United States v Burnette*, 518 F.3d 942, 945 (8th Cir. 2008) (no bias although judge stated that defendant was not credible in the course of sentencing coconspirator).

For all of these reasons, there is no merit to respondent's claim that the Commission improperly prejudged her case.

II. There Was No Basis For the Commission to Consider Respondent's Claim That She Was the Victim of Sexism

Respondent next argues that the Commission inadequately considered her claim that the charges against her, and the master's report, were the product of sexism. (Brief at pp 18-21) She cites several indicators that sexism still exists in our society. Then, rather than offer any evidence of bias in this case, she merely asks, apparently rhetorically, whether each of these indicators might have caused one or more of the complaints about respondent's own conduct. The Court can accept every one of her suggestions about societal sexism as valid, and there will still be no credible evidence that sexism played any role in this case.

The only evidentiary hooks on which respondent hangs her claims of sexism are that the master "treated an unwanted advance as proof of a disqualifying sexual relationship" and the master found that respondent's conduct demonstrated that she was in a romance with the officer in charge of *People v Kowalski* at the time that case went to trial. (Brief at p 20) Neither hook bears any weight.

The officer in charge, who was also the key witness in *Kowalski*, was Michigan State Police Detective Sean Furlong. The evidence showed that respondent and Furlong had been very close friends for over five years by the time the *Kowalski* trial began in 2013. The master found that respondent failed adequately to disclose her relationship with Furlong to the parties in *Kowalski*. One small piece of the evidence cited by the master to explain his finding was that Furlong kissed respondent in her chambers in 2007 without suffering any negative consequence. (R: 57, master's report at p 5) The master reasoned that if Furlong and respondent were not very close, his kissing a judge would have caused serious consequences in the courthouse. The master's inference was fair. More important, in light of respondent's argument, there is nothing in his inference that is somehow the product of "sexism."

Respondent's other suggested evidentiary hook for her claim of sexism is the master's conclusion that respondent and Furlong had a romance before the trial. (R: 57, master's report at p 5) Respondent's theory is apparently that the master could only believe the relationship was a romance if he was a sexist. (Brief at p 20) For present purposes, what is important is that whether the master's inference was right or wrong, nothing about it suggests it was the product of sexism, rather than a merely drawn without bias from the available facts.

Absent some clear suggestion of bias on the part of witnesses or the master – and respondent offers none – the Commission was under no obligation to dwell on respondent's complaints about sexism at any greater length than it did.

III. The Commission Correctly Concluded that Respondent Was Required to Disclose Her Relationship With Furlong to the *Kowalski* Parties More Fully and Honestly Than She Did, or in the Alternative, to Disqualify Herself from the Proceedings (Count I)

The Commission found respondent had a relationship with Furlong that she had a duty to disclose more honestly and fully than she actually did in connection with the *Kowalski* proceedings. (D&R at pp 7-8) Respondent begins her objection to this finding with a section labeled "What Really Happened." Unfortunately, this section overlooks much of what actually occurred between respondent and Furlong leading up to, during, and shortly after, the *Kowalski* trial. The salient facts are summarized here.

People v Kowalski was assigned to respondent in March 2009. Furlong was the co-officer in charge of the investigation. He took Kowalski's statement, which was the key piece of evidence (Respondent Tr 10/1/18, p 158/1-6; Piszczatowski Tr 10/4/18, p 921/9-13; Maas Tr 10/4/18, pp 991/23 – 992/6). Respondent, exercising her discretion, admitted the statement into evidence over Kowalski's pretrial objection, at a hearing at which Furlong was the main witness. She also exercised her discretion to prevent a defense expert from testifying about the unreliability of the

statement Furlong took from Kowalski. Right or wrong, respondent's pretrial rulings had a very negative impact on the defense case (Piszczatowski Tr 10/4/18, p 966/1-13).

Trial took place in January 2013. Furlong was the main prosecution witness during the trial. (Respondent Tr 10/1/18, p 158/7-10; Piszczatowski Tr 10/4/18 pp 920/15 – 921/13; Maas Tr 10/4/18 pp 991/11 – 982/15, 1003/8-10). On January 4, 2013, the Friday before trial, Livingston County attorney Tom Kizer sent a letter to the parties regarding respondent's relationships with Furlong and Furlong's close friend and fellow MSP officer, Chris Corriveau, who was also a witness in *Kowalski* (Ex. 1-9; Piszczatowski Tr 10/4/18, pp 922/19 – 923/14). The letter caused Kowalski to seek to disqualify respondent. She refused, after characterizing her relationships with Furlong and Corriveau as nothing more than routine professional friendships.[6]

The Commission found that "respondent was engaged in what was clearly a very close, personal relationship with Furlong during the relevant time period," which, at a minimum, she was required to disclose. (D&R at p 7) The record strongly supports the Commission's conclusion. It shows respondent joined a small social group that included Furlong and his good friend and MSP colleague, Chris Corriveau, in 2006, after which:

- Furlong kissed respondent in her chambers in 2007 (Ryan Tr 10/2/18, pp 494/11 – 495/7; Zysk Tr 10/9/18 pp 1465/17 – 1466/15);[7]

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[6] The letter, respondent's handling of it, and her characterization of her relationship are discussed in greater detail in the false statements section of this brief, below at pp 53-59.

[7] Before this Court, now that the evidence is in, respondent casually acknowledges that Furlong kissed her in 2007. (Brief at p 22) Respondent's inconsistent and misleading statements over the years concerning the kiss speak volumes about her overall credibility:

- Respondent claimed, under oath during her divorce deposition, that any witness who claimed she and Furlong had a romantic kiss around her 50th birthday (which was in 2007) would be lying. (Ex 1-14, Respondent Dep Tr Root v Brennan 218/5-9)

- Respondent thrice told the Commission, under oath, that when, just prior to trial, the *Kowalski* parties asked about her relationship with Furlong, she told them "we never had sex, or kissed." (Ex 16, p 21; Ex 19, pp 27-28, No. 42; Ex 21, pp 8-9, No. 27)

- Before *Kowalski* was assigned to respondent in March 2009, she said she was sure Kowalski was guilty based on remarks made to her by Furlong (Cox Tr 10/3/18, pp 590/12 – 591/19);

- Respondent had Furlong as a guest at her cottage among a small group of friends, including a) one trip that lasted nearly a week, and b) a weekend trip the year before the trial that consisted only of respondent, Furlong, Corriveau, and Corriveau's female friend, Kim Morrison (Morrison Tr 10/4/18, pp 852/18-853/19; Ryan Tr 10/2/18, p 481/8-17; 11/19/18, p 1773/13-22);

- Respondent gave Furlong regular use of her cottage in Holland (Root Tr 10/3/18, pp 573/22 – 574/9; Ryan Tr 10/2/18, p 481/3-20, pp 484/18 – 485/3, 9-25, p 486/3-10, Tr 11/19/18 p 1773/17-22; Respondent Tr 10/1/18, p 182/10 - 183/6, Tr 10/8/18 pp 1647/25 – 1648/6, Tr 10/10/18, pp 1624/8 – 1625/8; Morrison Tr 10/4/18, pp 852/18 – 853/19);

- Respondent had more than 1500 social phone conversations with Furlong between July 2008 and the start of trial, and they exchanged about 400 social texts from 2010 to the start of trial (Ex. 1-31, rows 3-1935; Respondent Tr 10/1/18, pp 165/19-23, 169/10-12; Ex. 1-14 (Respondent Dep Tr Root v Brennan 2/9/17, p 120/2-9); Ex. 16 p 13);

- Furlong was one of only three trusted friends respondent asked to proofread a statement she submitted to the Judicial Tenure Commission in 2009, in response to a complaint about her (Respondent Tr 10/1/18, pp 195/20 – 196/14; Ryan Tr 10/2/18, pp 487/24 – 488/25);

- Respondent had 3-5 picnics at Kensington Metropark consisting of her, Kim Morrison, Furlong, and Corriveau (Respondent Tr 10/1/18, p 187/17-24; cf. Morrison Tr 10/4/18, p 847/6-9), plus a trip to Kensington with Furlong and Corriveau to comfort Morrison when she failed to pass the bar exam (Morrison Tr 10/4/18, pp 847/17 – 848/8);

- Respondent said the same thing thrice more, under oath, at the hearing on the complaint. (Respondent Tr 10/10/18, p 1666/5-12; R: Respondent Tr 10/10/18, p 1666/17-22; R: Respondent Tr 10/10/18, p 1743/4-7)

- Finally, at the hearing on the complaint respondent denied ever telling Shawn Ryan that she and Furlong had a romantic kiss on about her 50th birthday. (Respondent Tr 10/1/18, p 193/8-10)

Giving respondent the benefit of every doubt, she did not consider the kiss to be "romantic," so her deposition and hearing testimony with respect to her statement to Shawn Ryan was technically accurate even if misleadingly incomplete. But that does not excuse her false denial to the parties in *Kowalski*, a false denial she has confirmed six times, under oath.

- During the 14 months before trial respondent and Furlong talked on the phone between one and two hours per month, with 80% of the calls initiated by respondent (Respondent Tr 10/1/18, pp 166/13-22, 169/2-9; Ex. 1-22; Ex. 1-29);

- Respondent consistently met with Furlong and Corriveau in chambers behind closed doors, which she did not do with other law enforcement; she sometimes interrupted court proceedings to do so (Cox Tr 10/3/18, p 584/10- 586/23; Bove Tr 10/4/18, pp 786/14 – 787/7; Zysk Tr 10/9/18, p 1463/18 – 1464/20);

- Furlong was a dinner guest, along with others, at respondent's home, including one dinner at which respondent and other women removed their clothes while in respondent's pool (Ryan Tr 10/2/18, pp 491/4-24, 492/5-13, 492/25-493/1, Tr 10/3/18, pp 561/19 – 562/12, Tr 11/19/18, pp 1771/14 – 1772/8; Pollesch Tr 10/9/18, pp 1426/25 – 1427/5, 1428/15 – 1430/9);

- Respondent met with Furlong in small social groups, often had lunch with him, and attended sporting events with him (Cox Tr 10/3/18, pp 588/23 – 589/19; Bove Tr 10/4/18, 787/8-10; Ryan Tr 10/2/18, p 484/8-12; Zysk Tr 10/9/18, p 1465/9-12);[8]

- Respondent caused Furlong to have the use of her husband's U of M football tickets (Root Tr 10/3/18, pp 574/21 – 575/25; Respondent Tr 10/1/18, pp 193/11-17, pp 194/20 – 195/14);

- For three years running, while *Kowalski* was pending before respondent, she went Christmas shopping with Furlong and one other person (Ryan Tr 10/2/18, p 486/11-22; Ryan Tr 11/19/18, pp 1768/25 – 1770/7, 1807/20 – 1808/20; Respondent Tr 10/1/18, p 191/16-21);

- Respondent had a 2012 conversation with her friend, Kim Morrison, which caused Morrison to think respondent had a romantic interest in Furlong at that time (Morrison Tr 10/4/18, pp 849/23 – 850/11)

- Respondent's friend, Shawn Ryan, recalled having dinner with respondent, Furlong, and Corriveau at a restaurant in November or December 2012, shortly before the *Kowalski* trial. The dinner was memorable to Ryan because it was the first time she noticed respondent looking at Furlong with a certain "look of affection" (Ryan Tr 10/2/18, pp 497/24 – 498/18).

[8] Although the evidence shows that respondent often had lunch with Furlong, and often left alone with him to go to lunch, and sometimes said she was going to lunch with Furlong without mentioning others, there is no direct evidence that she ate alone with him.

In addition, respondent did things during and shortly after the *Kowalski* trial that strongly suggest a deep pretrial relationship with Furlong:

- Respondent and Furlong exchanged social calls and texts *during* the trial, with the phone conversations totaling a half hour in length, plus another 20 conversations between verdict and sentence (Ex. 1-19, rows 257-259 (calls on January 18 and 19, 2013); Ex. 1-31 rows 1936-1952 (texts between January 18 and 19, 2013); Ex. 1-31, rows 1953-2179)

- On April 22, 2013, only seven weeks after Kowalski was sentenced, respondent's secretary went to respondent's office in preparation for the afternoon court proceedings (Cox Tr 11/19/18, p 1833/9-15). She was surprised to find respondent sitting on the floor under the window, pulled into a ball and obviously very distressed (Cox Tr 10/3/18, pp 593/14 – 594/4; Cox Tr 11/19/18, pp 1833/19 – 1834/1). A short time later, respondent's best friend, Shari Pollesch, came to respondent's office. Respondent told Pollesch she was upset because Furlong had told her the two of them could not be friends anymore (Pollesch Tr 10/9/18, pp 1401/23-1402/1).[9] After spending a few minutes with respondent, Pollesch determined that respondent was so distraught she could not handle her docket. (Cox Tr 10/3/18, p 594/6-10 & 11/19/18 pp 1855/14-1856/1; Pollesch Tr 10/9/18, p 1402/8-18; Ex 1-30, docket sheets).

Respondent's brief barely acknowledges that she spoke socially and at length with Furlong while the trial was going on, but this fact is significant. For the most part respondent ceased her calling and texting Furlong once the trial began. This was such a dramatic departure from their pattern of the previous five and a half years that it must be an implicit, and very appropriate, acknowledgment that they considered it improper to communicate privately during the trial. Yet, halfway through the trial, respondent called Furlong three times for a total of a half hour, and exchanged several texts with him. She broke their phone and text silence even though, just two weeks earlier, she had denied a motion to disqualify her that was based on her personal relationship with Furlong. And what was her compelling reason for doing so? She was bored and wanted

[9] A few weeks after this incident respondent explained to Cox that what had so upset her is that her husband had told her to stop speaking with Furlong (Cox Tr 10/3/18 p 596/5-15 & 11/19/18 p 1835/2-16; p 1837/8-21). Whether respondent's statement to Pollesch, her statement to Cox, or perhaps both statements, were correct is immaterial. Both statements made clear that her anguish was due to the prospect of losing her connection with Furlong.

someone to talk with (Respondent Tr 10/1/18, p 229/11-23; Ex. 16 p 13; Ex. 19 pp 14 – 15 ¶ 11.(iii)a). She would not have chosen Furlong as her talking partner, under those circumstances, unless she felt exceptionally close to him. In fact, respondent acknowledged to Shawn Ryan, shortly after her April 2013 meltdown in chambers, that Furlong was the person she *most* liked to talk with at the end of the day (Ryan Tr 10/2/18, pp 499/7 – 500/9).

Canon 3(C) requires a judge to disclose any relationship when grounds for disqualification may exist under the judicial disqualification rule, MCR 2.003. MCR 2.003 lists various bases for disqualification, including when the judge's participation in the case creates an appearance of impropriety. MCR 2.003(C)(1)(b). After the hearing on the formal complaint brought out the above details of respondent's relationship with Furlong, the Livingston County prosecutor was so troubled by the appearance of impropriety that he asked to have Kowalski's conviction set aside and a new trial granted before a different judge. (R: 65 at p 28 ¶ 41) The Commission correctly determined that respondent's longstanding and close relationship with Furlong required her to disclose its depth to the parties. (D&R at pp 7-8). She did not do so. Rather, when asked about the friendship on the eve of trial, she explained it as merely the sort of relationship a judge has with members of the prosecutor's office. (Piszczatowski Tr 10/4/18 pp 932/24 – 933/2; Ex 1-6 p 6)

Respondent first challenges the facts on which the Commission relied to determine that she should have disclosed more about her relationship with Furlong. She interposes a straw man to argue that the Commission "refus[es] to let go of the unfounded belief that Judge Brennan and Mr. Furlong had a sexual affair throughout *Kowalski*." (Brief at p 21) She goes on to argue that she did not become *romantically* involved with him until after the *Kowalski* case. Her argument is somewhat complex, and rests entirely on a willful mischaracterization of the complaint and the proceedings below. Fortunately, it is not necessary to sort through the details. The Commission

explicitly stated that it did *not* conclude respondent's relationship with Furlong was romantic while *Kowalski* was pending.[10] (D&R at p 7) Respondent is simply wrong to assert otherwise.

Respondent next argues that she had no duty to disclose her relationship with Furlong as of 2009, when she was assigned the case and issued pretrial rulings in it. (Brief at pp 23-24) Although the complaint is actually concerned with the relationship between respondent and Furlong as of the trial in 2013, even as of 2009 their relationship was much closer than respondent acknowledges in her brief. By then, Furlong had kissed her; he had had the use of her cottage at least once; respondent had told her secretary she knew Kowalski was guilty based on Furlong's comments; and they had exchanged over 140 social phone calls during the eight months between the date the phone records begin (July 21, 2008) and the date respondent was assigned to *Kowalski* (March 9, 2009). (Ex. 1-31 rows 3-146; Ex. 1-1) More significantly, they exchanged another 31 social calls between respondent receiving the case and the April 2, 2009, hearing on Kowalski's motion to suppress the statement Furlong took from him; 20 more social calls between the hearing and respondent's ruling denying the motion on April 13, 2009; and another 128 social calls between that ruling and respondent's July 27, 2009, decision to grant the prosecution's motion to preclude an expert who would have challenged the statement Furlong took. (Ex. 1-31 rows 147-325; Ex. 1-1)

Respondent next dismisses the significance of her look of affection for Furlong shortly before the trial and her becoming distraught at losing contact with him a few weeks after the sentencing. (Brief at pp 25-26) Her discussion relies entirely on isolating this evidence from the other evidence of their relationship that is summarized above. When the events just before, during,

[10] In fact, the complaint never asserted that respondent had a pre-*Kowalski* sexual relationship with respondent, and before the hearing the examiner explicitly clarified that it was not part of the examiner's case to try to prove such a relationship. (R: 42, Complaint at ¶ 17c; Tr 9/19/18 at p 52/22-25) There is simply no reason for respondent to make this argument, but for her need for the straw man it gives her.

and after the *Kowalski* trial are viewed in context with the evidence of a close relationship going back six years, those events do indeed suggest that respondent and Furlong were very close as of the start of trial.

Respondent next dismisses the significance of her 1500 pretrial phone calls and 400 pretrial texts with Furlong. (Brief at pp 26-28) She argues that the phone calls do not demonstrate a close relationship absent some evidence that, in the abstract, this is a significant number of calls. She misses the point. During the 14 months before trial she talked with Furlong almost as much as she talked with her sister and more than she talked with anyone else. (Ex. 1-24) That frequency of social contact (which respondent blithely dismisses as "less than one call a day") itself suggests a close enough relationship to disclose the communications, quite apart from all the other evidence concerning their relationship.

Respondent next argues that unless she had sex with Furlong, MCR 2.003 did not require her to disclose her relationship with him. (Brief at pp 28-33) Her argument is that although MCR 2.003 required her to recuse herself if her presiding created an appearance of impropriety, there is no appearance of impropriety when some other, more explicit, provision of Rule 2.003 governs her conduct. Respondent rests her argument on this Court's opinions in *In re Haley*, 476 Mich 180, 194 (2006), and *Adair v Michigan*, 474 Mich 1027 (2006).

Respondent is correct that in *Haley* and *Adair* this Court refused to find that "appearance of impropriety" was a basis for disqualification under the 2006 version of Rule 2.003, which had no such provision in it. Instead, the Court said, the question of disqualification was governed by Rule 2.003 so long as a provision of Rule 2.003 applied to the facts. The Court concluded that Rule 2.003 did cover the relationships at issue in *Haley* and *Adair*, and therefore refused to explore whether refusing to disqualify created an appearance of impropriety.

Whatever impact this analysis might have had were we litigating respondent's case in 2006 – and it is not clear it would have any impact – this Court amended Rule 2.003 in 2009, at which time it added "appearance of impropriety" as a separate basis for disqualification. Respondent acknowledges the amendment, but claims it worked no actual change in the scope of Rule 2.003. Rather, she says, since there is no *explicit* provision in Rule 2.003 that requires her to disqualify herself on the basis of friendship, *Haley* and *Adair* still negate any concern over the appearance of impropriety that a friendship might cause, and accordingly, Rule 2.003 (and, by extension, the Code of Judicial Conduct) imposed no duty to so much as disclose her relationship with Furlong.

Respondent's argument proves too much. No explicit provision of Rule 2.003 requires a judge to disqualify herself even if she has an active sexual relationship with a party or witness while a case is going on. Although it would clearly create an appearance of impropriety for the judge to preside over such a case, by respondent's logic the silence of Rule 2.003 about such a relationship question means she does not have to disqualify herself. That makes no sense, of course. Similarly, it makes no sense that respondent could have the closest, most intimate, *non*sexual relationship with a witness, yet be under no duty to disqualify so long as the specific relationship is not otherwise listed in the rule.[11]

Judicial relationships with parties, lawyers, and witnesses come in all shapes, sizes, and forms. Because of that, it is impossible to devise a rule that explicitly addresses all of them. The

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[11] Respondent notes that in *In re Haley* this Court declined to create an independent "appearance of impropriety" standard for judicial disqualification when there is an express, controlling, canon or court rule. (Brief at p 29) She claims MCR 2.003 is just such an explicit and controlling rule in this case. But it is not. Other than "appearance of impropriety," nothing explicit in MCR 2.003 speaks to the sort of relationship respondent had with Furlong.

Respondent's argument is, again, flawed as a matter of logic. If she were correct that 1) "appearance of impropriety" comes into play only when there is no other rule, and b) the explicit provisions of Rule 2.003 fill the field with respect to disqualification, then "appearance of impropriety" adds not a thing to Rule 2.003. That cannot be what this Court intended when it added that provision to the rule.

virtue of the "appearance of impropriety" is that it applies to all relationships *without* attempting the impossible. "Appearance of impropriety" is, of necessity, less precise than are other parts of Rule 2.003, but it is no less precise than many canons and is actually quite workable. In *Caperton v. Massey Coal Co.*, 556 U.S. 868, 888 (2009), the United States Supreme Court noted approvingly that

> The ABA Model Code's test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Id.*

As this Court said in *Adair*, assessing appearance of impropriety is to be done "from the perspective of a reasonable observer who is informed of all surrounding facts and circumstances." 474 Mich at 1039. That is the sort of workable standard to which courts are accustomed.

From the perspective of any reasonable objective observer who was informed of the evidence summarized above, respondent's relationship with Furlong created an appearance of impropriety. No reasonable, objective, defendant would think he could receive a fair trial from respondent if Furlong were the key to the prosecution. The Commission determined that respondent committed misconduct by failing to reveal the depth of her relationship with Furlong to the *Kowalski* parties "and/or failing to disqualify herself." (D&R at p 23) Respondent could have made a full disclosure of the facts relating to her relationship with Furlong, which would have enabled the parties to make an informed decision whether to appeal and enabled a higher court to make an informed decision regarding disqualification. Or, respondent could have simply disqualified herself from *Kowalski*. She violated Canons 2(A) and 3(C) by failing to do either.

IV. The Commission Correctly Concluded that Respondent Was Required to Disclose Her Relationship With Her Husband's Attorney and Her Best Friend Shari Pollesch, or to Disqualify Herself from Court Proceedings involving Pollesch or Her Firm (Count II)

Attorney Shari Pollesch represented respondent's husband from 2011 through 2016. Respondent also had a long-lasting friendship with Pollesch, and as of 2014 considered Pollesch to be her best friend. Meanwhile, respondent presided over ten cases between 2014 and 2016 in which either Pollesch or someone from her small firm represented a party. Respondent did not disclose either her husband's business relationship or her personal relationship with Pollesch in any of those cases. The Commission found that this was another violation of respondent's duty to disclose. (D&R at pp 8-9).

Respondent begins her challenge to this finding with a section of her brief labeled "What Happened." (Brief at pp 34-35) Although the section alludes to most of the relevant indicia of her friendship with Ms. Pollesch, it ignores one of the most significant: that respondent herself identified Pollesch as her best friend in late 2014.

But even that is not the Commission's single most determinative finding with respect to respondent's duty to disclose her relationship with Pollesch. The most determinative is that Pollesch provided legal services to respondent's husband and one of her sisters. (D&R at pp 8-9) "What Happened" acknowledges this finding but attempts to negate it with the claim that the Commission made no finding that failing to disclose the business relationship was improper. (Brief at p 35) To the contrary, the Commission's opinion makes clear that it identified several indicia that Pollesch had a close personal relationship with respondent, one of which was the legal assistance Pollesch provided to respondent's family. That finding was clearly a part of the Commission's determination that respondent had a duty to disclose the relationship. It is apparently respondent's position that because the Commission did not put this fact into a separate

"business relationship" box, and instead lumped it with other evidence in the "personal relationship" box, the fact does not count. There is no reason for such boxes.

Respondent also repeats her argument that nothing in MCR 2.003 explicitly refers to relationships such as hers with Pollesch, so like her relationship with Furlong in the *Kowalski* case, she had no duty to disclose her relationship with Pollesch. Just as with her relationship to Furlong, though, respondent's close personal friendship with Pollesch created at least the appearance of impropriety. That is, an objective and well-informed observer would have a serious question whether respondent's best friend, who was also her husband's lawyer, would receive preferential treatment in cases in which that best friend or her small firm appeared before respondent. At a minimum, she was required to put parties on notice and give them a chance to develop a record.

Respondent attempts to avoid the impropriety of not disclosing her relationship with Pollesch by posing a different question – whether "appearance of impropriety" requires judges to eschew friendships. (Brief at p 36). But this dramatic new straw man is not implicated by the facts of this case. The question is not whether a judge can have friends, but whether a judge is required to at least disclose that a lawyer appearing before the judge is the judge's *best* friend and/or the lawyer for the judge's spouse. As the Commission correctly found, the answer to that narrow question is "yes." It determined that respondent committed judicial misconduct by failing to disclose the relevant facts relating to her relationship with Pollesch "and/or failing to disqualify herself" from court proceedings in which Pollesch or her firm appeared.[12] (D&R at p 23) As with *Kowalski,* respondent had a choice to either make a full disclosure of her close relationship to counsel or to disqualify herself from proceedings in which Pollesch or her firm appeared. Respondent failed to elect either option, so again violated Canons 2(A) and 3(C).

[12] The Commission noted two cases in which respondent denied opposing counsel's motions to disqualify based on her relationship with Pollesch. (D&R, p 9)

V. The Commission Correctly Concluded that Respondent Failed to Promptly Disqualify Herself From Her Own Divorce Case and Tampered With Evidence (Counts IV & XVI)

In December 2016 respondent's husband, Don Root, filed for divorce. The case was automatically assigned to respondent. She did not disqualify herself immediately, although aware she needed to do so. While the case was still on her docket, Root filed an emergency motion to preserve evidence, which covered "email messaging, text messages, phone records, . . . and other relevant data" in respondent's possession. (Ex 4-3) Respondent still did not disqualify herself, but instead undertook ultimately successful efforts to delete data covered by the motion from her cell phone.

The Commission found that respondent's failing to disqualify herself from her own case was misconduct. (D&R at pp 2, 23, 25) Respondent, apparently overlooking the Commission's finding (Brief at p 9), does not take issue with it. The Commission also found that respondent committed misconduct by tampering with the evidence on her cell phone. (D&R at pp 9-12) Respondent does take issue with this finding. The facts that follow show both of the Commission's findings were clearly correct.

Respondent begins her objection with a section entitled "The Undisputed Evidence," shortly followed by another entitled "More Facts." Unfortunately, both sections fail to account for substantial evidence and misconstrue the evidence they do acknowledge. The details are extraordinary.

Respondent knew, as of the morning of Friday, December 2, 2016, that Root would file for divorce. That morning she texted Root that "the [divorce] case will Automatically [sic] be assigned to me and I will of course DQ myself." (Ex 4-10 p 5)[13] Root filed for divorce later that day, and

[13] When asked during the investigation why respondent did not promptly disqualify herself from her own divorce case, she responded under oath: "I know this will sound absurd but I do not know that it even registered with me

the case was assigned to respondent. (Pratt Tr 10/2/18, pp 316/13 – 317/1) Chief Judge David Reader informed respondent of the divorce, and expected her to disqualify herself. (Pratt Tr 10/2/18, p 317/3-7; R: Reader Tr 10/2/18, pp 356/19 – 357/10, 18-21) Respondent did not do so.

The following Monday Judge Reader again expected respondent to disqualify herself, but she still made no effort to do so. (Reader Tr 10/2/18, p 358/3-11; Respondent Tr 10/1/18, pp 108/23 – 109/19) However, respondent did speak with her divorce attorney for 17 minutes that afternoon. (Ex 4-6 p 3, call # 190)

The next day, December 6, respondent still did not disqualify herself. (Respondent Tr 10/1/18, p 115/5-8) Late that morning Root filed an emergency ex parte motion to preserve evidence, including all data of a type that included the data on respondent's cell phone. (Pratt Tr 10/2/18, pp 319/4 – 320/1; R: Ex 4-3 p 2 ¶¶ 1, 4) Judge Reader was concerned that respondent had not yet disqualified herself, because it was necessary to have her disqualification before the case could be reassigned to a judge who could review the emergency motion. (Reader Tr 10/2/18, pp 358/22 – 359/3, 362/2-6) He learned that his secretary, Jeannine Pratt, was going to Brighton that day, so asked her to stop by the Brighton court to pick up respondent's order disqualifying herself while she was in town. (Reader Tr 10/2/18, pp 361/22 – 362/6)

At 11:47 a.m. Pratt informed respondent by phone that the ex parte motion had been filed, and told her she needed to sign an order disqualifying herself so other Livingston County judges could also disqualify themselves and the case could be referred to SCAO for reassignment. (Pratt Tr 10/2/18, p 320/11-24, 19-24; Ex. 4-9 p 2) During the call Pratt read the title and first paragraph

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that [the divorce case] was my file until [the chief judge's secretary] came to the Brighton court" (Ex.19 at p 32 ¶60). Respondent is correct – her claim does sound absurd; especially in light of her telling Root, just before he filed for divorce and four days before the secretary came to her court, that the case would be assigned to her and she would disqualify herself. While respondent's false claim, that it did not register with her that the divorce was her case, is not charged as misconduct, it offers another revealing glimpse into her credibility.

of Root's motion to respondent, advised she would email the motion to her, and told her she would come to respondent's court in the afternoon to pick up the order of disqualification. (Pratt Tr 10/2/18, pp 320/25 – 321/13, 324/15-22) Nothing in the conversation gave Pratt the impression there would be any problem with her picking up the disqualification order that afternoon; respondent made no statement that she was too busy, or otherwise asking Pratt not to come by. Based on the conversation, Pratt believed respondent would have the signed order for her to pick up. (Pratt Tr 10/2/18, pp 324/23 – 325/9, 326/9-13)

Immediately after getting off the phone with Pratt, respondent spoke with her divorce attorney again, this time for six minutes. (Ex 4-6 p 3 call # 197) Meanwhile, Pratt emailed respondent the ex parte motion and a disqualification order ready for respondent's signature. (Exs 4-2, 4-3; Respondent Tr 10/1/18, pp 119/11 – 120/9; Pratt Tr 10/2/18, p 326/14-22)

When Pratt arrived at the Brighton courthouse about two hours later, respondent met her at the door by her office area, where she was standing with court administrator John Evans. Respondent refused to sign the disqualification order when Pratt presented it to her, stating she had not spoken with her attorney. (Respondent Tr 10/1/18, p 122/2 – 122/23; Pratt Tr 10/2/18, p 328/9-12; Evans Tr 10/2/18, p 407/12-24)) She did not say anything else about the disqualification order. (Pratt Tr 10/2/18 p 328/13-20)

That day or the next, respondent's research attorney, Robbin Pott, saw respondent's secretary, Tammi Morris, make multiple unsuccessful attempts to get respondent to sign the disqualification order. Pott recalled that the order was sitting on respondent's desk for a couple of days and respondent's refusal to sign it made Morris uneasy. (Pott Tr 10/2/18, pp 426/9 – 427/6) Based on what she saw, Pott concluded that respondent was avoiding signing the order (Pott Tr 10/2/18, pp 427/24 – 428/3)

Respondent later represented to the Commission that she signed the disqualification order the morning of December 7 and placed it with mail to be transported from the Brighton court to the Howell court. (Respondent Tr 10/1/18, pp 132/9 – 133/14) Judge Reader and Pratt told the afternoon mail clerk, responsible for picking up the mail from the Brighton court, to be on the lookout for the order that day. (Reader Tr 10/2/18, pp 362/23 – 363/4; Pratt Tr 10/2/18, p 330/1-14) When the clerk came back, in the late afternoon, the order was not in the mail. (Reader Tr 10/2/18, pp 363/6-9, 365/10-17; Pratt Tr 10/2/18, p 330/22-24)

Much later, respondent later told the Commission the reason the disqualification order was not in the December 7 mail run must have been that the mail run was early that day. (Respondent Tr 10/1/18, p 133/10-22; Ex. 16 p 22; Ex. 19 p 30 ¶ 57; Ex. 21 pp 22-23 ¶ 156) But respondent had claimed to have put the signed order in the mail that morning, and Pratt was explicit that the clerk left in the late afternoon to pick up the mail. (Pratt Tr 10/2/18, p 330/15-21)

On December 8 court administrator Evans went to the Brighton court. Judge Reader asked him to pick up the disqualification order from respondent while he was there. (Evans Tr 10/2/18, pp 405/6 – 406/2) Respondent handed him an envelope containing her signed order, dated the previous day, and stated: "This is what Dave's been having a cow about." (Evans Tr 10/2/18, p 412/1-8; Ex. 4-5) Respondent did not mention anything to Evans about the order having been intended for, but somehow omitted from, the previous day's mail. (Evans Tr 10/2/18, p 412/11-16)

Meanwhile, between the time Root filed the motion to preserve evidence and December 8, respondent asked people, including her staff and a police officer, for assistance deleting information, including an email account, from her cell phone. (Respondent Tr 10/10/18, p 1699/9-13; Pott Tr 10/2/18, pp 428/15 – 429/7 and 446/24 – 448/12; Milhouse Tr 10/3/18, pp 527/9 –

528/10) At the time she made those requests she knew she had to give the phone back to Root, and also knew the data on the phone was subject to Root's motion to preserve it. (Respondent Tr 10/10/18, pp 1699/1 – 1700/1)

Apparently not having succeeded in learning how to delete the information on her own, on December 8 respondent asked her court recorder, Felica Milhouse, to try to delete the Hotmail account from her phone. (Milhouse Tr 10/3/18, p 528/5-20) Milhouse could not discover how to do that. (Milhouse Tr 10/3/18, p 528/14-20) After Milhouse assisted respondent to begin the day's court proceedings, respondent instructed her to leave her duty station as court recorder to continue her effort to delete the email account from respondent's phone. (Milhouse Tr 10/3/18, pp 528/21 – 529/9) Respondent told Milhouse she wanted the account deleted because her husband wanted the phone back. (Milhouse Tr 10/3/18, p 532/8-15)

Following respondent's instructions, after Milhouse called the first case on December 8 she left the courtroom and again attempted to delete the account. When that was not successful she conducted a Google search on how to do so. (Milhouse Tr 10/3/18, pp 529/19 – 530/2, 546/20 – 547/22, and 558/10-22) Milhouse believed respondent's request to delete the email account was a matter of urgency that needed to be done right away. (Milhouse Tr 10/3/18, p 529/10-14) A forensic review of Milhouse's court computer revealed that between 10:00 a.m. and 5:45 p.m. on December 8, 72 internet searches were made on variations of the phrase "how to terminate [or delete or deactivate] a Hotmail account permanently." (R: 36, Stipulation at p 4)

On or shortly before December 8 respondent bought a new cell phone. When she did that, she claimed she had unspecified data copied from her old phone to the new phone, during which some "glitches" occurred. (Respondent Tr 10/8/18, pp 1337/20-21, 1339/18 – 1340/12-18) After having unspecified data copied from her old phone to the new phone, she had her old phone reset

to its factory settings. (Respondent Tr 10/8/18, pp 1341/22 – 1342/1; Tr 10/10/18, p 1701/8-23). Respondent's doing that removed all data from her old phone. (R: 36, Stipulation at p 2) Respondent then gave the original phone, which now contained no data, to her attorney, without informing anyone that she had wiped the data from it. (Respondent Tr 10/10/18, p 1702/1-9) During the formal hearing respondent admitted she knowingly deleted, or caused to be deleted, information from the old phone, knowing the phone was the subject of a motion to preserve evidence then pending in her divorce case then assigned to her. (Respondent Tr 10/10/18, pp 1700/22 – 1701/23 & 1704/3-6)[14]

Based on these facts, the Commission found that respondent a) failed to promptly disqualify herself from her divorce case, and b) tampered with the data on her phone while it was subject to the pending motion to preserve evidence. Respondent objects that there is nothing untoward about her transferring data from one phone to another. (Brief at pp 38-45) She would be correct had she merely copied data from the old phone to the new phone, without destroying the data on the old phone. And she could have done exactly that. Instead, having copied some data, she took the completely separate, completely unnecessary, step of then destroying all the data on her old phone. (R: 36, Stipulation at p 2)

Respondent would apparently like the Court to believe that her only goal with the phone was to fairly, fully, and safely transfer all data to the new phone, and even if she perhaps did not succeed in doing that, her good intentions insulate her from a charge that she tampered with evidence. However, as the summary above shows, there is significant evidence that this was *not* her intent. She sought help from several people with destroying, not copying, the data on the phone.

[14] On December 9 respondent's divorce case was reassigned to another judge. (Ex. 1-3)

One of those people was her court recorder, who she went so far as to instruct to leave court while court was in session to get respondent's Hotmail account removed from the phone.

Respondent twists Milhouse's testimony in an effort to deprive it of its force. She begins with the usual straw man – this time, it is a claim that the examiner "very much wanted" Milhouse to say that respondent asked Milhouse to delete "the contents" of her phone, but Milhouse would not say that. (Brief at pp 41-42) Respondent does not support her claim with any citation to the record, perhaps because the record does not support it. There is nothing in Milhouse's direct examination to even hint that the examiner expected or wanted Milhouse to say anything about data deletion other than she did: respondent wanted her to delete a Hotmail account. (Milhouse Tr 10/3/18 at pp 528/3 – 534/3, 556/16 – 559/3) The question of "contents" only came up during a cross examination, in which counsel for respondent engaged in a somewhat confusing colloquy with Milhouse, during which Milhouse repeatedly stated that respondent did *not* ask her to remove the "contents" of the phone; just the Hotmail account. (Milhouse Tr 10/3/18 at pp 534/6 – 556/6).

Respondent's brief to this Court tries to create ambiguity where there is none. She argues that Milhouse testified that respondent did not want "contents" removed from her phone, and never explained the distinction between removing the Hotmail account and removing "contents." Therefore, she says, there is no evidence that respondent wanted anything *removed* from the phone. (Brief at p 42). To the contrary. The questions put to Milhouse clearly distinguished between the entirety of the phone contents and the one Hotmail account. Milhouse plainly and repeatedly said that respondent did not want *all* contents removed, but only the Hotmail account. There is no ambiguity in Milhouse's testimony on this critical point.

If respondent merely had a good faith desire to copy data from the phone that was then subject to the motion to preserve evidence, she: a) had no reason to ask her staff and a police officer

how to *remove* data from the phone; b) had no reason to tell Milhouse to leave her duty post to *remove* a Hotmail account from the phone; and c) had no reason to delete *anything* from the phone, after copying whatever she copied and before turning it over to her attorney. In fact, once she was aware that there were "glitches" in whatever data transfer she attempted, if she was acting in good faith she had every reason *not* to delete anything from the old phone, in case the glitches had damaged any data.

Last but not least, the Commission knew, as is discussed further below at pp 50-52, that just weeks after these events respondent lied about them during her divorce deposition. Her false statements are an additional indication that her intent with respect to the phone was not pure. The evidence is clear that respondent intended to, and did, remove data from a phone when she knew the data was subject to a motion to preserve evidence.

Respondent claims that whatever she did, her "moving" data from one phone to another was not "tampering" within the meaning of MCL 750.483a(5)(a). (Brief at pp 39-41) She is wrong. By tampering with the device that held the data in such a way that it became impossible to know what data was preserved and what data was not preserved, respondent tampered with evidence under any common sense definition of "tampering."

Finally, respondent argues that Root's merely filing a motion to preserve the data on the phone did not demonstrate an intent to actually offer the data into evidence in any proceeding. Therefore, she says, she did not violate MCL 750.483a(5)(a). (Brief at pp 44-45). Respondent's interpretation of evidence tampering is somewhat crabbed. The much more reasonable interpretation of the statute is that a party has demonstrated enough intent to offer evidence to come under the protection of the evidence tampering statute, once the party asks that the evidence be preserved for that proceeding. The alternative is not palatable: respondent's interpretation

creates an incentive for parties to destroy evidence as soon as they learn a motion is pending to preserve it, quick before some judge grants the motion. That alternative is not compelled by the statutory language, and this Court should not adopt it.

More importantly for present purposes, it does not really matter whether respondent's conduct meets the elements of MCL 750.483a(5)(a).The question before the Court is whether she committed misconduct. Whether or not she violated a criminal statute, she certainly committed misconduct by refusing to disqualify herself from her own case while a motion to preserve evidence was pending, and using that time to get rid of data that was covered by the motion.

The Commission was correct to conclude that respondent violated the canons through her failure to disqualify herself and her destruction of the data on her old phone.

VI. Persistent abuse of attorneys, litigants, witnesses, and employees (Counts IX, X & XV)

The Commission determined that respondent was consistently abusive to attorneys, litigants and witnesses, and her own court staff. (D&R at pp 17-18). Respondent objects. She focuses on, and seeks to discount, only two of the witnesses who testified to her abuse, ignoring the rest. (Brief at pp 55-57) She points out that she did not engage in the particular sort of highly offensive language for which judges were disciplined in the 1970s, and draws the conclusion that she cannot be disciplined for persistent disrespect unless she used similar language. *Id*. at p 57. She misconstrues the Commission's finding, and creatively argues that the Commission may not sanction her conduct because the voters of Livingston County have approved it. (*Id*. at pp 57-59) She is wrong in every respect.

Respondent's treatment of lawyers & litigants

Respondent's argument mentions demeanor testimony from only two attorneys: Margaret Kurtzweil and Carol Lathrop Roberts. In fact, at least seven witnesses testified, with great

uniformity, that respondent treated lawyers and litigants very disrespectfully during court proceedings. Robbin Pott was a former litigator who was respondent's research attorney from November 2016 until May 2017 (Pott Tr 10/2/18, pp 421/1-22, 424/7-9; 436/23-25, 438/22 – 439/13). She observed that respondent treated people with disrespect, did not hear cases openly, fairly and objectively, and berated litigants and attorneys. She said respondent would shout or yell or cut off attorneys and pro per litigants almost daily, not allowing them to ask questions or answer them fully, and ruling before the parties had a chance to be heard; she created a very tense, angry, chaotic courtroom (Pott Tr 10/2/18, pp 431/17 – 432/2, 432/20 – 434/20, 457/2-4).

All of Pott's observations were borne out by the other demeanor witnesses. Attorney David Caplan characterized respondent as "unique" due to her rudeness to counsel, saying she had the worst demeanor of any judge before whom he had appeared in 44 years of experience as a litigator (Caplan Tr 10/3/18 p 765/15 – 766/2). He elaborated that she frequently dressed down attorneys in front of their clients when it was not necessary to do so (Caplan Tr 10/3/18, p 772/1-18).

Amy Krieg was a litigator for Shari Pollesch's firm from 2012 into 2016 (Krieg Tr 10/4/18, pp 881/19 – 882/14). Her first negative experience with respondent was in 2014 in connection with *Halliday v Halliday*, when she appeared before respondent for a pretrial conference early in the case (Krieg Tr 10/4/18, pp 882/17 – 883/9, 887/15 – 888/10). During the conference respondent became concerned about an aspect of the case.[15] She called the attorneys to chambers, where she accused Krieg's clients of committing a crime for which her bailiff could take them into custody right then, and said Krieg was implicated as their attorney (Krieg Tr 10/4/18, pp 888/23 – 889/3). The conversation was heated, and respondent's threat of arrest made Krieg fear for her clients

[15] The merits of respondent's concern are irrelevant to this argument. What matters is whether respondent was respectful and courteous. That said, respondent's concern was misplaced from the outset.

(Krieg Tr 10/4/18, p 890/10-19). When Krieg tried to explain why respondent was mistaken, respondent cut her off (Krieg Tr 10/4/18, pp 890/20 – p 891/1).

Respondent's handling of the pretrial conference caused Krieg to seek respondent's disqualification (Krieg Tr 10/4/18, p 891/9-18). At the hearing on the motion to disqualify, with her client present, respondent threatened to turn Krieg in to the Attorney Grievance Commission (Krieg Tr 10/4/18, p 892/15-19, 893/16-19). The master noted that respondent caused Krieg to leave litigation because she did not want to be treated the way respondent had treated her (R 57, master's report, p 15; Krieg Tr 10/4/18, p 899/5-11).

Margaret Kurtzweil is one of the two witnesses respondent acknowledges as having complained about her demeanor. Kurtzweil observed that respondent was consistently testy with attorneys and litigants (Kurtzweil Tr 10/5/18, pp 1023/8 – 1024/21, 1025/4-11). She observed respondent treat others that way, then experienced it herself when she appeared on *Schiebner v Schiebner* in November 2016, with Shari Pollesch on the other side (Kurtzweil Tr 10/5/18, pp 1026/5-13; 1029/13-17). *Schiebner* had previously been assigned to a different judge; this was the first hearing before respondent (Kurtzweil Tr 10/5/18, p 1028/8-9). Early in the hearing, after Kurtzweil had the temerity to disagree with her, respondent became extremely angry for what she perceived to be Kurtzweil's overly close relationship with the receiver. She lit into Kurtzweil, who characterized respondent's treatment of her as "wicked" (Kurtzweil Tr 10/5/18, pp 1035/14 – 1036/8). The video of the hearing confirms Kurtzweil's perception. (Ex. 30, at 2:00:51 – 2:01:37)

What is noteworthy about respondent's attacking Kurtzweil is: 1) she did so solely based on having watched a video of a proceeding before the previous judge; and 2) the previous judge, who was there when that prior interaction took place, had expressed no concerns about it. Also noteworthy, and consistent with the testimony of other demeanor witnesses, is that respondent tore

into Kurtzweil before making any effort to understand her position (Kurtzweil Tr 10/5/18, pp 1038/19 – 1039/2; Respondent Tr 10/8/18, pp 1730/6 – 1732/24). In Kurtzweil's experience as a litigator, respondent's temperament was well outside the norm; she had never seen another judge behave as respondent did (Kurtzweil Tr 10/5/18, pp 1046/1-3, 22 – 1047/14). Due to the way respondent treated her, Kurtzweil decided to never appear before her again (Kurtzweil Tr 10/5/18, pp 1047/16 – 1048/1).

Carol Lathrop Roberts is the other demeanor witness respondent acknowledges. She is a general practitioner who appeared in respondent's court dozens of times (Roberts Tr 10/5/18, pp 1127/11 – 1128/1). She considered respondent's behavior in the courtroom appalling. She said respondent intimidated litigants and attorneys; was abusive, including to her staff; and was often angry and let everyone know (Roberts Tr 10/5/18, p 1128/7-25). Roberts felt respondent was consistently the most disrespectful judge with whom she was familiar. She referred to respondent as "a black smear on the judiciary" (Roberts Tr 10/5/18, p 1143/10-16).

One case vividly illustrated Roberts's observations. *Brisson v Terlecky* was a paternity action in which Roberts represented the mother/defendant (Roberts Tr 10/5/18, p 1133/19-21). The trial date was June 21, 2017 (Roberts Tr 10/5/18, pp 1139/6-7). Based on her history with respondent, Roberts was so concerned about what would happen that she arranged for counsel to be on standby to represent her in case she was locked up (Roberts Tr 10/5/18, p 1140/9-15).

Her concern proved justified. Roberts attempted to explain that under the applicable paternity law the trial could not take place that day.[16] The video shows respondent interrupted Roberts every time she tried to make her argument, never letting her complete it. When Roberts insisted on trying to explain the law on which she was relying to support a result respondent did

[16] The June 21 proceedings are captured in Ex. 8-3; the transcript is Ex. 8-2.

not want to reach, respondent lost her temper and had Roberts taken to the lockup for a short time. Ex 8-2, p 4/22 – 13/17. As the master noted, whether or not respondent had some basis for frustration, "[s]urely . . .there should be a more appropriate first remedy for unnecessary persistence then arresting a lawyer."[17] (R: 57, master's report at p 16).

Respondent's court recorder, Kristi Cox, saw that respondent often mistreated people who were older or hard of hearing (Cox Tr 10/3/18, pp 598/16 – 599/2). Bruce Sage is an older attorney who is somewhat hard of hearing. In his 44 years of litigation he appeared before many judges without difficulty (Sage Tr 10/5/18, pp 1085/19 – 1087/12). Respondent was the lone exception. (Sage Tr 10/5/18, pp 1099/22 -1100/4).

Sage represented the plaintiff in *Sullivan v Sullivan*, over which respondent presided in 2015 and 2016. He felt he was always "climbing up the mountain" when representing Ms. Sullivan because he had to take on both opposing counsel and respondent (Sage Tr 10/5/18, pp 1088/18 – 1089/1). Her treatment interfered with his ability to put on his case. She would not allow him to ask questions, and more than once threatened to fine him (Sage Tr 10/5/18, p 1100/5-23). He testified that he loves practicing law, but found it distasteful to practice in front of respondent (Sage Tr 10/5/18, pp 1089/10 – 1090/1).

Sage felt mocked by respondent (Sage Tr 10/5/18, p 1089/17-19). Exhibit 10-11 shows why.[18] In one excerpt respondent is seen and heard asking for the patience of Job to deal with Sage; to the amusement, by the way, of the opposing party, who was sitting right next to her while she

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[17] With respect to the master's choice of words, Roberts's persistence was only "unnecessary" in the sense that she continued talking after respondent told her to stop. In fact, her persistence was minimal, and was a reaction to respondent cutting her off before she could complete her brief statement and cite the applicable law.

[18] *Sullivan v Sullivan* included a full-day trial and eight other hearings. Exhibit 10-11 consists of 30 or so excerpts from the proceedings. The exhibit attempts to communicate respondent's disrespect of Sage without going through the entire several hours of proceedings. With the exception of a couple that were included by mistake, the excerpts show respondent treating Sage – or, sometimes, opposing counsel – excessively curtly or rudely.

did so. (Ex 10-11, excerpt "#8-2015-10-22_10.19.01.314-Part C-trimmed"; Respondent Tr 10/2/18, pp 306/11 – 308/1) In another instance Sage mispronounced "Herve Leger," the name of a foreign fashion label that may not be familiar to many.[19] (Ex. 10-11, the excerpt named "Sullivan Trial #9 trimmed" at 2:12:49) Respondent toyed with the mispronunciation, then instructed someone off-camera that Sage's mistake would go into respondent's "best of" video, which was a collection she maintained of embarrassing moments in court.[20] Sage was so troubled by the way respondent treated him that he hired an investigator to watch the proceedings, to verify he was not imagining respondent's bias. It is kind of amazing that respondent's conduct caused an attorney to go to this length to assure himself he was not crazy (Sage Tr 10/5/18, pp 1101/11 – 1102/7).

Respondent argues that the Commission did not make its own finding that respondent treated Sage disrespectfully, but substituted the Court of Appeals' judgment for its own. (Brief at p 57) She does not explain her basis for that. There is none. The Commission referred to the Court of Appeals' comment that respondent's treatment of Sage damaged the appearance of justice. (Report at pp 17-18). Nothing about that reference suggests that the Commission was substituting the Court of Appeals' judgment for its own.

Respondent's treatment of employees

The master found that respondent was notoriously abusive toward her staff, as well. (R: 57, master's report at pp 17-18). Respondent claims the Commission did not find the same. (Brief at

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[19] The mispronunciation is not apparent in the transcript. For reference, it occurs at Ex 10-3, p 163/12-12.

[20] Several other telling excerpts include when respondent told Sage he had made a childish comment (Ex 10-3, p 168-170; Ex 10-11, the excerpt labeled "Sullivan Trial #10 trimmed" at 3:05:44 – 3:06:31), when she used a demeaning tone of voice that Sage testified "was not uncommon" (Ex 10-3, p 79-81; Ex 10-11, the excerpt labeled "Sullivan Trial #4 trimmed"; Sage Tr 10/5/18, pp 1091/22 – 1092/10) and when respondent needlessly interfered in Sage's attempt to make a record. (Ex. 10-3, p 214-222; Ex. 10-11, excerpt labeled "Sullivan Trial #14 trimmed"; Sage Tr 10/5/18, pp 1092/24 – 1093/24). Other video excerpts are self-explanatory and quite revealing of respondent's demeaning conduct.

pp 9-10) She is mistaken. The Commission found that one of the aggravating factors when considering the appropriate sanction was respondent's pattern of abusing her staff. (D&R at p 25)

The Commission was clearly right. Former court administrator Francine Zysk testified that she quit her job due to the poor way respondent treated her. Zysk added that as of 2017, *seventeen to twenty-one* staff members had left the Brighton court due to respondent's treatment of them (Zysk Tr 10/9/18, pp 1462/16-25, 1528/13-17). She said every employee in the civil division who went to the Brighton court complained about respondent; they asserted that no one should be talked to or spoken to the way respondent spoke to them (Zysk Tr 10/9/18, p 1461/11-19).

Kristi Cox was respondent's secretary and court recorder from 2005 into 2015 (Cox Tr 10/3/18, pp 580-16 – 581/12). In 2015 she took a two-level pay demotion, which was a substantial pay cut, to leave respondent. (Cox Tr 10/3/18, p 680/9-14). Cox was diagnosed with post-traumatic stress disorder, which she attributed to working with respondent (Cox Tr 10/3/18, p 680/15-19). Respondent demeaned, degraded, and belittled Cox during most of the time Cox worked for her (Cox Tr 10/3/18, pp 600/9 – 601/13, 602/12 – 604/5, 605/16-606/5).

Respondent's abuse of Cox was visible to others. APA Shawn Ryan saw respondent rudely talk down to Cox in the courtroom; it made Ryan and others feel uncomfortable (Ryan Tr 10/3/18, pp 508/14-22, 509/11-21). Carol Lathrop Roberts observed that respondent spoke to Cox in a very brusque, rude, dismissive manner; respondent always seemed to be angry about something, and often Cox was the target of the anger (Roberts Tr 10/5/18, p 1128/7-25).[21]

[21] Other witnesses testified about respondent's abuse of Cox. Those included Jeannine Pratt (Pratt Tr 10/2/18, pp 331/18 – p 332/4); Francine Zysk (Zysk Tr 10/9/18, p 1455/21-25 and p 1456/1-19); and Kim Morrison, who found it painful to watch (Morrison Tr 10/4/18, pp 856/14 – 857/3). Respondent's very close friend, Sean Furlong, was troubled enough that he offered to talk with respondent about how she treated Cox (Cox Tr 10/3/18, pp 601/20 – 602/2).

Jessica Sharpe was respondent's law clerk in 2014-2016. She confirmed Cox's perception that respondent was cruel to her (Sharpe Tr 10/3/18, p 697/3-10). Sharpe was also a target for respondent's disrespect by the end of her tenure. (Sharpe Tr 10/3/18, p 697/11-20). Respondent became aggressive and disrespectful, and Sharpe could do nothing right (Sharpe Tr 10/3/18, pp 714/16 – 715/1). She would angrily kick Sharpe out of the courtroom even though her job was to be there, and at times when irritated, would fling files at Sharpe with some velocity instead of handing them to her (Sharpe Tr 10/3/18, pp 715/5 – 716/8). Sharpe ultimately quit rather than take respondent's abuse (Sharpe Tr 10/3/18, p 722/20-24).

Lisa Bove was respondent's secretary from Cox's departure in 2015 until August 2016 (Bove Tr 10/4/18, pp 782/22-25; 805/25 – 806/1). Bove both worked for and socialized with her. She described respondent as a "Jekyll and Hyde" personality (Bove Tr 10/4/18, p 790/6-11). Any day could be great when Bove walked in, but within a few minutes, depending on who was before respondent and what was happening, "it could get kind of ugly" (Bove Tr 10/4/18, p 791/2-8).[22]

The Commission's conclusion that respondent was persistently disrespectful, including to Roberts and Sage, as charged in Counts IX, X, and XV, is well supported by the evidence. She is not insulated from accountability for her abusive behavior by virtue of being reelected in 2014 in a campaign in which her demeanor may have been at issue, nor by the fact that she was able to secure various endorsements in that campaign.

[22] One specific incident described by Sharpe, Bove, and Zysk related to respondent's anger at her staff when a jury pool was mistakenly sent home without a jury being selected. The three staff members all described respondent's reaction as angry or heated and unwilling to listen to their explanations (Sharpe Tr 10/3/18, pp 717/15-20, 751/18 – 752/7; Bove Tr 10/4/18, p 797/3-15; Zysk Tr 10/9/18; pp 1459/22 – 1461/5). Another explosion happened when the court's Polycom system could not be used during a court proceeding, even though Sharpe and Bove had verified that it was working properly just before the proceeding. Respondent yelled at Bove and Sharpe for not being prepared for court, even though the problem appeared to be on the other side of the communications link and she and Sharpe could not control that (Bove Tr 10/4/18, pp 797/16 – 799/20).

VII. Directing Employees To Perform Personal Tasks (Count XI)

The Commission found that respondent committed misconduct by having her staff do a substantial number of personal tasks for her during court time. (D&R at p 18). Respondent argues that she never directed her staff to perform the tasks – they either volunteered or complied if asked – so having her staff perform errands was not misconduct. (Brief at p 63)

In light of the abusive way respondent treated staff, it takes courage for her to argue that they "volunteered" to do her personal errands. But courage is not evidence, and the evidence is to the contrary. When respondent told Cox to run errands, her typical expression was "I need you to do this"; Cox felt compelled to comply (Cox Tr 10/3/18, pp 610/2-5, 610/24 – 611/1, 612/8-9, 682/17 – p 683/20). Around 90% of the time respondent asked Sharpe to do personal tasks, they were "urgent" and Sharpe felt she could not say no (Sharpe Tr 10/3/18, pp 707/12 – 708/2).[23] It should be noted that respondent did not restrict her requests to when she was too busy to her personal tasks herself, nor did she only ask Cox to do them when Cox was not busy. Cox was usually busy all the time – she worked over 8 hours per day just to get her work done. (Cox Tr 10/3/18, pp 616/25 – 617/ 24). The fact that Cox did respondent's errands even though she did not have time to complete her own work makes it more unlikely that she "volunteered" to do them.

Respondent next argues that it is not misconduct for a judge's staff to do personal errands. She offers different variations on the theme that unless the judge makes the errands a condition of employment or they are in pursuit of the judge's side business, personal errands are never misconduct. (Brief pp 63-66) She cites several cases, all but one from other states, in which courts

[23] Disregarding the evidence just cited, respondent wrongly states there was no evidence presented at the public hearing that she required any member of her staff to do personal tasks for her. (Brief at p 66) She argues that in fact, Cox and Sharpe testified that they did respondent's personal errands voluntarily and willingly. (*Id*. at pp 66-68) A review of Cox's and Sharpe's testimony, in the context in which it was given, belies respondent's claims.

found it was misconduct for a judge to have an employee perform personal tasks. She argues that since she did not do what those judges did, she must not have done anything wrong. (Brief at pp 64-66)

Nothing in the cases respondent cites suggests judges are free to ask employees to do more than de minimis personal errands.[24] Court employees are not the personal employees of judges, at least in Livingston County, and judges should not use their power over them to treat them as such. The Court need not define the boundary between an acceptable and unacceptable level of personal errands to decide this case. As the Commission said, quoting the master: "[w]hatever may be the correct standard of what a judge can properly ask of an employee, [respondent] went far beyond it." (D&R at p 18)

The Commission and master were right. Respondent had Cox prepare her packages and take them to the post office or other delivery service; pay her bills; obtain cash from an ATM;[25] go to her house to wait for a propane delivery and cable TV installation (the latter took all of one day and part of the next); schedule her pedicures and waxing; shop online for concert tickets and parking passes for baseball games; run alimony and/or child support guidelines over and over for respondent's sister, who was going through a divorce;[26] and create labels for a party (Cox Tr 10/3/18, pp 607/21 – 616/17).

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[24] The cases on which respondent relies are *In re Gallagher*, 326 Or 267 (1998); In re Davis, 113 Nev 1204 (1997); *In re Cooley*, 454 Mich 1215 (1997); *In re Decuir*, 654 So2d 687 (1995); and *In Matter of Neely*, 364 SE2d 250 (W Va 1987). She buttresses her argument with one of her straw men, asserting (incorrectly) that the examiners interpret *Cooley* to impose an "absolute ban" on staff assistance during work hours. (Brief at p 66) To the contrary, the Commission only contends that excessive staff errands become misconduct.

[25] When respondent needed money she would simply say: "I need $250 from the bank" and slide her money card to Cox. Cox knew respondent's PIN because she used the card so often (Cox Tr 10/3/18, pp 607/21 – 608/8).

[26] This incident gives additional insight into respondent's credibility. She testified that running the numbers was actually Cox's idea, because Cox thought so highly of respondent's sister's husband. (Respondent Tr 10/2/18, pp 255/11 – 256/9; Ex. 19 p 66 ¶ 159.g) But Cox did not even know the husband (Cox Tr 10/3/18, pp 615/13 – 614/16).

In addition to having Sharpe stain her deck, which actually *was* voluntary, respondent directed Sharpe get her ordained so she could perform her niece's wedding; take her car to the dealer and wait while certain work was done; go to her home to obtain a water sample and deliver it for testing; go to her home to arrange for respondent to have Netflix access on her TV; pay her bills; buy plane tickets and concert tickets; and mail packages for her. (Sharpe Tr 10/3/18, pp 697/23 – 698/10, 702/13 – 703/5, 706/5-707/3, 710/14—711/22, 754/16 – 755/2).

This Court considered a judge having perform personal services in *In re Cooley*, 454 Mich 1215 (1997). In a consent decision, the Court publicly censured Judge Cooley for the following, among other things: [27]

> From at least 1987 until approximately 1994, Respondent on occasion appropriated the services of court personnel whom she requested to perform tasks related to the production [Judge Cooley's radio and television show] during court hours at the 36th District Court.

In *In re Trudel*, 465 Mich 1314 (2002), another consent decision that does not contain detailed facts, this Court found "credible evidence supporting numerous other allegations of misconduct," including Judge Trudel's "misuse of court time, personnel, facilities, and other resources."[28] The Commission correctly found that respondent went far beyond whatever personal errands a judge may legitimately direct county employees to do.

VIII. Employee Campaign Activity During Court Hours (Count XII)

The Commission found that respondent committed misconduct by having her staff work on her 2014 reelection campaign during the work day. Report at pp 18-20. Respondent agrees that

[27] Judge Cooley committed other misconduct as well, including use of court resources for the program, soliciting funds for the program, and improper participation in the settlement of a court proceeding.

[28] Judge Trudel also engaged in misconduct other than the misuse of court resources.

she had her staff do the work, but offers several misplaced arguments that her doing so was not misconduct. (Brief at pp 60-63)

Respondent's first claim is that her staff were not doing the campaign work on court time, but only on their "breaks."[29] If "break time" existed at all for Cox and Sharpe, it existed only in respondent's head.[30] One will search the record in vain for any evidence that Cox or Sharpe believed they were doing respondent's bidding on either actual breaks or available break time.[31]

Respondent's next argument is that having her staff do campaign work on county time does not violate the criminal law. She is mistaken. MCL 169.257(1) makes it a misdemeanor to use public resources for campaign purposes. It states:

> A public body or a person acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a [campaign] contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a).

The Commission found that respondent violated this statute. (D&R p 20).

Respondent argues that the statute does not apply to her, because she is not a "public body" and, when doing the campaign work, was not acting for a public body. (Brief at p 61) She says her campaign work was to benefit her personally, so when she had her staff do the work it was for her *personal* capacity, not her *public* capacity. Respondent's argument has perfect circularity. By

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[29] This was respondent's position at the hearing on the complaint as well. Interestingly, and as discussed in greater detail in the false statements section of the brief at pp 65-67, below, before respondent became aware that there was actual physical evidence demonstrating that Cox did campaign work during court work hours, she said nothing about the work being done during breaks. Rather, she then claimed that the work was not done during the work day at all. The "break" story appeared for the first time at the hearing.

[30] The master found respondent's claim that the campaign work was only done on breaks to be "false and insupportable." (R 57, master's report at p 22)

[31] What one will find is that they joked about the work being a "break" (Cox Tr 10/3/18, p 623/10-15). But Cox also made clear that it was no real break.

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respondent's logic, no matter what county resources a judge uses for campaign purposes, the statute is not violated because the judge is not acting for a public body when using the resources. The flaws in the argument include: 1) the only power respondent had to make her staff do the work was her power as a judge, not her power as a person; and 2) while given a public office by virtue of her position as a judge, she used her public staff who were all on public time to do her campaign work. The Commission correctly found that respondent violated the statute.[32]

Respondent argues that even if she violated the statute, she only committed a misdemeanor. She says committing a misdemeanor is "not actionable judicial misconduct." (Brief at p 62) That would probably come as a pleasant surprise to the many judges whose misdemeanor convictions for drunk driving and other offenses have been the basis for suspending them from judicial office. The only support respondent offers for her argument is that MCR 9.205(B) includes conviction of a felony among the species of actionable misconduct, but says nothing about misdemeanors. Once again drawing much too much comfort from statutory language, she concludes that since Rule 9.205(B) does not mention misdemeanors, it must be okay for judges to commit them. Apparently she overlooks that Rule 9.205(B)(2) makes it misconduct to violate the Code of Judicial Conduct, and Canon 2(B) required her to respect and observe the law. Committing a misdemeanor violates that canon.[33]

For all of these reasons, the Commission correctly found it was misconduct for respondent to direct her staff to do campaign work on county time.

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[32] Even if her use of county resources to assist her campaign did not violate the statute, it nonetheless violated Canons 2(A) and 2(B).

[33] Respondent's campaign activities violated other canons as well, but respondent's argument makes this one particularly pertinent.

IX. Misconduct During Depositions (Count VII)

The Commission also found that respondent committed misconduct during depositions of two witnesses that were taken during her divorce case. (D&R at p 21). Respondent objects. (Brief pp 70-72)

On January 18, 2017, respondent's friend, Sean Furlong, was deposed. Respondent was an observer. Furlong was asked by opposing counsel whether he and respondent had exchanged any texts or phone calls during the *Kowalski* trial, and responded that they had not. Ex. 1-4, Furlong Dep Tr *Root v Brennan* 1/18/17, p 56/2-10. Respondent interrupted the deposition to tell him they did communicate during the *Kowalski* trial and to give him a number for how often they had done so.[34] Ex. 1-4, Furlong Dep Tr *Root v Brennan* 1/18/17, p 56/6-19.

On March 9, 2017, Francine Zysk was deposed, and again respondent observed. Zysk was questioned about rumors of respondent having been caught intoxicated in her office in Brighton. Ex 3-2, Zysk Dep Tr 3/9/17, *Root v Brennan,* p 27/12-17. As Zysk began to answer the question respondent challenged her, stating: "Okay, you need to stop for a minute." Ex 3-2, Zysk Dep Tr 3/9/17, *Root v Brennan,* p 27/20-21. She then told Zysk: "You are lying. You're such a liar." Ex 3-2, Zysk Dep Tr 3/9/17, *Root v Brennan,* pp 27/25 – 28/1.

Respondent acknowledges that she did these things, but argues that it is not misconduct for a judge to interfere with a deposition in this fashion. To the contrary, a judge who scolds or corrects a witness during a deposition in the judge's own case has, at a minimum, eroded confidence in the judiciary and committed an impropriety (Canon 2(A)), and conducted herself in a way that reduces public confidence in the integrity of the judiciary (Canon 2(B)). Respondent's interruptions were

[34] Respondent told Furlong they exchanged one communication. They actually spoke three times and exchanged fourteen texts over two days. Ex. 1-31, rows 1936-1952.

also arguably proscribed by MCR 2.306(C)(5)(a), which forbids a deponent conferring with another while a question is pending. Respondent forced a "conferring" on both Furlong and Zysk.

The Commission correctly found that respondent's interference with the depositions were yet more judicial misconduct.

X. The Commission Correctly Determined That Respondent Made Numerous Intentionally False Statements (Counts XII, XIV, & XVII)

The Commission concluded that respondent "made misrepresentations and false statements with a frequency and intent to deceive that is completely at odds with her position as an officer of the court." (D&R at p 12) It adopted, as an accurate summary of the false statements, the examiner's "Appendix 2 – False Statements," as had the master.[35] (R 57, master's report at p 12) The Commission found respondent made those intentionally false statements under oath in depositions; under oath to the Commission; and during or in connection with court proceedings.[36] Respondent argues that while she made a few innocent mistakes, she never said anything that was knowingly or deliberately false.[37] (Brief at p 45). The evidence supports the Commission's findings.

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[35] There was no "Appendix 1" to the Commission's report. The "Appendix 2" to which the report refers was originally the second appendix attached to the examiner's closing argument to the master. The master adopted Appendix 2 for his report without renaming it, although his report did not have an Appendix 1. The Commission preserved the name to be consistent with the master's report.

[36] The report states that the Commission adopts Appendix 2 "except where noted." (D&R at p 12). The balance of the report does not note any exceptions to Appendix 2, indicating the Commission adopted it in its entirety. Having adopted the appendix, the Commission did not belabor every one of the twenty or so false statements in it, but only highlighted a few.

[37] Respondent discusses at some length the standard for finding a false statement. (Brief at pp 48-49) At the end of the day, her analysis concludes that a false statement is a statement that is not true, which the speaker knows it is not true and makes with intent to deceive. The Commission agrees. As it said: the request to impose costs is "based on her intentional misrepresentations and misleading statements (D&R at p 2); "Respondent made misrepresentations and false statements with a frequency and intent to deceive" (D&R at p 12); "The evidence shows that Respondent engaged in a pattern of deceit" (D&R at p 24); "by contrast [to *Gorcyca*], the record in the instant case reveals a series of misrepresentations that appear to have been made intentionally as part of a pattern of deceit" (D&R at p 25); "In addition to other misconduct, Respondent made intentional and false representations, under oath, during her divorce deposition and during the Commission's investigation and proceedings" (D&R at p 32); "As noted, the Commission finds that Respondent made intentional

Two things are worth keeping in mind while reviewing respondent's false statements:

1) Since respondent's credibility is central to determining whether her false statements were deliberate or innocent, even her deceptions that were not charged as misconduct are important. Three are particularly telling, four of which are recounted at footnotes 7, 13, 26, and 34, above. The master was taken by yet another, which is discussed following 2), below.

2) The evidence shows that respondent's particular style of deception is to paint a false picture with statements that may appear, on cursory review, to be small lies. As a consequence, in order to appreciate the deliberate falsity of many of her statements and the considerable impact of the lies, it is necessary to develop some context. This brief was guided by that need.

A major issue during the investigation and hearing was whether respondent had her employees perform personal tasks. At the very end of the last day of the hearing she was granted the chance to testify in surrebuttal. She made the extraordinary claim that both her State Court Administrative Office regional administrator and her chief judge had approved her using employees to do personal errands during work time (Respondent Tr 11/19/18 pp 1891/9 – 1893/7). She had not made this claim in any of her three letters answering the Commission's questions about employees doing errands for her, nor in her answer to the first amended complaint. (Ex. 16 pp 49 – 53; Ex. 19 pp 64-71; Ex. 21 pp 47 – 55; and Ex. 32 pp 26 – 31). She did not make this claim when asked about the topic as the first witness at the hearing (Respondent Tr 10/1/18, pp 96/6-16, 243/19 – 246/15; Respondent Tr 10/2/18, pp 250/14 – 260/4, 268/2 – 275/13). And, she did not make this claim when she later testified in her defense about the topic (Respondent Tr 10/9/18, pp 1575/20 – 1582/8, 1586/6 – 1594/5). She only made this claim in the closing minutes of the hearing.

misrepresentations and misleading statements to the Commission in her written responses to the Commission and during her testimony at the public hearing" (D&R at p 32); respondent made "intentionally false and misleading statements on the record in cases over which she presided and during her divorce deposition," and "committed judicial misconduct by making intentional misrepresentations or misleading statements to the Commission in her written responses to the Commission and in her testimony at the public hearing" (D&R at p 33).

If true, her claim would have been powerful exonerating evidence with respect to the personal tasks. However, when pressed on cross examination about that crucial testimony, respondent essentially abandoned it (Respondent Tr 11/19/18, pp 1920/13 – 1925/14). In fact, she denied she had ever testified that way in the first place. The master found her mutually contradictory versions, within minutes of each other, quite telling. (R 57, master's report at pp 18-19)

With respondent's doubtful credibility as the lens, below are the various statements the Commission found to be false, the evidence concerning them, and when respondent challenges them, a response to her challenge.[38]

Respondent's False Statements Surrounding Her Divorce Case

Respondent made the false statements charged in Count XVII(a)-(g) in connection with her not disqualifying herself from her divorce proceeding and deleting data from her cell phone. Much of the relevant context concerning the divorce is above at pp 19-25. The following nutshell, relevant to the false statements, is either from those pages or based on additional record as cited.

By December 1, 2016, respondent knew her husband would file for divorce. On December 2 she texted him that she would disqualify herself when the divorce was filed. He filed that day, but she did not disqualify herself for six more days. The Monday following the filing respondent talked with her divorce lawyer for 17 minutes. The next day, December 6, her husband filed an emergency motion to preserve evidence that included the data on respondent's cell phone. Jeannine Pratt, the chief judge's secretary, called respondent and told her the motion had been filed; read a portion of the motion to her; emailed the motion to her; asked her to sign the order disqualifying herself so Pratt could pick it up later that afternoon; and emailed her an order to disqualify that

[38] This brief addresses the false statements thematically rather than in the order the Commission discussed them.

was ready for her signature. Right after speaking with Pratt, respondent spoke again with her divorce lawyer. When Pratt came to respondent's chambers to pick up the signed order, respondent refused to give it to her and instead said she needed to speak with her lawyer. Not until two days later, on December 8, did respondent hand the signed order, dated December 7, to the court administrator for delivery to the chief judge.

Between her husband's filing the motion to preserve data on December 6, and December 8, respondent asked several people how to delete data from her phone. On December 8 she had all data deleted from that phone.

Respondent's failure to promptly disqualify herself, her basing part of the delay on a supposed need to talk with her attorney, and her deleting data from her cell phone while the data was subject to a motion to preserve, were all highly improper. That left respondent with the problem of how to explain her actions when she was asked about them during her divorce deposition and the Commission's investigation. Her response was to make several false statements, including those described below.

A. Count XVII(a)

Count XVII(a) charged that during her divorce deposition, only six weeks after the events just summarized, respondent falsely testified that she first learned her husband's motion to preserve evidence had been filed when her lawyer so informed her. Respondent's testimony to that effect is at Ex. 1-13, respondent Dep. Tr Root v Brennan, 1/16/17, pp 47/18-24, 50/9-12. Her testimony was false. Pratt informed her of the motion on December 6. Respondent's attorney did not file an appearance, or receive the complaint of divorce and ex parte motion, until the next day. (Ex. 4-8; Ex. 4-7).

Respondent acknowledges that her testimony was false, but claims she had merely an innocent misrecollection. Brief at pp 49-50. The context shows otherwise. As noted, at the time of her deposition respondent was in the awkward position of having delayed disqualifying herself from her own case while she attempted to delete data covered by a pending motion to preserve evidence. Her actions, already bad, are much more egregious if she did them while aware the motion had been filed. If believed, her claim that she first learned of the motion from her attorney would buy her at least one important day before she became aware of the motion; a day that was especially important to her overall narrative since the order of disqualification was purportedly signed on December 7.[39] Further, her claim that she first learned about the motion to disqualify from her attorney rather than Pratt, if believed, would help insulate her from a finding that she had bad intent when she refused Pratt's request that she sign the order to disqualify herself. In other words, the false statement about how respondent learned of the motion served her interests as they appeared to be at the time she made the statement.

It is not plausible that respondent would have forgotten, in a short six weeks, that it was Pratt who informed her of the motion in the course of also asking her to disqualify herself on the basis of that very motion. The conversation between Pratt and respondent was no routine phone call. Respondent was then in the middle of her multi-day refusal to disqualify herself from her own case – about as basic an obligation as exists for a judge. Further, it was respondent's learning about the motion from Pratt that triggered her efforts to delete data from her cell phone – violating another fundamental obligation of a judge. Respondent could not admit it was Pratt who told her

[39] As noted above at p 22, although the order bore the date "December 7," respondent did not provide it to the court administrator until December 8.

about the motion without also admitting that she was well aware the motion was pending when she refused to disqualify herself two hours after receiving it.[40]

The Commission correctly found that this false statement was not mere misrecollection.

B. Counts XVII(b(ii) and XVII(c)

When Pratt went to the Brighton courthouse to pick up the signed order of disqualification, respondent refused to give it to her, telling her she needed to speak with her attorney. Absent some legitimate reason for delay (and respondent gave none to Pratt), her refusal to sign the disqualification order until she spoke with her attorney was clear misconduct. To exculpate herself she needed an alternative explanation for her refusal to sign.

She provided part of that alternative explanation during her divorce deposition, just six weeks later. When counsel asked respondent about her December 6 interaction with Pratt, she falsely claimed she told Pratt she would sign the order when she had time, the next day. Ex 1-13 at p 46/5-8. That was a much more palatable justification for refusing to sign than needing to speak with her attorney, but Count XVII(c) charges that this testimony was false.

Respondent continued her revised history when answering the Commission's eventual questions about these events. In October 2017 and January 2018 she told the Commission, under oath, that she first spoke to her attorney *after* Pratt's attempt to get the disqualification order. Count XVII(b)(ii) charges that the October statement was false.

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[40] Tellingly, respondent continued her efforts to minimize her awareness of the pending motion to preserve evidence even into the formal hearing on the complaint. Early in the hearing, at a time when she had never yet acknowledged that she actually *was* aware of the motion to preserve evidence when Pratt asked her to sign the order to disqualify, respondent testified somewhat ambiguously that she knew presently that the motion to preserve evidence had been sent to her, but did not presently know whether she knew that on the day Pratt sent it to her (Respondent Tr 10/1/18, p 140/18-23). In a similarly ambiguous manner, she further testified, implausibly, that Pratt's sending her an email with the motion attached did not mean she actually opened the email or the attached motion (Respondent Tr 10/1/18, p 137/2-10). Ultimately, respondent did finally admit that she was aware of the motion when she refused to sign the order of disqualification (Respondent Tr 10/10/18, pp 1698/25 – 1699/8).

Respondent's January statement went on to acknowledge that Pratt understood the reason she refused to sign was *because* she had not yet spoken with her attorney. Regarding that, she wrote: "I do not remember saying I had to consult with an attorney before signing the order of disqualification. But I can see how my mentioning I had not spoken to an attorney could be considered the same." Ex. 19 p 30 ¶ 56: *cf*. Ex 16 p 22 "I do remember saying something to the effect that I would sign it later and that I had not spoken to an attorney"; Ex. 21 p 22 ¶ 153. The clear implication of respondent's statements was that Pratt was confused, but understandably so, when she drew the damning conclusion that respondent refused to sign the order *because* she had not spoken with her attorney. Rather, respondent intimated, she had merely observed to Pratt that she had not yet spoken with her attorney, apropos nothing, while also telling her she would sign the order later. Ex. 16 p 23; Ex.19 pp 29-30 ¶ 53.

Taken together, respondent's deposition testimony and her statements to the Commission, if accepted, would turn her very problematic conversation with Pratt into a much more benign one. If her statement to Pratt that she had not talked with her lawyer could be passed off as mere casual conversation, then she could perhaps say she was waiting for time to sign the order. Ex 16 p 22; Ex 19, p 30, ¶ 55. Had respondent acknowledged to the Commission that as of the time she talked to Pratt she *had*, in fact, already spoken with her lawyer, she could no longer explain away her statement to Pratt as mere casual conversation.

Respondent's whole narrative was false, including the portion charged as misconduct. Other than her refusal to sign the order, the *only* thing she told Pratt was that she needed to talk with her attorney. But she had already spoken with her attorney; in fact, twice by the time Pratt came to her chambers, including a six minute call just two hours earlier, right after Pratt asked her to sign the order of disqualification. Pratt's only reason to be at respondent's courthouse that day

was to obtain the order to disqualify. Having just talked with her lawyer, the only reason for respondent to tell Pratt she had *not* spoken with her attorney, immediately after refusing to sign the disqualification order, was to give Pratt a reason why she refused to sign the order.

In the event, respondent was not too busy to take a few seconds to sign her name to an order that was already prepared. Neither court administrator Evans nor Pratt saw respondent doing anything on December 6 that would made her too busy to sign the order right away, and Evans was surprised she did not do so (Evans Tr 10/2/18, pp 410/20-25, 411/12-17; Pratt Tr 10/2/18, p 329/11-19). Pratt noted that respondent was speaking with Evans near the door to the courthouse and was not wearing her robe, causing Pratt to conclude she had not just come off the bench and was not immediately going onto the bench (Pratt Tr 10/2/18, p 329/11-19).

Respondent construes her deposition testimony differently. She argues that she did not literally testify that she told Pratt she was "too busy" to sign the disqualification order. Brief p 50. This is a literally true but substantively false statement. Her actual testimony was: "And she had an order for disqualification, and I was — I think it was a Tuesday, because I was really busy. And I said I would take care of it when I had time the next day." Ex 1-13, p 46/5-8. There is no meaningful distinction between respondent telling Pratt she would do it when she had time and her telling Pratt she was then too busy. In case there was any doubt about what she intended to communicate to Pratt, respondent testified a little later that the reason she did not sign the order was because she was too busy. Ex 1-13, p 52/19-20.

Respondent accurately notes that when pressed during the deposition she ultimately claimed she did not remember her exact words with Pratt; she only remembered "the circumstances." Brief p 50. She argues that once she claimed not to remember the conversation with Pratt, whatever she said about it was not a lie. There are two problems with her position. One

is that she was not charged with falsely claiming she did not remember the conversation. The other is that lack of memory is only a defense to lying if the purported lack of memory is sincere. Respondent was charged with lying for offering a false reason – one never stated to Pratt, one that was not true, and one that she could not plausibly have thought was true when she said it – for why she did not sign the order. Whether or not she was able to recall her exact conversation with Pratt, she was well aware the exculpatory version she offered up was false.

C. Count XVII(d)

Six weeks after asking her staff for assistance with deleting information from her phone, respondent testified in her divorce deposition that she asked for this assistance "jokingly." (Ex. 1-13 (Respondent Dep Tr, *Root v Brennan*, January 16, 2017, p 59/7-13) Count XVII(d) charges that this testimony was false.

When Robbin Pott first heard respondent ask about deleting information from her cell phone, she assumed respondent *must* be joking, because she could not believe a person would really do such a thing (Pott Tr 10/2/18 p 429/3-20). However, it became clear to her respondent was *not* joking when she went so far as to ask the same question of a police officer who came to court seeking a search warrant. Pott also came to believe respondent was serious about the data removal due to her continuing refusal to sign the disqualification order in her own divorce case (Pott Tr 10/2/18, p 429/13 -- 430/6). Once Pott understood respondent was serious about deleting the information from her phone, she became so concerned about the impact of respondent's behavior on Pott's own license to practice law that she consulted with an attorney (Pott Tr 10/2/18 p 430/7 – 431/1).

It was also clear to respondent's court recorder, Felica Milhouse, that respondent was not joking when she directed Milhouse to leave the courtroom during a proceeding in order to figure

out how to delete the email account from respondent's phone (Milhouse Tr 10/3/18, p 530/12-14). In fact, although it took a while, even respondent admitted during the formal hearing that her requests to delete data were serious (Respondent Tr 10/10/18, pp 1704/19 – 1705/14). Respondent's exchange with the master is striking for her resistance to admitting what had, by then, become obvious – that she was quite serious when she asked her staff for assistance with deleting data from the phone.

Respondent argues that her testimony was not false, because she was both joking and serious. Brief at p 50. There are two problems with her argument: 1) Assuming respondent really was "both joking and serious," her testimony intentionally omitted the only operative and relevant part of that equation. If, as her testimony communicated, she *only* asked "jokingly" for assistance with deleting information from her phone, then there was no reason for counsel to explore the steps she actually did take. On the other hand, had she acknowledged that she had also sincerely asked for help deleting data, there would have been a lot for counsel to pursue. 2) Pott's and Milhouse's observations contradict respondent's claim that she was joking even in part. Viewed in the light most favorable to respondent, her testimony during her deposition was deliberately misleading. The Commission correctly found that it was misconduct.

D. Count XVII(e)

Three weeks after respondent testified she was merely joking when she asked how to delete information from her cell phone, she testified that she had not requested help with deleting messages from it. (Ex. 1-14, Respondent Dep Tr, *Root v Brennan*, February 9, 2017 pp 206/15 – 207/12) Count XVII(e) charges that this testimony was false. It clearly was. As noted above, she even instructed her court recorder to leave the courtroom to do the very thing she denied doing. Respondent does not object to the Commission's finding that this testimony was false.

E. Count XVII(f)

Respondent's ultimately successful efforts to delete the data from her cell phone are discussed above at pp 23-24. Two months later, on February 9, 2017, she testified in her divorce deposition that she did not take any steps to delete data from, or to reset, her cell phone.[41] Count XVII(f) charges that this testimony was false.

Not only did the evidence discussed above demonstrate that respondent took steps to reset her cell phone, she even acknowledged during the formal hearing that she had in fact done the thing she had denied during the deposition (Respondent Tr 10/10/18, pp 1706/15 – 1707/6). The Commission agreed; based on the evidence it found she lied, as charged, during the deposition.

Respondent offers two misplaced objections to the Commission's finding. Brief at pp 50-51. She notes that shortly before denying she had reset her phone, she acknowledged deleting messages from it. Therefore, she argues, her testimony was truthful. This is a non sequitur. She did claim, in response to a quite different question, that she deleted all text messages as they came to her. Ex. 1-14 p 205/5-25. That answer had nothing to do with the question whether she removed *all* data from her phone, including email messages, phone messages, and everything else.[42]

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[41] Q: And did you ever reset your phone after – do you know the difference between deleting and resetting the phone?

A. No.

Q: Okay. So you never took any steps to reset it, meaning get rid of everything that's on there by having it physically reset so all your apps go off, everything goes off that phone?

A. No, I never had all my apps go off the phone.

Ex. 1-14, Respondent Dep Tr, *Root v Brennan*, February 9, 2017, p 206/1-10.

[42] Indeed, respondent's resetting her phone made it impossible to verify whether she had, as she claimed, deleted text messages as they came to her.

Respondent's other objection also misses the mark. At the formal hearing she was asked to explain the contradiction between her denial, during the deposition, that she reset her phone and the fact that she actually *had* reset it. Her only explanation was that she was not going to make it easy for her husband's attorney (Respondent Tr 10/1/18 at p 154/16). She argues that this statement is not an admission that she had lied during the deposition; it's just a statement that her husband's attorney had asked the wrong question. Brief at p 51. But in context, it *was* an admission. The attorney had asked the right question. Her explanation only revealed that one motive for her lie was that she did not want to make it easy for the lawyer.[43]

F. Count XVII(g)

The Commission sent respondent a 28-day letter in March 2018. It was then aware that respondent had delayed disqualifying herself from her divorce even after the motion to preserve evidence was filed, but was not yet aware that respondent had reset her cell phone at that same time. The 28-Day letter asked respondent about refusing to disqualify herself once she was aware the motion had been filed. Ex. 20 p 21 ¶ 155. In April 2018 respondent gave an answer in which she belittled any concern. She said that although the motion was pending, "[t]here was nothing to preserve." Ex. 21 p 23 ¶ 156 (paragraph beginning "During the discovery . . ."). Respondent elaborated that her husband already had her phone records and she had admitted to having extramarital affairs. Count XVII(g) charged that respondent's statement that there was nothing to preserve was false.

It was. Respondent clearly believed there was something to preserve, because she had her court recorder scrambling to delete data from the phone shortly after the motion was filed, and she

[43] It is quite likely that respondent had other motives as well. Had she answered the question truthfully, she would have admitted to removing evidence while aware a motion was pending to preserve that evidence in a case she should no longer have been presiding over in the first place. She may not have wanted to make it easy for counsel, but she also did not want to admit her wrongdoing.

took the step of having the phone cleared of all data. The Hotmail account she asked her court recorder to delete is a prime example of data on the phone that would not be "phone records" possessed by her husband. Further, the contents of her phone had potential relevance beyond whether they disclosed the mere existence of extramarital affairs.

Respondent does not object to the Commission's finding that she lied as charged in this count.

False Statements About Respondent's Relationship with Furlong & Corriveau

The next several false statements are based on respondent's efforts to conceal, minimize, or normalize her relationship with Sean Furlong and his close friend, Chris Corriveau.

G. Count XIII(A)

As noted above at pp 8-11, as of the start of the *Kowalski* trial respondent had had a close personal friendship with Furlong for about six years. On the Friday before the trial Brighton attorney Tom Kizer sent a letter to *Kowalski* counsel alerting them to respondent's relationships with Furlong and Chris Corriveau, both of whom were listed as witnesses. In pertinent part the letter asserted, vaguely, that respondent had a lengthy social relationship with them and had once met privately in her office with Corriveau. (Ex. 1-9; Piszczatowski Tr 10/4/18, p 924/14-25). Counsel met with respondent in chambers the same day the letter was received, to discuss it (Piszczatowski Tr 10/4/18, pp 927/11 – 928/8). Count XIII(A) charges, and the Commission found, that she falsely minimized her relationship with Furlong and Corriveau during this conversation.

Comparing her actual relationship with Furlong with what she disclosed in chambers shows the Commission was correct. When her relationship with Furlong was brought up, respondent took over the conversation (Piszczatowski Tr 10/4/18, p 928/20-25). She said she knew a lot of people (implying she knew them all in the same way). She said she had a "relationship" with Furlong and

Corriveau in the sense that she knew them. She said she had seen "him" [presumably Furlong] at parties, fundraisers, retirement parties, and "we might go out" or respondent might see "him" [presumably Furlong] at the bar (Piszczatowski Tr 10/4/18, p 930/3-10). She said nothing to confirm that her relationship with either of them was lengthy or close (Piszczatowski Tr 10/4/18, pp 930/24 – 931/4). To the contrary, she described her relationships with them as not all that deep; as being just a "professional relationship" (Piszczatowski Tr 10/4/18, pp 931/16 – 932/2). She likened her friendship with Furlong to "knowing people in the prosecutor's office" (Piszczatowski Tr 10/4/18 pp 932/24 – 933/2) Respondent also remembers telling counsel she had not had sex with Furlong or kissed him.[44] (Ex 16, p 21; Ex 19, pp 27-28, No. 42; Ex 21, pp 8-9, No. 27; Respondent Tr 10/10/18, p 1666/5-12; Respondent Tr 10/10/18, p 1666/17-22; Respondent Tr 10/10/18, p 1743/4-7)

The bottom line is that respondent said nothing in chambers that added to the sparse information in the letter (Piszczatowski Tr 10/4/18, p 937/18-20). To the contrary, she communicated the idea that the letter *over*stated her relationship with Furlong and Corriveau. (Maas Tr 10/4/18, p 996/20-25)

Respondent omitted very significant information about her relationship with Furlong during the conversation in chambers. She said nothing to hint that during the four preceding years she and Furlong had shared over 1000 personal phone conversations (Piszczatowski Tr 10/4/18, pp 933/24 – 934/3).[45] She did not tell them that during the 14 months prior to trial she had spent as much time on the phone with Furlong as with anyone else, and much more than with most

[44] Interestingly, this is information respondent volunteered. It was not asked of her, and did not seem to be raised by Kizer's letter. More interestingly, respondent now acknowledges that Furlong *had* kissed her.

[45] Exhibit 1-31 shows the total actually exceeded 1500 calls during that period.

people (Piszczatowski Tr 10/4/18, p 934/4-8). She also did not disclose that she had regular and frequent social interactions with Furlong and Corriveau in a small group, not just a casual professional relationship (Piszczatowski Tr 10/4/18, p 936/4-14).

Although the letter explicitly stated that respondent had once met with Corriveau privately in her chambers, she did not disclose that in fact, she gave both Furlong and Corriveau the closed-door treatment when they came to the courthouse (Piszczatowski Tr 10/4/18, p 936/19-24).[46] She did not disclose that she had removed her clothing while in her pool, at a party at which Furlong was present (Piszczatowski Tr 10/4/18, pp 936/25 – 937/3). She never mentioned that for three years while *Kowalski* was on her docket she had gone Christmas shopping with only Furlong and one other person (Piszczatowski Tr 10/4/18, p 937/21-25).[47]

After the meeting in chambers respondent went on the record to hear Kowalski's motion to disqualify her. During that hearing she revealed nothing else of note concerning her friendships with Furlong or Corriveau (Ex 1-6 Tr; Ex 1-7 video). In fact, to the extent she revealed anything about them at all, she merely likened them to her acquaintance with the previous prosecutor and his wife. Ex 1-6 Tr p 6/14-16; Ex 1-7 (Video). Based on what respondent said in chambers and on the record, counsel were led to believe that respondent had a normal professional and casual social relationship with Furlong, not a close personal friendship (Piszczatowski Tr 10/4/18, pp 939/15 – 940/20; Maas Tr 10/4/18, pp 997/19 – 998/1). Kristi Cox, who as respondent's secretary and court recorder only knew of respondent's relationship with Furlong and Corriveau based on her limited observations at work and whatever respondent said in her presence, did not think

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[46] See below at pp 56-59.

[47] Additional testimony by *Kowalski* counsel regarding respondent's failure to reveal relevant facts regarding her relationship is at: Piszczatowski Tr 10/4/18, pp 933/24 – 934/4-8, p 936/4-24, p 937/21-25, pp 939/15 – 940/20; Maas Tr 10/4/18, p 993/15-18, pp 997/19 – 998/1.

respondent fairly disclosed the extent of her friendships with them that day (Cox Tr 10/3/18, p 593/8-10).

Respondent objects that she was merely silent with respect to aspects of her relationship with Furlong, and "silence is not untruthful." Brief at p 52. In point of fact, she was not silent. In chambers she told counsel she and Furlong had not kissed, when actually they had. That was not silence, and it was false. Both in chambers and on the record she described her relationship with Furlong in such a minimized fashion that she mischaracterized it as merely professional. Respondent was not just incomplete. She concealed every relevant fact about the relationship that might have raised a question whether she should preside over the case.

Even if she had been just incomplete, in this context "mere" incompleteness was false. When there is a legal or equitable duty of disclosure, "[a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood." *Tompkins v Hollister*, 60 Mich 470, 483; 27 NW 651 (1886). Respondent had a duty to disclose, but chose instead to conceal, her relationship with Furlong.

H. Count XVII(i)

As just noted, one of the few specific claims in Kizer's letter to *Kowalski* counsel was that respondent once met privately with Corriveau. During the January 4 hearing on the motion to disqualify her, respondent said, in a dismissive tone, that he came for a search warrant, and that is what she does for officers who came to her court (Ex 1-7 p 8/11-17; p 6 at 2:55:00).

To the contrary, the Commission's investigation disclosed that while respondent regularly gave both Furlong and Corriveau special closed-door audiences, she did not do that for other law enforcement. Because of the contradiction, the Commission asked respondent about giving preferential treatment to Furlong and Corriveau. In October 2017 and January, April, and August

2018, respondent answered, under oath, that she rarely handled search warrants at the bench and she routinely took *all* police officers into her office and closed the door with them; she did not treat one police officer differently than another. Ex. 19 pp 16 ¶ 13.d, 23 ¶ 30.e, 26 ¶ 33; Ex. 21 pp 2 ¶ 4.h, 7 ¶ 14.f. At the formal hearing respondent confirmed that by those remarks she intended to communicate that she met with *all* officers who came to her court behind closed doors (Respondent Tr 10/1/18, p 223/9-18). Count XVII(i) charged that her statements to the Commission were false, because she did not routinely take police officers other than Furlong and Corriveau into her office and close the door.

Respondent neither acknowledges nor denies that her statements were false. Brief at p 53. They were. Her long-time secretary, Kristi Cox, observed that generally when a police officer came into the court room for a search warrant while a matter was proceeding, respondent would stop the proceedings and handle the warrant on the bench (Cox Tr 10/3/18, p 584/10-20). If respondent was not in the courtroom, she would handle the warrant in her office with the door open, and the officer would remain only a short time (Cox Tr 10/3/18, pp 584/22 – 586/4).

However, if Furlong or Corriveau made search warrant requests while respondent was in a proceeding in the courtroom, respondent would take a recess, take Furlong or Corriveau to her office, and close the door. Furlong's and Corriveau's visits always took longer, a detail Cox noticed because she had people waiting in the courtroom for respondent to return to the bench (Cox Tr. 10/3/18, p 586/9-23). Before the *Kowalski* trial respondent did not close the door with *any* officer other than Furlong and Corriveau (Cox Tr 10/3/18, pp 585/18 – 586/4).

Respondent suggests that if she had a preference it was for MSP officers generally, not just Furlong and Corriveau. To the contrary, Cox testified that before the *Kowalski* trial no MSP officer

other than Furlong and Corriveau received "off-the-bench, closed-door" treatment (Cox Tr 10/3/18, p 677/9-21).[48]

Lisa Bove, a Brighton district court employee between 2008 and 2013, also noticed the pre-*Kowalski* special treatment Furlong and Corriveau received. She described respondent as noticeably friendly with Corriveau and Furlong during that time. She noticed that respondent would meet with them behind closed doors; she did not know of any other officers treated that way (Bove Tr 10/4/18, pp 786/14 – 787/7). Similarly, Francine Zysk observed that Furlong was at the court a lot during the period she was chief probation officer, which began in 2006. She stated respondent was "very close" with Furlong, and "simply friends" with Corriveau. She described respondent's relationship with Furlong and Corriveau as different than her relationships with other law enforcement officers (Zysk Tr 10/9/18, p 1463/18 – 1464/20).

Though Felica Milhouse only began working for respondent in late 2016, years after *Kowalski* was over, what she observed then is consistent with Cox's description of respondent's treatment of officers who came to the court, and inconsistent with respondent's claim that she met with *all* police officers behind closed doors. During her employment Milhouse observed that when officers came to obtain search warrants, if respondent was on the bench she would pause the record, turn on the "white noise" machine, and do the warrant from the bench. If respondent was off the bench the officer came to her office; she thought the door remained open (though she was not sure) (Milhouse Tr 10/3/18, pp 533/6 – 534/1).

[48] The only other officer Cox saw receive treatment similar to that accorded Furlong and Corriveau was MSP Trooper Singleton, and he received that treatment only right before Cox left respondent's employ in 2015, well after the *Kowalski* trial (Cox Tr 10/3/18, pp 586/24 – 587/13). Although Cox was not in a position to know why any person received preferential treatment, she did recall that respondent considered Singleton "hot." (Cox Tr 10/3/18, pp 586/24 – 587/13)

In short, the evidence confirms the Commission's conclusion that respondent lied about her treatment of Furlong and Corriveau vis a vis other police officers. Respondent's main objection is that even if she lied, her lie was immaterial. Brief at p 53.[49] She appears not to appreciate that were she to have been truthful in response to the claim that she met privately with Corriveau, she would have had to acknowledge a special relationship with a witness in the murder trial that was about to start. A full disclosure of her meeting privately with Corriveau would have had to include a full disclosure that she also met with Furlong privately. If she had acknowledged to the Commission that she met privately only with Furlong and Corriveau, that would have indicated she lied to counsel when she denied giving them preferential treatment. She told a material lie during the *Kowalski* disqualification hearing, and perpetuated it when questioned by the Commission. Though respondent claims not to see it, those lies were highly material.

I. Count XVII(h)

In April 2018 respondent told the Commission, under oath, that she had not texted with Sean Furlong during the *Kowalski* trial. Count XVII(h) charges that this was false. The Commission found the charge established. Respondent does not object to the Commission's finding. The finding was correct. Respondent and Furlong exchanged 14 social texts during the trial. Ex. 1-31, rows 1936-1939, 1941-1943, 1945-1947, 1949-1952. Respondent appears to have been the initiator of two of the four threads of texts.

[49] Implicit in respondent's argument is that materiality is a necessary precondition to finding misconduct when a judge lies. Because all of respondent's charged lies were material the Court does not need to answer that question in this case. That said, if the question does come up the Court should hold that materiality is *not* an element of misconduct based on a lie. Materiality is an element of a criminal charge of perjury, but judicial misconduct does not rest on the criminal law. Judicial lies can undermine the integrity of the judiciary even when the lies are not material to any particular proceeding. It is not clear why *any* judicial lie (except "little white lies" or the like) should be acceptable under the canons. The better way to recognize that some lies are material and others are not is through the degree of consequence the judge suffers for telling the lie.

J. Count XVII(j)

The Commission's investigation focused heavily on the nature of respondent's relationship with Sean Furlong. In response to the Commission's questions about that relationship, among other things respondent said: 1) She socialized with Sean Furlong "because" she was socializing with Shawn Ryan; 2) Sean Furlong would come to Jameson's, the bar where respondent often met with Mr. Furlong and others, "because of his relationship with Shawn Ryan"; and 3) It would have been "extremely rare" for her to see Furlong at Jameson's without Shawn Ryan being there. Count XVII(j) alleges that these statements were false.

Shawn Ryan is, and then was, an assistant prosecuting attorney in Livingston County who was a friend of respondent beginning around 2006, not long after respondent took the bench (Ryan Tr 10-2-18, p 476/3-10). Ryan was also a friend of Furlong and Corriveau, and it was Ryan who initially invited respondent to join the circle of which they were a part in about 2006 (Ryan Tr 10-2-18, p 477/15-25).

The Commission asked respondent, in detail, to describe her friendship with Furlong. Her answers, across several statements she provided to the Commission, frequently and gratuitously invoked Ryan, although the Commission's questions had only been about her own relationship with Furlong. Ex. 16 pp 9 – 13, 15; Ex. 19 pp 8 – 14, 17; Ex. 21 pp 1-2, 8 – 9. Respondent's statements to the Commission at the pages just cited convey the clear impression that she was straining to make Ryan's own friendship with Furlong the primary reason Furlong was in respondent's life. If the Commission believed that, it would greatly diminish the significance of respondent's frequent socializing with Furlong.

Thus, as part of explaining her relationship with Furlong, respondent told the Commission that Furlong came to the bars that respondent also frequented "because" Ryan was there. Ex. 16 p

9; Ex. 19 p 10 ¶ 5.1.c. She told the Commission it would be "extremely rare" for her to be at Jameson's (one of the bars) with Furlong, without Ryan also being there. Ex. 21 p 8 ¶ 25; *cf*. Ex. 19 p 23 ¶ 31 ("When I socialized with Furlong and Corriveau, [Ryan] was present").

These statements were false (Ryan Tr 10/2/18, pp 482/23 – 483/9; 11/19/18, p 1768/11-24). Ryan was only the impetus behind respondent's *initial* involvement with Furlong, in 2006. For the six years after that, from 2007 through 2012, respondent had her own friendship with Furlong and Corriveau (Ryan Tr 10/2/18, pp 483/18 – 484/1).

Another participant in the group of friends was now-assistant prosecuting attorney Kim Morrison. Interestingly (and falsely), during the formal hearing, when respondent identified the nucleus who met after work she denied that Kim Morrison was part of it (Respondent Tr 10/1/18, p 187/4-6).[50] To the contrary, Morrison described extensive socializing with respondent, Furlong, and Corriveau. She met Corriveau and Furlong around 2007, and started socializing with them and respondent around that time (Morrison Tr 10/4/18, pp 834/7-20, 835/1-7, 839/15-22). They mostly hung out in a restaurant or bar, and occasionally at respondent's house (Morrison Tr 10/4/18, p 836/19-21). Morrison described the socializing after 2009 as usually happening *without* Ryan, and instead consisting of respondent, Furlong, Corriveau, and at times Morrison (Morrison Tr 10/4/18, pp 838/23 – 839/3, 840/11-24). Morrison said she, respondent, Furlong, and Corriveau were close friends from 2008 through 2012, and the other three were close enough to regularly socialize

[50] The record shows Morrison was a central part of respondent's after-work socializing for most of the six years before the *Kowalski* trial; quite likely more than Ryan was. Given this circumstance, it is quite odd that respondent would deny her presence while under oath. The possibilities suggested by the evidence are: 1) for respondent to acknowledge socializing with Furlong and Morrison, in addition to Furlong and Ryan, would destroy her effort to portray *Ryan* as the primary reason she spent any time in Furlong's company; or 2) As noted above at p 9, Morrison was part of a foursome, consisting of respondent, Furlong, Corriveau, and Morrison, who spent a weekend at respondent's cottage in 2012, the year before the *Kowalski* trial (Morrison Tr 10/4/18, pp 852/18-853/19). Respondent may have omitted Morrison from the group to minimize the chance that this damaging testimony would come out.

without her (Morrison Tr 10/4/18, p 854/2-11). She continued to socialize regularly with them through 2011 (Morrison Tr 10/4/18, p 841/10 – 842/25).

It was as inconsistent with Morrison's recollection as it was Ryan's that the only reason Furlong was at Jameson's was because of Ryan, or that the reason respondent socialized with Furlong was because she was socializing with Ryan (Morrison Tr 10/4/18, pp 843/25 – 844/11). Morrison explicitly rejected respondent's claim that it would have been "extremely rare" for respondent to socialize with Furlong and Corriveau, and without Ryan, during the years before the *Kowalski* trial. Rather, she confirmed, it was pretty common for them to socialize without Ryan (Morrison Tr 10/4/18, p 843/11-22).

The Commission's finding, that respondent's explanations to the Commission about Ryan's place in her relationship with Furlong were false, was well supported by the evidence. Respondent takes issue with one sentence in this finding, divorcing the sentence from its context and ignoring the rest of the finding. That is, she focuses on the Commission's statement that she overstated, to a large degree, her friendship with [Shawn] Ryan, but she ignores the Commission's complementary statement that the aspect of the Ryan relationship she overstated was its significance to her own independent relationship with Furlong. Compare brief at p 53 with R: 57, Appendix 2 at pp 4-5. She was not charged with overstating her relationship with Ryan. She was charged with falsely using Ryan to minimize her relationship with Furlong, not with overstating her relationship with Ryan, and the Commission's finding was that she did the former.

Finally, respondent argues that a partially true statement is not a falsehood. Brief at p 53. She is wrong. A statement that is mostly false does not become true if a mere nubbin of it is true. Especially when, as here, the nubbin of truth actually helps do the misleading. The Commission's finding was correct.

False Statements Concerning Shari Pollesch

K. Counts XIII(B) & XIV(A)

As is noted above, Shari Pollesch is a Brighton attorney who represented respondent's husband, Don Root, from 2011 until the end of 2016. In April 2017 a party in *McFarlane v McFarlane* moved to disqualify respondent based on that representation. Ex. 13-2 p 8/15-19. Respondent held a hearing at which, in the course of denying the motion, she claimed she did not know Pollesch represented Root until her [December 2016] divorce, or perhaps a little before. Ex. 13-2 p 10/12-14; respondent Tr 10/2/18, pp 294/17 – 295/21. Count XIII(B) charges that this denial was false.

As part of its investigation the Commission inquired into the relationship between respondent and Pollesch, to determine whether respondent had made a false statement in *McFarlane* and whether she had violated a duty to disclose her overall relationship with Pollesch in other cases. In her first answer respondent told the Commission something similar to what she told the attorney in *McFarlane* – she was not aware of the representation until January 3, 2017. Ex. 19 pp 38 – 39 ¶ 73, p 41 ¶¶ 76, 81. The Commission then sent respondent a 28-Day letter in which it alleged she should have disclosed Pollesch's representation of Root. Respondent defended against the allegation by repeating her previous statement to the Commission. Ex. 21 pp 13 – 14 ¶ 76, p 15 ¶ 85b,c, p 17 ¶ 89b, c. Count XIV(A) charges that these two statements are also false.

The Commission found that respondent lied as charged in Counts XIII(B) and XIV(A). Respondent appears not to disagree, but argues that her lies did not matter. She says the only thing that matters is the fact that Pollesch represented respondent's husband, not the timing of her knowledge of the representation. Having defined the fact of the representation as the only relevant

question, respondent asserts that any error as to *when* she became aware of the representation was immaterial. On that basis, she boldly asserts that "[s]he told the truth." Brief at p 52.

Respondent did not tell the truth, and she is wrong about what facts were material. It mattered to the attorney in *McFarlane* to know whether respondent was aware, well before January 2017, that Pollesch represented Root. The case had been on her docket for a substantial time, and had she been aware of the representation earlier, the attorney may have been able to show she had violated a past duty to disqualify herself. It also mattered to the Commission to know, because 1) the Commission was charged with determining whether respondent had violated a duty to disclose the relationship in *any* cases in which Pollesch or her firm appeared before respondent, not just *McFarlane*, and 2) the Commission was charged with determining whether respondent had made a false statement to the parties in *McFarlane*.

Since respondent does not challenge the Commission's finding that she lied about when she knew Pollesch represented Root, a brief summary of the pertinent facts will suffice. Before the representation began, respondent talked with Pollesch about Root's need for legal advice (Pollesch Tr 10/9/18, pp 1392/10 – 1393/5). That led to a lunch meeting between respondent, Pollesch and Root. (Pollesch Tr 10/9/18, pp 1395/23 – 1396/1). Root retained Pollesch a short time later, in June 2011 (Pollesch Tr 10/9/18, p 1396/2-5; Ex. 2-2). Pollesch continued to represent the business until late 2016 or early 2017 (Pollesch Tr 10/9/18, p 1396/6-9; Ex. 2-3 (invoices)).

Root testified that respondent was aware, during the representation, that Pollesch represented him (Root Tr 10/3/18, pp 569/21 – 570/5 & 572/5-8). Respondent's employees, Kristi Cox and Jessica Sharpe, who left respondent's employ in about April 2015 and April 2016, respectively, both recalled respondent herself saying that Pollesch represented Root (Cox Tr 10/3/18, p 597/2-15; Sharpe Tr 10/3/18, p 722/4-19). In fact, in December 2014 – pretty much the

middle of Pollesch's representation of Root – respondent casually mentioned, on the record in an unrelated case, that Pollesch represented Root. She even revealed her knowledge of the particulars of the relationship, stating she knew Root paid "a lot" for Pollesch's services. Ex 2-42 pp 7/17 – 8/4; Ex 2-43 (video- entire excerpt).

The Commission correctly found that respondent lied as charged in Counts XIII(B) and XIV(A).

L. Count XIV(B) – False Statements About Campaign and Personal Work

Pages 38-39, above, discuss the Commission's findings that respondent committed misconduct by having her staff work on her campaign and do her personal errands during county work hours. This section discusses the Commission's findings that respondent made false statements about those things.

Part of the Commission's investigation concerned whether respondent had her employees work on her campaigns during work hours. Count XIV(B) alleged that respondent falsely denied doing so when asked. In fact, she could not have been clearer or more adamant in her denials. She said:

> I have always been extremely cautious about not intertwining my campaigns and my judicial work. . . . I never allowed campaign work to be done during work hours. . . . Mixing my campaign with work was an absolute no. . . . I was absolute in keeping work and my campaigns separate. (Ex. 16 pp 54-55; Ex. 19 p 67 ¶ 160)

With respect to her legal assistant, Jessica Sharpe, in particular, respondent wrote:

> She was never to work on my campaign during work hours. . . . The only things she could have done during work hours would have been door to door which I would not have known was being done during work hours and friends to friends cards. . . . I was adamant about keeping the campaign separate from work. No work during work hours or on County equipment. (Ex. 19 pp 70 – 71 ¶ 166)

Months later, the 28-day letter the Commission sent respondent alleged that she had her secretary, Kristi Cox, work on her 2014 campaign during county time. (Ex. 20 p 40 ¶ 320)

Respondent answered, under oath: "No. I was emphatic about keeping my campaigns separate from work. Campaign work during work hours was prohibited." (Ex. 21 p 50 ¶ 320) In response to a similar allegation concerning Sharpe, respondent wrote: "She was never to work on my campaign during work hours. . . . I would not have let her. I was adamant about keeping the campaign separate from work. No work during work hours or on County equipment." Ex. 21 pp 53 – 54 ¶ 329.

Respondent's statements about Cox's and Sharpe's work on her campaign were false and she knew they were false. As both Cox and Sharpe explained, respondent actually *worked with them* as they did campaign work on county time. They did this in respondent's courtroom, and in a corner of the courthouse where they could access the internet service of a neighboring business to avoid leaving a trace of their campaign work on the county's computer system (Cox Tr 10/3/18, pp 622/10 – 623/18, 625/11 – 626/1; Sharpe Tr 10/3/18, p 713/3-11). Cox and Sharpe were clear that respondent knew they did significant 2014 campaign work on county time (Cox Tr 10/3/18 pp 622/6 – 623/18, 624/9-12; Sharpe Tr 10/3/18, pp 713/3 – 714/15). In fact, at the formal hearing respondent even acknowledged that she worked with Sharpe and Cox on the campaign, during the day, on two press questionnaires (Respondent Tr 10/10/18, pp 1719/9 – 1721/4).

The formal complaint alleged that respondent had her staff do campaign tasks on county time. After the complaint was filed the Commission became aware of Exhibit 11-1, which is a thumb drive containing campaign work Kristi Cox did for respondent. The time stamps on the thumb drive identified work Cox did during the workday. Before discovery of the thumb drive respondent had not so much as hinted, in any of her statements to the Commission, that her staff did *any* campaign work during the day, including on their alleged "breaks," nor had she hinted that she had worked on her campaign with her staff during court hours. Respondent received Exhibit

11-1 before the formal hearing, of course. Then, when respondent testified at the formal hearing, her explanation shifted from the categorical denials quoted above to an admission that yes, there was a little campaign work during the day, but the staff only did that work on their breaks (Respondent Tr 10/2/18, p 280/17-24).[51]

Respondent's several statements to the Commission, sanctimoniously proclaiming she was well aware staff were not supposed to do campaign work on county time and she never ever let that happen, were false. The Commission correctly concluded they were knowingly false.

Respondent objects to the Commission's finding, but her objection is hard to follow. She notes that she instructed her staff to stay off the county computer system while doing campaign work. Brief at pp 54-55. While that is true, her giving that instruction does not call into question whether she lied as charged. Respondent also seems to contend that because she really was careful to separate campaign work and county time in her 2006 and 2008 campaigns, she accidentally thought she had done the same in 2014 and sincerely maintained that position until Exhibit 11-1 informed her of her error and gave her the chance to fix it. Ergo, she seems to say, her false statements to the Commission were a mere mistake.

With respect, it is not plausible that a judge who took so religiously her obligation to separate campaign work from county time would have been unaware, when asked by the Commission, that she had violated her obligation multiple times. It is more plausible that respondent, when faced with definitive proof of her lie, was simply attempting to cover her misconduct. The Commission's finding that she lied was correct.

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[51] Respondent's new explanation is suspect not only because she never raised it until new evidence gave the lie to her original story, but because her staff deny it. Cox and Sharpe testified that they did not take breaks or have extra time during the work day to do respondent's personal tasks, because they always had court work to do (Cox Tr 11-19-18, pp 1823/19 – 1824/2, pp 1824/21- 1825/5, p 1844/5-9; Sharpe Tr 11-19-18, pp 1859/25 – 1860/11).

M. Count XVII(n)

Above at pp 38-39 is a discussion of the abusive environment in which respondent's staff worked. Within that environment, respondent told Kristi Cox and Jessica Sharpe to do personal tasks for her during the workday. One of those tasks was paying her personal bills.

When the Commission asked respondent about having her staff do personal errands for her, she denied that she ever directed them to do that. (R 6, answer to amended complaint, ¶'s 245, 247, 254 and 256) Instead, she claimed, they just liked to do things for her. With respect to paying her bills in particular, she acknowledged they did so but claimed doing so was *their* initiative, not hers. Thus, in January and April 2018, she told the Commission that her staff recognized she was helpless to deal with her own finances, and recognizing that, would take her personal bills from her desk and pay them. Ex. 19 p 66 ¶ 159.a; Ex. 21 pp 48 – 49 ¶ 319.a thru c. In January 2018 she claimed Sharpe was her employee who was "most insistent" about paying her bills. Ex. 19 p 70 ¶ 165.a. The clear import of respondent's statements is that her employees volunteered to pay her bills, which implication was intended to support respondent's overall position that she did not direct her employees to do personal things for her.

Respondent confirmed that this was her intended implication during her testimony at the formal hearing (Respondent Tr 10/1/18, p 245/12-25). She went so far as to say that her staff "hounded" her to let them pay her bills (Respondent Tr 10/1/18, p 246/11-15). Contrary to her elaborate claim, though, both Cox and Sharpe made clear they did *not* volunteer; rather, respondent directed them to pay her bills (Cox Tr 10/3/18 pp 611/2 – 612/9; Sharpe Tr 10/3/18, p 711/11-22).

Count XVII(n) alleged that respondent's various statements that her employees paid her bills at their initiative, not hers, were false. The Commission agreed. It is not clear whether respondent objects to this finding. She contends that her staff were not "dragooned" into paying

the bills. Brief at p 54. The evidence shows they were told by their boss to pay the bills and did not feel they could refuse (Cox Tr 10/3/18, pp 611/21 – 612/9, 683/13-20; Sharpe Tr 10/3/18, pp 707/9-15, 711/14-18). That probably is technically a "dragooning," but whether it meets the dictionary definition is beside the point. Respondent's directing them is the opposite of respondent's statement to the Commission that she did not direct them. Respondent's statements to the Commission were an attempt to avoid responsibility by putting the onus of the personal errands on her employees. The Commission was correct to find that was a lie.

N. Count XVII(l)

During her divorce deposition respondent testified that she did not have Sharpe run errands for her during work hours. Ex. 1-14, respondent Dep Tr Root v Brennan 2/9/17, pp 148/22 – 149/1. In April 2018 and again in her answer to the complaint, respondent claimed to the Commission, under oath, that it was not her intent to have her employees do personal tasks for her while they were being paid by Livingston County. Ex. 21 p 47 ¶ 316, p 51 ¶ 325; Ex. 32 p 26 ¶ 245, p 28 ¶ 254. She repeated this idea during the formal hearing (Respondent Tr 10/2/18, pp 259/5 – 260/7).

Among the tasks respondent had Sharpe do was stain her deck. She told Sharpe to leave to do that in the middle of a work day, i.e. while Sharpe was being paid by Livingston County, on September 1 & 2, 2015 (Sharpe Tr 10/3/18, pp 698/12 – 699/14 – 700/19; Cox Tr 10/3/18, p 619/7-20; Ex. 29). She told Sharpe to go do that even after Sharpe told her she was working at that time. Sharpe texted respondent about the deck job during work hours (Sharpe Tr 10/3/18, pp 699/17 – 700/5; Ex. 11-11, p 2).

Sharpe was deposed in connection with respondent's divorce, and according to respondent, testified that she had stained respondent's deck while on the clock. Ex. 1-14, respondent Dep Tr Root v Brennan 2/9/17, pp 133/24 – 134/1. Respondent was deposed at a later date, and testified

that this was a lie. Ex. 1-14, respondent Dep Tr Root v Brennan 2/9/17, pp 133/19 – 134/10, 253/21 – 254/13. Respondent reiterated this under oath to the Commission in October 2017; January and April, 2018; and in her answer to the complaint. Ex. 16 p 53; Ex. 19 p 69 ¶ 164.a; Ex. 21 pp 51-52 ¶ 326.a, Ex. 32 p 29 ¶ 255a.

Respondent now acknowledges that her testimony that Sharpe lied, and her various statements that Sharpe did not stain the deck while working for the county, were wrong. She says her mistake is innocent, though, because she did not know. Brief at pp 51-52. The evidence supports the Commission's contrary conclusion. Respondent was Sharpe's boss and gave her an instruction to go stain her deck in the middle of the work day. The most natural interpretation of the interaction between respondent and Sharpe informed both parties that Sharpe was on the clock. An employer cannot tell an employee to go do something in the middle of the work day, say nothing about clocking out, and not know that the employee remained on the clock.

O. Count XVII(m)

Sharpe worked for respondent beginning in early 2014 (Sharpe Tr 10/3/18, p 694/22-23). In August 2015 she spent the evening partying with respondent, then spent the night at her house. During the night she became ill in one of respondent's beds (Sharpe Tr 10-3-18, p 708/17-18). She left without waking respondent (Sharpe Tr 10/3/18, pp 708/16 – 709/3). She then tried to reach respondent by phone to apologize, but could not reach her so texted instead. Ex 11-11 p 1; Sharpe Tr 10/3/18, p 709/13-22. Respondent answered, texting "it happens to the best of us," adding that she had woken up and been embarrassed about much worse herself. Ex. 11-11 p 1;[52] Sharpe Tr 10/3/18, p 709/19-22. Sharpe offered to pay for the sheets, but respondent declined (Sharpe Tr 10/3/18, p 710/14-19).

[52] The word "worse" is missing from Ex 11-11, but Sharpe testified to it (Sharpe Tr 10/3/18, p 709/19-22).

Notably, in light of respondent's testimony that was to come, months after this incident respondent advocated to make Sharpe her full time employee (Sharpe Tr 10/3/18, pp 694/10 – 695/9; 11/19/18, p 1860/12-16). Months after that, in April 2016, Sharpe quit working for respondent because she could no longer tolerate the way respondent treated her (Sharpe Tr 10/3/18, p 722/20-24)

These otherwise insignificant events became significant when Sharpe and respondent were deposed in respondent's divorce, less than a year after respondent drove Sharpe out of her office. Before Sharpe testified, respondent said she was angry that Sharpe had been subpoenaed because she had done some "really horrible things" at work and at respondent's house. Ex. 1-13, respondent Dep Tr Root v Brennan 1/16/17, p 40/7-14. After Sharpe testified, respondent attacked her again. She described the "really horrible things" as Sharpe vomiting in one of her beds, then failing to apologize or pay for the damage. Respondent was pushed on this testimony, and said she was "certain" Sharpe had not apologized, because it was "not in her nature" to do so. Ex. 1-14, respondent Dep Tr Root v Brennan 2/9/17, p 169/7 – 171/18.

Count XVII(l) charged that respondent's testimony about this incident was false and she knew it was false. The Commission agreed. Respondent objects. Brief at p 51. She does not deny that her attack on Sharpe and her character was clearly false. Rather, she claims once more that she just had an innocent failure of recollection caused by the passage of time. That might be plausible if respondent was wrong as to a detail or two rather than the heart of the matter; or if she had expressed any uncertainty about her recollection rather than being adamant about it; or if she had not made it a point to reinforce her certainty by falsely claiming that it was not in Sharpe's nature to apologize.

Respondent intended to malign Sharpe during her testimony. She was clearly angry that Sharpe talked about the deck staining during Sharpe's own deposition. She may still have had the anger she demonstrated toward Sharpe during Sharpe's last months working for her. Or perhaps she was just seeking to discredit Sharpe, because Sharpe had testified unfavorably to her. Whatever her motivation, respondent's slander was deliberate.

P. Count XIII(C) – False Statement to Attorney Bruce Sage

The discussion of respondent's treatment of counsel, above at pp 27-32, shows how she mistreated and disrespected attorney Bruce Sage, who represented the plaintiff in *Sullivan v Sullivan*. Sage's client lived in Florida and it was a significant expense for her to come to court; each trip cost about $2,000, including flight, rental car and hotel stay (Sage Tr 10/5/18, p 1102/13-23).

On October 5, 2015, respondent scheduled the next hearing in the case for October 22, and said she expected Sage's client to be present. Sage asked whether his client could testify by telephone. Respondent stated: "No. We don't have a system that would allow that" (Sage Tr 10/5/18, pp 1103/3-12; Ex 10-7, p 30/22-25).

Count XIII(C) charges that respondent's statement was false. Her court did have a phone system that allowed parties and witnesses to appear remotely. It was as simple as Kristi Cox flipping a switch, after which the sound came through overhead speakers (Cox Tr 10/3/18, p 599/3-20). The system worked and was in place well before *Sullivan* was on respondent's docket. She was aware of it, having used it previously (Cox Tr 10/3/18, pp 599/21 – 600/8, 653/24 – 654/6; stipulation, Tr p 916/4-14).[53]

[53] Respondent had used the system once. The caller called from a construction site on a cell phone, making him hard to hear. That apparently caused respondent to not want to use the system thereafter (Cox Tr 10/3/18, pp 599/23 – 600/8).

Interestingly, at another hearing, just five months after respondent told Sage she had no phone system to allow remote testimony, she noted to *Sullivan* counsel that the defendant might have to pay Sage's client's flight and hotel expenses for her appearance then. She indicated those expenses had not been necessary, because they "could have gotten her on the phone." (Sage Tr 10/5/18, pp 1104/6-14; Ex 10-10, p 4/6-10) To the same effect, *before* the client retained Sage, respondent had allowed her to appear by telephone during a pretrial. Ex 11-1, entries on 7/24 and 7/28. Respondent must have been aware there was a suitable phone system as of October 5.

Respondent claims she did not intend to mislead Sage, because she believed the phone really did not work. Brief pp 52-53. Her objection misconstrues the evidence.[54] Respondent had two systems available to her, and simply chose to not use the one designed for remote testimony. The system was never changed or "fixed." It always worked just fine.

It is not plausible that respondent was unaware of that. This had been her courtroom for over a decade, she had used the system in the past, and she told the parties five months later that they *should* have used the system. What is more plausible is that her telling Sage there was no phone system was one more aspect of her disrespecting him. The Commission was right to find that she deliberately deceived Sage as charged in Count XIII(C).

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[54] In her answer to the complaint respondent doubled down on her claim that there was no phone by which Sage's client could have appeared remotely. Ex. 32, p 41/¶ 239, 240; p 55, ¶ 312. She contended that a system specifically designed for telephonic participation was installed *after* the *Sullivan* case. At the formal hearing on the complaint respondent learned that the evidence would show that contrary to her claim, the phone had not been upgraded for at least seven years. Stipulation at Tr p 916/4-14. After becoming aware of that evidence respondent changed her claim, to now assert that the change since *Sullivan* was that her new secretary, Felica Milhouse, had figured out how to use the court phone system. Actually, Milhouse only flipped the switch that had always been there, and which Cox also knew how to flip (Cox Tr 10/3/18, p 599/12-22). Respondent testified that she was surprised by Milhouse's success, and thought it was a "new system" (Respondent Tr 10/8/18, pp 1360/25 – 1361/23). Notably, respondent was talking about her own courtroom, where she had presided over cases for more than 13 years.

The Commission Properly Obtained Respondent's Comments

As many of the Commission's findings show, respondent repeatedly lied in her statements to the Commission. Those lies were all under oath. Respondent seeks to avoid responsibility for that by contending she never should have been asked to provide information under oath in the first place. Brief at pp 46-48.

Respondent is wrong about the Commission' authority to request that she sign under oath, as discussed below. More important is that it does not matter whether the Commission had authority to ensure that her statements were accompanied by the solemnity of the oath. They were, and she repeatedly lied anyhow. Her sworn lies are not insulated from consequences, even if, had she proceeded differently, she might have been able to lie without swearing.

Respondent's argument is that if the statements were obtained improperly they were available only to impeach her testimony at the formal hearing, not as substantive evidence. In support she cites *Michigan v Harvey*, 494 U.S. 344 (1990), and *People v Reed*, 393 Mich 342 (1975). Neither case has anything remotely to do with this case. *Harvey* held that a statement taken in a criminal case in violation of the Sixth Amendment right to counsel is available for impeachment purposes, though it cannot be used substantively. *Reed* held that a statement taken in a criminal case which is suppressed is nonetheless available to impeach.

In contrast, this is not a criminal case. Respondent was not coerced to give any statement. To the extent she had an obligation to answer questions from the Commission, that obligation does not implicate and did not violate either the state or federal constitutions. There was no basis to suppress her statements in the first place. Neither precedent nor logic suggest that a judge gets a pass for lying under oath if the oath was administered by mistake.

That said, there was no mistake – the Commission was within its authority to ask respondent to swear she was telling the truth. As respondent notes, two years ago this Court drew a distinction between the significance of false statements under oath and those made in other contexts. *In re Simpson*, 500 Mich 533, 561 (2017). To ensure respondents fully appreciate their obligation to be truthful with the Commission, and are held fully accountable for untruthfulness, following *Simpson* the Commission decided to have all judges submit their statements to the Commission under oath. It acted pursuant to MCR 9.208(B), which requires judges to comply with reasonable requests by the Commission. This request was eminently reasonable, which is underscored by this Court's recent adoption of MCR 9.221(B), effective September 1, which requires essentially the same thing.

The Commission's Findings That Respondent Lied Were Not "Tainted"

Finally, respondent makes the creative argument that the Due Process clause of the United States Constitution forbids the Commission to find misconduct when the finding enables the Commission to assess costs. Brief at pp 45-46. She cites three United States Supreme Court cases. None suggest the Commission's assessing costs is unconstitutional.

Tumey v Ohio, 273 U.S. 510 (1927), established the principle that due process does not tolerate a factfinder who has a personal pecuniary interest in the outcome of the case. *Gibson v Berryhill*, 411 U.S. 564 (1973), applied that principle to a board of optometrists whose decision to find misconduct by some optometrists had the potential to increase the income of board members. *Ward v. Monroeville*, 409 U.S. 57 (1972), extended the principle to mayors who were responsible for the finances of a municipality, when the health of the finances largely depended on the collection of fines that were assessed by the mayor.

None of those situations apply here. The Commission has no personal pecuniary interest at all – commissioners receive no compensation for their work no matter how much they assess in costs. The Commission is not responsible for its budget or for generating revenue. The budget is set by the state, and the Commission's available funds do not depend in any way on any revenue the Commission generates. In recent memory the Commission at times spends more than it is annually allocated by its budget, but faces no unpleasant consequence for the deficits. Therefore, in recent memory, any costs it collects merely reduce somewhat the Commission's deficit on paper; those costs do not enable any additional spending.

In *Ward* the Supreme Court articulated the standard that governs:

> [T]he test is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . .

409 U.S. at 60. No commissioner has any connection to the costs the Commission collects. The average man in a commissioner's situation would feel no temptation to put a thumb on the scale in order to collect the costs of pursuing a case. The Due Process clause is not offended by the Commission's authority to assess costs upon a finding that a respondent told lies.

Conclusion Concerning False Statements

Respondent lied on the bench while presiding over three cases – *Kowalski*, *McFarlane*, and *Sullivan*. She repeatedly lied during her divorce deposition. She repeatedly lied to the Commission during its investigation into her various species of misconduct. Her false statements in these three contexts were a "deceit trifecta," a striking penchant for dishonesty in three circumstances when honesty is *most* expected of a judge.

DISCIPLINARY ANALYSIS

The Commission thoroughly considered this Court's judicial misconduct precedents and the seven sanction factors established as a framework in *In re Brown*, 461 Mich 1291, 1292-93 (1999). Based on that analysis the Commission recommended that this Court remove respondent from the judiciary; that the removal extend through the next judicial term; and that respondent be assessed costs. (D&R at pp 23-32)

Perhaps because respondent denies committing any misconduct whatsoever, she does not address the question of the appropriate sanction. In the absence of an objection by respondent, there is no need for this brief to restate the Commission's careful analysis.

One part of the analysis deserves explicit mention, though. *Brown* established the guiding principle that "[t]he most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." 461 Mich at 1292. With that thought in mind, *In re Adams*, 494 Mich. 162 (2013), essentially resolves the sanction analysis in this case. *Adams* removed a judge from the bench because she gave false testimony and forged her attorney's signature to documents during her divorce proceedings. This Court stated that because Judge Adams had engaged in deceit and intentional misrepresentation, removing her from judicial office was "necessary to restore and maintain the dignity and honor of the judiciary and, most importantly, to protect the public." *Id*. at 187. The Court noted that removal was its consistent sanction when a judge testifies falsely under oath, and cited seven additional cases in which it had imposed that sanction for that reason.

The Court removed Judge Adams although her divorce misdeeds were her only misconduct and although, at the time of her divorce, she was enduring significant personal turmoil as a result of her daughter's suicide. Respondent is Judge Adams on steroids. She lied under oath and tampered with evidence in her divorce proceedings, but she also committed serious and extensive

additional misconduct that Judge Adams did not. Further, respondent has no mitigating circumstances. *Adams* alone demonstrates that the Commission's recommendation to remove respondent is correct.

The Commission's sanction analysis included the recommendation that respondent be suspended "through the next judicial term." (D&R at p 33) This Court imposed that sanction in *In re McCree,* 495 Mich 51, 86 (2014):

> We agree with the JTC that a removal, without more, would be an insufficient sanction in this case. If we were to remove respondent and he were to be reelected in 2014, that would amount to a less than one-year suspension (less than two years including his interim suspension), which we believe is clearly insufficient given the seriousness of his misconduct. This Court has a duty to preserve the integrity of the judiciary. Allowing respondent to serve as a judge after only a one-year suspension will not, in our judgment, adequately preserve the integrity of our state's judiciary.

Similarly, given the breadth, duration, and seriousness of respondent's misconduct, coupled with her failure or refusal to accept responsibility for any of it, in order to preserve the integrity of the state's judiciary she should be suspended for more than the approximately 18 months that would pass between a decision to remove her and when her next term would begin. Like Judge McCree, respondent has a "cavalier attitude about serious misconduct" and an "apparent failure to comprehend fully the magnitude of [her] wrongdoing . . . ." (495 Mich at 86-87) Like Judge McCree, respondent "lied repeatedly to the JTC and the master while under oath." (*Id*. at 87) Like Judge McCree, respondent "is now unfit to serve as a judge, and [she] will remain unfit to do so one year from now." (*Id*.) Therefore, like Judge McCree, respondent should be removed not only for this term, but for next term as well.

RELIEF REQUESTED

For the reasons stated in this brief, the Commission asks that the Court adopt its Decision & Recommendation in full, and issue an order finding respondent engaged in misconduct that warrants her removal from the bench, extend the period of removal through the next judicial term, and assess costs.

Respectfully submitted,

/s/
LYNN HELLAND (P32192)
Examiner

/s/
CASIMIR J. SWASTEK (P42767)
Associate Examiner

3034 W. Grand Blvd. Suite 8-450
Detroit, Michigan 48202
(313) 875-5110

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