

**STATE OF MICHIGAN
IN THE SUPREME COURT**

COMPLAINT AGAINST:

HON. DEBORAH ROSS ADAMS
3rd Circuit Court
Coleman A. Young Municipal Ctr.
2 Woodward Avenue, Room 1921
Detroit, Michigan 48226

DOCKET NO.: 144985

FORMAL COMPLAINT NO.: 89

**BRIEF IN SUPPORT OF THE COMMISSION'S DECISION AND
RECOMMENDATION FOR ORDER OF DISCIPLINE**

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

**JUDICIAL TENURE COMMISSION
OF THE STATE OF MICHIGAN**

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JURISDICTION

Judge Deborah Ross Adams (“Respondent”) is, and at all material times was, a judge of the 3rd Circuit Court in Wayne County. As a judge, Respondent is subject to all the duties and responsibilities imposed on her by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205. The Court has authority to act upon the recommendation of the Judicial Tenure Commission. Const. 1963, Art. 6, §30; Michigan Court Rules 9.224 and 9.225 provide the method for this review.

STANDARD OF PROOF

The standard of proof in judicial disciplinary proceedings is by a preponderance of the evidence. *In re Ferrara*, 458 Mich 350, 360 (1998); *In re Haley*, 476 Mich 180, 189 (2008); MCR 9.211(A).

STANDARD OF REVIEW

The Supreme Court reviews the Commission's findings of fact on a de novo basis. *In re Jenkins*, 437 Mich 15, 18 (1991). The Court also reviews the recommendations of the Commission de novo. *In re Hathaway*, 464 Mich 672, 684 (2001).

COUNTER STATEMENT OF PROCEEDINGS

On April 17, 2012, the Judicial Tenure Commission (“JTC” or “Commission”) issued a 16-page, three-count formal complaint against Respondent and filed a Request for Appointment of Master with the Michigan Supreme Court. On April 26, 2012, the Court appointed the Hon. Donald G. Miller as master to hear Formal Complaint No. 89 (“FC”). Following a pre-trial conference held at the Macomb County Circuit Court on May 15, 2012, the Hon. Donald G. Miller issued a scheduling order setting deadline dates for Respondent’s Answer to the Formal Complaint and for the submission of reports and decisions. In the same order, the Hon. Donald G. Miller set deadline dates for the exchange of witness lists and exhibits, the filing of motions and for a pre-trial date. Finally, the Master’s order provided that the formal hearing would commence on September 11, 2012 at the Old Macomb County Probate Court in Mt. Clemens, Michigan.

On May 30, 2012, Respondent filed her Answer to the Formal Complaint. On June 25, 2012, the Examiner filed a Witness List and an Exhibit List. On the same date, Respondent filed her Witness and Exhibit lists together with a “Motion to Disqualify the Examiner” and a “Motion to Strike Surplusage.” In the Motion to Disqualify, Respondent alleged that the Examiner had demonstrated a personal conflict of interest “grounded in both his animus and vindictiveness,” and in the Motion to Strike Surplusage, she requested the Master to strike from the Formal Complaint all references and/or allegations that she committed felony violations under Michigan law. The Examiner filed responses to Respondent’s motions on July 9, 2012. On July 17, 2012, Respondent filed reply briefs in support of her motions. On August 9, 2012, the Master conducted a pre-trial and heard arguments on all pre-trial matters. In an August 15, 2012 opinion, the Master denied both motions.

On August 30, 2012, William Brukoff, divorce attorney for Respondent's former husband, filed objections to Respondent's subpoena for the production of his client's entire divorce file. On September 8, 2012, Respondent filed a response to Mr. Brukoff's Objections to Subpoena to Produce Documents. Arguments on the motion were scheduled for September 11, 2012.

On September 5, 2012, Respondent filed a Motion in Limine seeking the exclusion of a number of the Examiner's proposed exhibits on the grounds that they either contained hearsay or were protected by an attorney-client or marital privilege. On September 7, 2012, the Examiner filed an answer to Respondent's Motion in Limine.

The public hearing on FC 89 began on September 11, 2012. Prior to the presentation of proofs, the Master addressed and denied Mr. Brukoff's request to quash the subpoena for the production of his client's divorce file. Complete access to the file in the Adams v Adams matter was granted to Respondent's counsel throughout the week of September 11, 2012. The Master also addressed Respondent's Motion in Limine, ruling that he would address Respondent's objections as the Examiner sought to introduce each of the disputed items of evidence.

Thereafter, the proofs on FC 89 began and continued through and including September 14, 2012. Closing arguments were made on September 17, 2012 and transcripts of the hearing were filed on September 25, 2012. On October 5, 2012, proposed findings of fact and conclusions of law were filed by both parties. The Master's Findings of Fact and Conclusions of Law were filed on October 9, 2012. On October 15, 2012, the Commission, through its Chairperson, Thomas J. Ryan, issued an order setting deadline dates for the parties' submission of objections to the Master's report, as contemplated in MCR 9.215. The order provided that any

objections were to be filed no later than 4:30 p.m. on November 6, 2012 and any briefs no later than 4:30 p.m. on November 20, 2012.

Consistent with the Commission's October 15, 2012 order, the Examiner filed his objections to the Master's Report on November 5, 2012. On November 6, 2012, Respondent filed a Statement of Objections to Master's Report, a Motion to Disqualify JTC Vice Chairperson Grant¹ and a Motion to Dismiss. The Examiner's answers to each of Respondent's motions as well as the Brief in Support of Sanctions and a Response to Respondent's Statement of Objections to Master's Report were filed on November 20, 2012. As set forth in the Commission's October 15, 2012 scheduling order, and pursuant to MCR 9.213, a public hearing before the Commission was held on Monday, December 3, 2012 in a courtroom of the Court of Appeals at 3020 W. Grand Boulevard, Detroit, Michigan. Prior to the hearing itself, Vice Chairperson Grant denied Respondent's motion to disqualify her, stating that she could be fair and impartial. The Respondent argued for a dismissal, and the Examiner argued for removal from office.

The JTC issued its Decision and Recommendation for Discipline ("D&R") on December 28, 2012. The Commission adopted the Master's findings of fact that Respondent lied under oath in Judge Brennan's court and made misrepresentations to the JTC during the course of the investigation. The Commission also adopted the Master's finding that the Examiner proved that Respondent did not have permission to sign attorney Andra Dudley's name to the Motion filed on May 5, 2011. Contrary to the Master's findings, the Commission also found that the Examiner proved by preponderance of the evidence that Respondent did not have Ms. Dudley's permission to file pleadings on Respondent's behalf and that Respondent did not supply a copy

¹ The basis of Respondent's Motion was that Vice Chairperson Grant was the Chief Judge of the Oakland County Circuit Court where Respondent's unethical and improper conduct occurred.

of the motion and attendant documents to Ms. Dudley. The JTC recommended that the Supreme Court suspend Respondent without pay for 180 days and that she pay costs incurred by the Commission in prosecuting this matter.

Respondent filed her petition to reject the JTC's recommendation on February 19, 2013. The Examiner filed his response on March 12, 2013.

COUNTER-STATEMENT OF QUESTION INVOLVED

WHETHER THE EVIDENCE PRESENTED AT THE FORMAL HEARING
WAS SUFFICIENT TO SUPPORT THE JUDICIAL TENURE COMMISSION'S
FINDING OF MISCONDUCT BY RESPONDENT?

The Commission Answers Yes

Respondent Answers No

COUNTERSTATEMENT OF FACTS

A. COUNT I – Misrepresentations Under Oath

Respondent is a judge at the Third Circuit Court for the County of Wayne. In September of 2009, Respondent's now former husband Anthony Adams ("Plaintiff"), represented by Mr. Brukoff, filed for divorce in Wayne County's Third Circuit Court. (TX, Vol. 1, p. 86)¹ Because of Respondent's position in that court, in March of 2010 the State Court Administrator's Office (SCAO) transferred the case to the Sixth Circuit Court for the County of Oakland in March, 2010. The case was assigned to the docket of the Honorable Mary Ellen Brennan under case no. 10-SC-0009-SC. (E's Exh. 1; TX, Vol. 1, p. 90) On January 5, 2011, after several adjournments of various court proceedings including the trial (E's Exh. 63), Judge Brennan issued a Domestic Scheduling Order setting March 10, 2011 as the deadline for mediation and March 21 and March 22, 2011 as the dates for trial. (E's Exh. 2; TX, Vol. 1, p. 109; Vol. 3, p. 627-628).

During the course of her divorce, Respondent was represented by four attorneys (TX, Vol. 1, p. 91-98; Vol. 3, p. 626-627) including Janice Burns who entered the case in January of 2011 (TX, Vol. 1, p. 95-96; E's Exh. 44 and 45), and Andra Dudley who began representing Respondent in February of 2011. Although the Commission's D&R indicates that Ms. Dudley's representation was pursuant to an "Exparte (sic) Motion for Entry of Order for Substitution of Counsel" ("Ex Parte Motion") (D&R, p. 2), the formal hearing record demonstrated that Judge Brennan refused to accept that motion because of its proximity to the mediation and trial dates. (TX, Vol. 2, p. 324; Vol. 3, p. 546-547, 629) The evidence also showed that on February 28, 2011, the parties presented, and Judge Brennan signed, a stipulated Order for Substitution of Counsel for Defendant, For Continuation of Scheduling Order for Mediation Date and Other

¹ TX=Transcript of Formal Hearing; E's Exh. = Examiner's Exhibit; R's Ans. to FC 89 = Respondent's Answer to Formal Complaint No. 89; MR = Master's Report; D&R = Commission's Decision and Recommendation.

Relief. ("Substitution Order") (E's Exh. 4; TX, Vol. 2, p. 330-331) It was through that Substitution Order, entered on March 4, 2011 and premised on the parties' stipulation that the January 5, 2011 scheduling order would remain in full force and effect, that Ms. Dudley entered her appearance. (TX, Vol. 2 p. 330) The Ex Parte Motion, which Judge Brennan rejected, was prepared by Respondent who signed her then-attorney Burns' name without Ms. Burns' knowledge or permission and filed it with the court. (D&R, p. 2; TX, Vol. 3, p. 549-550) At no time did Respondent provide Ms. Burns with a copy of that motion. (TX, Vol. 3, p. 553) In fact, the first time Ms. Burns became aware of the forgery of her signature was after the instant investigation began. (TX, Vol. 3, p. 554; D&R, p. 3)

On March 10, 2011, following an all-day session with the mediator Gil Gugni (TX, Vol. 1, p. 138, 141; Vol. 2, p. 31), the parties reached a settlement agreement. (TX, Vol. 1, p. 141-142; Vol. 2, p. 336) On March 11, 2011, in order to avoid media coverage and protect their privacy (TX, Vol. 1; p. 143; p. 225; Vol. 2, p. 338), the parties agreed to conduct a pro-confessor conference ("pro-con") prior to the March 21, 2011 trial date. (TX, Vol. 2, p. 338) Contrary to Respondent's claim that the pro-con date was scheduled sua sponte by the court, the March 16, 2011 date was selected by the parties themselves. (TX, Vol. 2, p. 338-339)

By the afternoon of Monday, March 14, 2011, or the morning of March 15, 2011, Respondent contacted Ms. Dudley wanting the March 16, 2011 hearing postponed. (TX, Vol. 2, p. 342-343) Although Ms. Dudley contacted the court as her client had requested, at 11:57 AM on March 15, 2011, she sent Respondent an email stating that Judge Brennan refused to grant an adjournment. (E's Exh. 8) In the same email, Ms. Dudley advised Respondent that her presence was not mandatory and that Ms. Dudley would make the court appearance on her behalf. (E's Exh. 8; TX, Vol. 2, p. 341-342)

Shortly after lunch on March 15, 2011, Respondent called Judge Brennan's court herself to request an adjournment of the March 16, 2011 pro-con hearing. (R's Ans. to FC 89, par. 13; TX, Vol. 1, p. 178-179) Because Respondent had called the court on numerous occasions during the course of the divorce proceedings, Judge Brennan's staff became familiar with her voice. (TX, Vol. 4, p. 737, 738) On March 15, 2011, Respondent spoke to the judicial secretary Kirsten Turner who, consistent with Judge Brennan's policy that represented parties may not personally contact the court, informed Respondent that "[s]he needed to contact her attorney" regarding the adjournment. (TX, Vol. 4, p. 738-741) It is undisputed that Respondent did not call Ms. Dudley after she spoke to Ms. Turner.

On the afternoon of March 16, 2011, Respondent appeared for the pro-con hearing as scheduled. (TX, Vol. 1, p. 145, p. 186, E's Exh. 10) Judge Brennan placed both parties under oath. (TX, Vol. 1, p. 186; Vol. 2, p. 345; Vol. 3, p. 639) After making a finding that the marriage had broken down to the extent that the objects of matrimony could not be preserved (TX, Vol. 3, p. 640), Judge Brennan addressed the issue of Respondent's repeated phone calls to the judicial staff and her chambers. (TX, Vol. 1, p. 187-188; Vol. 3, p. 645-646; E's Exh. 9; E's Exh.10).

Although Respondent has since admitted making the March 15, 2011 phone call (R's Ans. to FC 89, par 13), she vehemently denied it when questioned by Judge Brennan on March 16, 2012. In fact, on March 16, 2011, Respondent insisted that the *only* time she had called the court was when she was "unrepresented." (E's Exh. 9, p. 18; E's Exh. 10) Respondent continued her denials even after Ms. Turner testified under oath that on the previous afternoon she spoke to a woman who identified herself as Deborah Adams. (E's Exh. 9, p. 19-20; E's Exh. 10) Respondent's denials included the following statements:

- "I didn't call your chambers directly."

- “Judge, I did not call your staff directly.”
- “I did not call anyone direct – your chambers directly.”
- “Again, I did not call your staff.”
- “I did not call anyone.”
- “I did not have any conversation.”
- “The only time I’ve called your chambers was when I was unrepresented.”
- “I haven’t admitted to speaking with anyone.”
- “My clerk called the Court to see if the time to be – could be changed.”
- “...maybe someone from my court called but I did not call.”
- “No. I did not call here.”
- “I’ve never called your chambers directly.”

(E’s Exh. 9, pp. 16-20; E’s Exh. 10)

B. COUNT II – Forgery and Filing of Forged and Unauthorized Pleadings

At the conclusion of the March 16, 2011 hearing, Respondent’s case was re-scheduled to April 11, 2011, to allow for the preparation of a settlement agreement and judgment of divorce. (E’s Exh. 11; TX, Vol. 1, p. 223) Appearances by the parties and their attorneys was mandatory only in the event that the settlement agreement and judgment of divorce were not signed and filed with the county clerk’s office prior to that date. (E’s Exh. 11)

Plaintiff’s counsel, William Brukoff, prepared three and perhaps as many as four separate drafts of a proposed settlement agreement. (TX, Vol. 1, p. 228-230) Each draft was submitted to Ms. Dudley who in turn forwarded it to Respondent. (E’s Exh. 12; TX, Vol. 1, p. 228) It is undisputed that Respondent revised each of the drafts (TX, Vol. 1, p. 228) and that each draft

was returned through Ms. Dudley to Mr. Brukoff who then incorporated the revisions into a new proposed settlement agreement document. (TX, Vol. 2, p. 361-365; E's Exh. 12)

On April 7, 2011, without Ms. Dudley's knowledge or permission, Respondent faxed one of the revised drafts to Mr. Brukoff under a cover sheet that represented that it was being sent by Ms. Dudley herself. (E's Exh. 13; TX, Vol.1, p. 232; Vol. 2, p. 366, p. 365-367) On April 8, 2011, a telephone conference was held between the attorneys and the mediator to resolve the issues raised in Respondent's revisions. (TX, Vol. 2, p. 367-368) A final proposal of the settlement agreement was distributed on the afternoon of Friday, April 8, 2011. Respondent admitted receiving a copy of that document. (R's Ans. to FC 89, par. 47).

In the early morning hours of April 11, 2011, Respondent emailed Ms. Dudley stating that the docket in her own court prohibited her from appearing before Judge Brennan. (E's Exh. 73; TX, Vol. 2, p. 373) Although Ms. Dudley requested an adjournment when she appeared in court, Judge Brennan denied it. (TX, Vol. 2, p. 373) Judge Brennan also confirmed with both attorneys and the mediator that the settlement agreement conformed to the parties' mediation agreement, and signed the Judgment of Divorce ("JOD"). On Mr. Brukoff's motion, Judge Brennan issued an order for Respondent to sign the settlement agreement by the end of April 11, 2011, or to return to court on April 14, 2011 to "show cause" why she should not be held in contempt for failing to appear at the April 11, 2011 hearing. (E's Exh. 37; R's Ans. to FC 89, par. 57; TX, Vol. 2, 373-374; Vol. 3, p. 657)

Immediately after the April 11, 2011 hearing, Ms. Dudley contacted Respondent to inform her of Judge Brennan's decision (TX, Vol. 1, p. 248, Vol. 2, p. 373, 375) and then delivered the settlement agreement to Respondent's office at the Third Circuit Court. (R's Ans. to FC 89; par. 58; TX, Vol. 1, p. 248-250) Ms. Dudley advised Respondent that she could *either*

sign the documents *or* appear before Judge Brennan and explain her non-appearance at the April 11, 2011 hearing (TX, Vol. 2, p. 383-384, p. 394). Respondent signed the settlement agreement. (TX, Vol. 2, p. 394) Thereafter, Ms. Dudley delivered the documents to Mr. Brukoff (TX, Vol. 2, p. 397-398) who had them filed with the Oakland County Clerk's office later that afternoon. (E's Exh. 63)

As provided in the JOD, Ms. Dudley's representation of Respondent ceased upon its filing with the county clerk's office "unless specifically hereinafter retained." (E's Exh. 16, p. 8; TX, Vol. 2, p. 400) Consistent with that provision, on April 25, 2011 Ms. Dudley sent an email to Respondent, Mr. Brukoff and Mr. Gugni confirming that she no longer represented Respondent. (TX, Vol. 2, p. 402-404; E's Exh. 31) Ms. Dudley also advised that she would notify everyone *if* Respondent retained her for any post-judgment matters.² (E's Exh. 31, TX, Vol. 2, p. 403-404) On April 26, 2011, Ms. Dudley emailed Respondent stating, "If you want to preserve your appellate rights, file a motion." (E's Exh. 17; TX, Vol. 2, p. 410)

Despite the clear provision in the JOD and Ms. Dudley's emails, on May 5, 2011, Respondent signed Ms. Dudley's name to a Motion to Set Aside or Modify the Judgment of Divorce, Brief in Support, and Notice of Hearing ("Motion to Set Aside"). (TX, Vol. 1, p. 264-265) Respondent admitted to the preparation of those documents (E's Exh. 18, 19, 20, 21; R's Ans. to FC 89, par. 66) and to affixing Ms. Dudley's signature on each of them. (TX, Vol. 1, p. 264-265) At 2:20 PM on May 5, 2011, Respondent had the motion filed with the clerk of the Sixth Circuit Court as well as with Judge Brennan's court. (R's Ans. to FC 89, par. 66; 68; TX, Vol. 1, p. 276) Although Respondent served a copy of the Motion to Set Aside on Mr. Brukoff

² Consistent with a JOD provision that any post judgment disputes related to the drafting or language of the Eligible Domestic Relations Order (EDRO) concerning the City of Detroit Defined Benefit Pension of Anthony Adams shall be resolved by Gilbert Gugni as the binding arbitrator, an arbitration meeting was scheduled for May 6, 2011. Ms. Dudley did not appear at that meeting.

and the mediator, she did not provide a copy to Ms. Dudley. (TX, Vol. 2, p. 413) Respondent also did not provide Ms. Dudley with notice of the date she selected for the hearing of the motion. At 4:30 PM on May 5, 2011, more than two hours after the Motion to Set Aside was filed with the court, Respondent sent an email to Ms. Dudley stating that she had tried to contact her “to obtain permission to file a quick pleading on my behalf under your name.” (E’s Exh. 32, TX. Vol. 2, p. 419-420) It is undisputed that with regard to the Motion to Set Aside, Respondent had no contact with Ms. Dudley prior to filing the Motion on May 5, 2011.

Ms. Dudley first learned that the Motion to Set Aside had been filed and served under her purported signature when Mr. Brukoff called her to discuss the matter. (TX, Vol. 2, p. 406-407) Ms. Dudley explained that she had not filed any motions and requested that Mr. Brukoff provide her with its copy. (TX, Vol. 2, p.414-415; E’s Exh. 39) At 4:35 PM on May 5, 2011, Ms. Dudley also transmitted the following email to Respondent:

I did not receive any contact from you this week and hopefully you did not file any pleadings with my name without me first reviewing them and without my permission.

(E’s Exh. 32; TX, Vol. 2, p. 419-420)

On May 6, 2011, Respondent attended a meeting with the mediator, the Plaintiff, and Mr. Brukoff, to resolve the couple’s property settlement issues. As she no longer represented Respondent, Ms. Dudley did not appear. (TX, Vol. 1, p. 276; Vol. 2, p. 405) On Monday, May 9, 2011 Ms. Dudley received a copy of the Motion to Set Aside from Plaintiff’s counsel and realized that Respondent not only filed the Motion under Dudley’s name, address and p-number, Respondent also forged Dudley’s signature to the documents, which by then were pending with the Sixth Circuit Court. (E’s Exh. 18, 19, 20, 21; TX, Vol. 2, p. 411-412)

C. COUNT III – Misrepresentations to the Commission

In Respondent's answers to the Request for Comments, dated October 14, 2011 and the 28-day letter, dated February 21, 2012, Respondent made misrepresentations to the Commission. Respondent stated that she had contacted the court of the Hon. Mary Ellen Brennan's staff on only four occasions. (FC 89, par 86) Respondent stated that the staff of the Hon. Mary Ellen never told her that it was improper to contact the court when she was represented by counsel. (FC 89, par. 88) Respondent stated that she had Ms. Dudley's permission to sign her name to the Motion she had filed on May 5, 2011. (FC 89, par. 92) In her Answer to the Formal Complaint Respondent admitted she made all of those statements, but denied that they were false. Based on the evidence presented at the formal hearing, the Master found that Respondent's answers listed above were false and the Commission adopted these findings. (D&R, p. 10)

Respondent made further misrepresentations for which the Master found "insufficient evidence to meet the statutory minimum of a preponderance of the evidence." (MR, p. 5) These statements included that Respondent had Ms. Dudley's permission to file pleadings on her behalf (FC 89, par 90); that Respondent stated that she provided a copy the Motion to Ms. Dudley (FC 89, par. 94); and that Respondent stated that she provided a copy of the Notice of Hearing to Ms. Dudley. (FC 89, par. 96) Respondent stated in her Answer to the Formal Complaint that these statements were not false. While the Master found that there was insufficient evidence to prove these misrepresentations, the Commission disagreed and determined that sufficient proof was presented by the Examiner.

ARGUMENT

THE COMMISSION'S FINDING OF MISCONDUCT AND ASSESSMENT OF COSTS IS WARRANTED BASED UPON RESPONDENT'S REPEATED AND SERIOUS ACTS OF MISCONDUCT.

The evidence of Respondent's misconduct is overwhelming. It is further compounded by the fact that Respondent's lying about her wrongdoings during the course of the Commission's investigation of this matter as well as during the formal hearing before the Master. The Commission's finding of misconduct, which is well-supported by the evidence, should be adopted by this Court.

A. COUNT I - Misrepresentations Under Oath

The Master determined that the Examiner proved by a preponderance of the evidence that during her March 16, 2011 court appearance Respondent made "false statements under oath" by denying that she had repeatedly called Judge Brennan's chambers, except for a short time when she was not represented by counsel. (MR, p. 2) The Master also concluded that the representations Respondent made in her answers to the Commission's 28-day letter, wherein she claimed that she had only called Judge Brennan's court on three occasions, were also false. (MR, p. 2). These findings were adopted by the Commission (D&R, p. 10) and should be adopted by this Court.

The Commission did not concur with the Master's determination that the *sole* issue in Count I of the formal complaint was "whether Respondent telephoned Judge Brennan's court on more than one occasion during the time she was represented by counsel." (MR, p. 2) The Commission correctly recognized that the central issue in Count I was whether on March 16, 2011 Respondent made repeated misrepresentations, and thus committed repeated acts of perjury, by claiming under oath that she had not made *any* calls to Judge Brennan's court on

March 15, 2011. Based on the evidence presented, the Commission found that Respondent's denials of calling Judge Brennan's staff on March 15, 2011 were "plainly false" (D&R, p. 13) and constituted judicial misconduct. The Commission's finding is supported by overwhelming evidence and should be adopted by this Court.

Respondent's March 16, 2011 testimony before Judge Brennan (E's Exh. 9, p. 15-22; E's Exh. 10) was conclusively proven false by Respondent's own answer to the formal complaint, her testimony during the formal hearing before the Master, and her brief to this Court. In each of these, Respondent admitted to making the March 15, 2011 call. That evidence alone proved that Respondent's testimony under oath on March 16, 2011 was false, and as such amounted to perjury. Further, the evidence presented at the formal hearing proved that Respondent's misrepresentations and perjury continued throughout her testimony before the Master and continue in the brief Respondent submitted to this Court.

Respondent testified before the Master and argues in her brief to this Court that she did not receive notice of the March 16, 2011 pro-con date until after 4:00 PM on Tuesday, March 15, 2011. (TX, Vol. 1, p. 152) That testimony was false, as the evidence was clear that Respondent agreed to schedule the pro-con before the March 21, 2011 trial date. (TX, Vol. 2, p. 338, 339-341).

Andra Dudley testified that on Friday, March 11, 2011, she spoke to Respondent and Mr. Brukoff about a date on which to schedule the pro-con. (TX, Vol. 2, p. 338-339) She also testified that March 16, 2011 was selected specifically to avoid the media attention that was expected on the March 21, 2011 trial date. (TX, Vol. 1, p. 144; p. 225; Vol. 2, p. 334) Supporting Ms. Dudley's testimony was Respondent's admission at the formal hearing that she wanted to avoid any media coverage of her divorce. (TX, Vol.1, p.225; Vol. 2, p. 338) Also

supporting Ms. Dudley's testimony was a docket sheet which Respondent provided with her answers to the 28-day letter (TX, Vol. 1, p. 155; E's Exh. 7) listing the matters scheduled in her court for March 16, 2011. A date of March 11, 2011 appeared at the bottom of that docket sheet showing that the document was printed on that date. (E's Exh. 7, TX, Vol. 4, p. 779-780) Respondent herself testified that she directed her clerk, Sharon Parr, to "make arrangements" for her March 16, 2011 docket. (TX, Vol. 1, p. 149; Vol. 4, p. 772-773) Contrary to Respondent's claim that she gave that directive to the clerk on March 15, 2011 (E's Exh. 7), the *docket sheet* proved that Ms. Parr's verification of Respondent's March 16, 2011 caseload and her availability for the March 16, 2011 hearing before Judge Brennan took place on March 11, 2011. This is also consistent with Ms. Parr's testimony that on March 11, 2011 a case originally set for an all-day hearing on March 16, 2011 was adjourned to April 15, 2011. (E's Exh. 51; TX, Vol. 4, p. 780-783)³

Additional evidence that Respondent was well aware of the March 16, 2011 hearing date prior to the afternoon of March 15, 2011 appeared in an email Ms. Dudley sent to Respondent on March 15, 2011 at 11:57 AM. (E's Exh. 8) In that email, transmitted more than four hours before Respondent claimed she first learned of the March 16, 2011 hearing, Ms. Dudley informed Respondent that she was unable to obtain the adjournment that Respondent was seeking. (E's Exh. 8; TX, Vol. 2, p. 341-342) Respondent admitted at the formal hearing that at the time she made the March 15, 2011 call, which Judge Brennan's staff testified came into their court shortly after lunch (Tx, Vol. 4, p. 738), she knew that Judge Brennan denied Ms. Dudley's adjournment request. (TX, Vol. 1, p. 162, p. 184-185)

³ Ms. Parr testified that only one case was handled by Respondent on March 16, 2011 – an in-camera review with a minor child, which was scheduled for 9:00 AM. The pro-con was scheduled for 1:00 PM on March 16, 2011.

Respondent's claims during the formal hearing and in her brief to this Court, that Ms. Dudley "directed" her to make the March 15, 2011 call to Judge Brennan's court, were also false. (TX, Vol. 1, p. 153; R's Brief, p. 24) Respondent specifically testified that at 4:00 PM on March 15, 2011, she received a call from Ms. Dudley "yelling and screaming at me, saying the judge, you know, called us in and we have to be there tomorrow." (TX, Vol. 1, p. 152-154) Respondent further claimed that at 4:30 PM, Ms. Dudley called again, stating that she could not secure an adjournment and suggesting that Respondent "might have a better luck" if she called the court herself. (TX, Vol. 1, p. 153-154; R's Brief, p. 24)

Once again, the email Ms. Dudley sent to Respondent at 11:57 AM on March 15, 2011 proved that Respondent had notice of the March 16, 2011 hearing and had engaged in adjournment discussions with her counsel prior to that date and time. (E's Exh. 8) Further, Judge Brennan's clerk Ryan Matthews stated that court appearances for matters such as motions and pro-cons were *always* scheduled by the parties themselves and not by the court. (TX, Vol. 2, p. 338-339; Vol. 3, p. 600) Next, Judge Brennan's staff unequivocally testified that Respondent's March 15, 2011 call came shortly after lunch and not at 4:30 PM as Respondent testified at the formal hearing, or in the "late afternoon," as she claims in her brief to this Court. (TX, Vol. 4, p. 738; R's brief, p. 24) Finally, Ms. Dudley testified that she did not, and would never, instruct a client to contact a court personally. (TX, Vol. 2, p. 343) In fact, Ms. Dudley testified that she was not aware of her client's telephone call to the court until she appeared before Judge Brennan on March 16, 2011. (TX, Vol. 2, p. 344)

Unable to have the matter adjourned Respondent appeared at the pro-con on March 16, 2011, as originally scheduled. (TX, Vol. 1, p. 145; Vol. 2, p. 344; Vol. 3, p. 639) After placing both parties under oath (Vol. 1, p. 186; Vol. 2, p. 345; Vol. 3, p. 639) and taking the statutory

proofs (TX, Vol. 3, p. 640), Judge Brennan addressed Respondent regarding the previous day's phone call. (TX, Vol. 1, p. 187; Vol. 3, p. 645) The evidence overwhelmingly proved that Respondent committed perjury before Judge Brennan. The evidence also proved that she once again testified falsely at the formal hearing before the Master, where her testimony was contradicted not only by other witnesses, but also by the video of the March 16, 2011 hearing itself. (E's Exh. 9; Exh. 10)

Respondent testified before the Master, argued before the Commission, and now asserts in her brief to this Court, that her March 16, 2011 statements in response to Judge Brennan's inquiries did not rise to the level of "willfulness" required by Michigan's perjury statute.⁴ Respondent claims that on March 16, 2011, due to the ambiguity of the questions, she believed that Judge Brennan was accusing her of attempting to make improper ex parte contact with the judge herself. (TX, Vol. 1, p. 203; R's Brief p. 25) She testified that she was "taken aback" when Judge Brennan first addressed her about the March 15, 2011 telephone call (TX, Vol. 1, p. 201), that she was overwhelmed, crying and that her nose was running (TX, Vol. 1, p. 200). Respondent further testified that Judge Brennan was asking questions in a "rapid fire" manner (TX, Vol. 1, p. 200-203), and had used an "accusatory tone of voice." (TX, Vol. 1, p. 203) Respondent's assertions were clearly proven false.

First, it should be noted that willfulness has been defined as an action taken knowledgeably. A conscious, intentional, deliberate, voluntary decision. No showing of malicious intent is necessary. *Barker Bros. Const. v Bureau of Safety & Regulation*, 212 Mich App 132 (1995) Willfulness has also been defined as some intent, not specific intent, but some knowing exercise of choice. *People v Lockett*, 253 Mich App 651 (2002)

⁴ MCL 750.423

In the present case, Respondent was clearly aware that the court had denied her attorney's request for an adjournment. (TX, Vol. 1, p. 162, p. 184-185) Despite that, she called Judge Brennan's court herself, undoubtedly expecting that her position as a judicial officer would result in a different answer. Respondent, having been a judge since 1997, was, or should have been, well aware that such use of her judicial position was in violation of the Code of Judicial Conduct and as such improper. When confronted with her improper act by Judge Brennan on March 16, 2011, she chose to lie. Repeatedly, Respondent denied calling the court, denied calling "here," denied speaking to "anyone," and suggested that someone else, including her clerk, had made the March 15, 2011 phone call.

Further, as the Commission noted in its D&R, Respondent's claim that she believed she was being accused of ex parte communications, is "belied by her specific denials, while under oath, to having *any* conversation with Judge Brennan's staff the previous day." (Emphasis provided) (D&R, p. 12) The video of the March 16, 2011 hearing also demonstrated that Respondent was neither overwhelmed, nor was she crying. (E's Exh. 10) Judge Brennan's questions were not asked in a "rapid fire" manner and were not made in an accusatory or demeaning tone. (E's Exh. 10) The formal hearing evidence was clear that as Ms. Dudley stood next to her client on March 16, 2011, she observed no tears and no running nose. (TX, Vol. 2, p. 357) Although Ms. Dudley repeatedly reminded Respondent that she was under oath (TX, Vol. 2, p. 348), told her not to argue with the court (TX, Vol. 2, p. 354), and ultimately grabbed her arm and told her to "stop" (TX, Vol. 2, p. 354), she observed nothing but anger on the part of her client. (TX, Vol. 2, p. 358)

The video of the March 16, 2011 proceeding also supported Judge Brennan's testimony that she did not yell, that she was calm, and that she had made every effort to be empathetic in

view of the fact that Respondent was a judge who had just gotten divorced. (TX, Vol. 3, p. 647) The video further demonstrated that Judge Brennan made every attempt to insure that Respondent understood the questions asked (TX, Vol. 3, p. 647), and continued her inquiry only because Respondent refused to provide answers to the questions being asked. By addressing the issue of the phone calls, Judge Brennan was simply attempting to insure that Respondent stopped violating the policy applicable to all represented litigants, to wit, that all contacts with the court of represented parties be made by counsel. (TX. Vol. 3, pp. 635-636)

In fact, Judge Brennan specifically indicated to Respondent, "I'm addressing an issue. This is real simple. It's just a don't do it." (E's Exh. 9, p. 19; E's Exh. 10) Rather than taking the opportunity to admit the phone call and end the inquiry, Respondent continued to deny calling Judge Brennan's staff or speaking with anyone. (E's Exh. 9; E's Exh. 10)

Respondent exhibited the same evasiveness in her testimony during the formal hearing before the Master when she repeatedly refused to answer the most direct questions asked by the Co-Examiner.⁵ It was that same refusal to provide direct answers on March 16, 2011 that caused Judge Brennan to ask: "Without the game playing, tell me how you got in touch with my staff." (E's Exh. 9, p. 21; E's Exh. 10) Contrary to Respondent's argument in her brief to this Court, Judge Brennan's questions were in no way vague or capable of "several plausible meanings." (R's brief, p. 26)

The video of the March 16, 2011 hearing showed Respondent angry and annoyed at having been confronted with her improper conduct. (E's Exh. 10) The same exhibit further showed that Respondent continued her false testimony by claiming that she had called the "chambers" only when she was unrepresented. (E's Exh. 9, p. 18; E's Exh. 10) While it was

⁵ Examples of Respondent's evasiveness appear on the following pages of the formal hearing transcript: p. 111, 112, 119, 124, 134-135, 136, 146, 147, 150-151, 152-153, 159, 166-167, 175-176, 185-186, 190, 192, 196, 201, 202-203, 228-230, 232, 252-253.

undisputed that Respondent was unrepresented only during a five-week period in April and May of 2010 Ex. 63), the testimony of Judge Brennan and her staff clearly established that Respondent made numerous calls throughout the 13 months that the case was pending before the court. (TX, Vol. 3, p. 596; Vol. 4, p. 737)

During her March 16, 2011 testimony before Judge Brennan, Respondent had ample opportunity to admit and explain the purpose of her March 15, 2011 telephone call to the court. Rather than doing so, Respondent repeatedly denied making the phone call. Respondent even contradicted herself as to whether someone from her court made the call:

Ms. Adams: My clerk called the Court to see if the time to be – could be changed because I needed - -

The Court: Was it - - okay.

Ms. Adams: - -I was in court all day today.

The Court: Was it you or your clerk?

Ms. Adams: Excuse me, I just indicated that maybe someone from my court called *but I did not call*.

(Emphasis added) (E's Exh. 9, p. 19; E's Exh. 10) Moments later, when Judge Brennan reminded Respondent;

The Court: I asked you if you had a conversation with somebody from my staff yesterday. You said that you had a clerk call –

Ms. Adams: I did not say that. I said if anyone called –

(E's Exh. 9, p. 20; E's Exh. 10) Respondent continued her denials even after Judge Brennan's secretary, Kirsten Turner, testified that on March 15, 2011, she had spoken to a woman who identified herself as "Deborah Adams." In response to that testimony, Respondent's immediate comment was "That is not correct," followed by "I did not call here." (E's Exh. 9, p. 20; E's Exh.

10) As the Commission noted in its D&R, Respondent's repeated assertions, while under oath, that she "did not call [Judge Brennan's] staff were plainly false." (D&R, p. 13)

By her own admission, Respondent contacted Judge Brennan's court on three occasions prior to March 15, 2011. (TX, Vol. 1, p. 196) Clearly, she was aware of the standard phrase used by the court staff in answering all in-coming calls, to wit, "Judge Brennan's chambers." (TX, Vol. 3, p. 596; Vol. 4, p. 738-739) If Respondent indeed believed on March 16, 2011 that she was being accused of attempting to speak with Judge Brennan, she could have admitted the call and explained that was not her intent, rather than intentionally engaging in word games, outright misrepresentations, and fraudulently suggesting that someone else made the call that she clearly knew she had made. In short, Respondent committed perjury.

The perjury statute, MCL 750.423, provides as follows:

Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall willfully swear falsely, in regard to *any matter or thing*, respecting which such oath is authorized or required, shall be guilty of perjury (Emphasis supplied)

The two elements of perjury are the administration of a valid oath and willfully false statements or testimony. *People v Lively*, 470 Mich 248 (2004). Respondent's actions clearly satisfy both elements.

Respondent's assertion that the hearing was concluded before she was questioned by Judge Brennan and that her false statements did not relate to the "specific purpose" of the pro-con hearing, to wit the granting of divorce, is discredited by *Lively, supra*. In *Lively*, this Court specifically stated that "materiality to the issue before the court" is irrelevant to the determination whether perjury has been committed. In reaching that decision, the Court reasoned as follows:

Our legislature has thus defined perjury as a willfully false statement regarding *any* matter or thing, if an oath is authorized or required. Noticeably absent from this definition is any reference to materiality. The Legislature could easily have used a phrase such as “in regard to any *material* matter or thing,” or “in regard to any matter or thing *material to the issue or cause before the court,*” but the legislature did not use such language. (Emphasis in original)

Id. at 253. Consistent with that holding, the Master in the present case properly found that once a person is placed under oath, he/she remains under oath until excused by the court. (MR, p. 2)

Further, Respondent’s reliance on Canon 3A (4) of the Michigan Code of Judicial Conduct (“MCJC”) to argue that litigants are allowed to make contact with the court about scheduling matters is erroneous. While the Code of Judicial Conduct *permits* a judge to engage in ex parte on scheduling matters, the rule does not prohibit the court from implementing a policy, such as Judge Brennan’s, that no contact will be permitted between the court and litigants who are represented by counsel. Furthermore, and more importantly, Respondent’s argument ignores the fact that her misconduct is not only in having made the March 15, 2011 call but in having repeatedly lied about it under oath.

Second, Respondent’s attempt to justify or excuse her actions by the stress of a bitter divorce, the allegedly substandard legal representation, or the fact that she was surprised by Judge Brennan’s inquiry, are also without merit. In fact, it is disturbing that Respondent would use such excuses to commit illegal and unethical acts. As a judge, whether on the bench or off, Respondent is bound by the Code of Judicial Conduct, which requires that she avoid engaging in any acts of impropriety as well as any acts that may create the appearance of impropriety. (Canon 2A) Respondent is under a continuous duty to respect and observe the law and to personally observe high standard of conduct. (MCJC, Canon 1; MCR 9.205)

B. COUNT II – Forgery and Filing of Forged and Unauthorized Pleadings

The Master correctly determined that Respondent did not have Ms. Dudley's permission to sign her name to the Motion to Set Aside, filed on May 5, 2011. The Commission agreed with that finding by the Master, and the Examiner urges this Court to likewise adopt it.

The Master stated that the evidence was insufficient to show that Respondent had violated the forgery statute.⁶ (MR, p. 3-4) He determined that because the Motion was an "appropriately" drafted document "together with necessary supporting brief and routine procedural papers," it did not purport to be what it was not. (MR, p. 4) In essence, the Master erroneously interpreted the forgery statute as requiring the *content* of the document to be false. (MR, p. 4) The Master also concluded that the evidence was insufficient to prove that Respondent violated the uttering and publishing statute⁷ because there was no evidence that by filing the Motion to Set Aside Respondent "intended to injure or defraud anyone." (MR, p. 4) Finally, the Master determined that the evidence did not support a finding that Respondent signed Ms. Dudley's name without permission. (MR, p. 3-4)

The Commission disagreed with the Master's findings regarding these issues. (D&R, p. 14) First, it noted that the Master's conclusion that the evidence did not support a finding that Respondent signed Ms. Dudley's name without permission was inconsistent with his finding that Respondent made misrepresentations to the Commission that she had permission to sign Ms. Dudley's name. (D&R, p. 14) The Commission went on to find that the Examiner proved by preponderance of the evidence that Respondent signed and filed the Motion without Dudley's knowledge or permission and that Respondent failed to provide a copy of the May 5, 2011 motion to Ms. Dudley. (D&R, p. 10; p. 13-14). The Commission concluded that Respondent's

⁶ MCL 750.248

⁷ MCL 750.249

contention that she believed she had Ms. Dudley's permission to sign her name to the Motion to Set Aside was not credible. (D&R, p. 13) With overwhelming evidence in support of that conclusion, the Examiner urges this Court to adopt the Commission's determination.

The evidence proved that following the March 16, 2011 hearing, Respondent's divorce case was adjourned until April 11, 2011 for the return of judgment. (E's Exh. 11; TX, Vol. 1, p. 223) Several drafts of a proposed settlement agreement were prepared and exchanged between the parties prior to April 11, 2011. (TX, Vol. 1, p. 228; Vol. 2, p. 360-364) In order to resolve the issues Respondent raised in the last draft of the proposed agreement, a telephone conference was conducted on April 8, 2011 between the attorneys and the mediator, Gil Gugni. (TX, Vol. 2, p. 367-368) A final draft of the proposed settlement agreement was delivered to the parties and their counsel on the afternoon of Friday, April 8, 2011. (TX, Vol. 2, p. 368) .

At 7:57 AM on April 11, 2011, Respondent sent an email to Ms. Dudley requesting an adjournment due to the size of her own docket. (E's Exh. 73) Ms. Dudley appeared before Judge Brennan without Respondent (TX, Vol. 2, p. 371-372) and requested an adjournment. (E's Exh. 14; TX, Vol. 2, p. 372-373; Vol. 3, p. 654) Although Respondent claims in her brief to this Court that the adjournment was necessary because of a problem with the language of the Plaintiff's pension distribution (R's Brief, p. 37), she did not mention that issue in her email to Ms. Dudley on April 11, 2011. In fact, Respondent did not raise that issue until after the Judgment of Divorce had been entered.

Judge Brennan denied Ms. Dudley's request for an adjournment and signed the Judgment of Divorce. (TX, Vol. 3, p. 655-656) Judge Brennan also ordered Respondent to either sign the settlement agreement by the end of April 11, 2011 or return to court on April 14, 2011 to "show

cause” why she should not be held in contempt of court for failing to appear on April 11, 2011. (E’s Exh. 37; R’s Ans. to FC 89, par. 57; TX, Vol. 3, p. 657-658)

Immediately after the April 11, 2011 court appearance, Ms. Dudley delivered the documents to Respondent’s court for her signature. (R’s Ans. to FC 89, par. 58; TX, Vol. 1, p. 248-250, p. 376) Contrary to Respondent’s formal hearing testimony, the order issued by Judge Brennan on April 11, 2011 did *not* hold her in contempt of court. (E’s Exh. 37; TX, Vol. 3, p. 657-658) The order contained *standard* show cause language, which Respondent, as a judicial officer since 2003, was certainly familiar with, and which Ms. Dudley had explained during their meeting on the afternoon of April 11, 2011. (TX, Vol. 2, p. 384) In fact, Ms Dudley told Respondent that she did not have to sign the settlement agreement if she did not wish to. (TX, Vol. 2, p. 383-384) Ms. Dudley also assured Respondent that she would accompany her to the show cause proceeding on April 14, 2011. (TX, Vol. 2, p. 384, 394) Despite those assurances, Respondent signed the settlement agreement (R’s Ans. to FC 89, par. 59; TX, Vol. 2, p. 394; Vol. 3, p. 254) which was then delivered by Ms. Dudley to the offices of William Brukoff (TX, Vol. 2, p. 397-398) and filed with the Oakland County Clerk’s Office later that same afternoon. (E’s Exh. 63)

Respondent’s signature triggered a provision in the Judgment of Divorce specifically releasing Ms. Dudley from further representation of Respondent. (E’s Exh. 16, p. 8; TX, Vol. 2, p. 400) Despite Respondent’s claim in her Answer to the Formal Complaint that the release was “limited,” (R’s Ans. to FC 89, par. 60), the provision in question contained no such language. In fact, the “Release of Attorneys” provision stated in its entirety as follows:

The attorneys for the parties *shall* be and hereby are release [sic] as attorneys of record in post judgment proceedings *unless specifically hereinafter retained* by their respective clients for such post judgment actions.

(Emphasis added) (E's Exh. 16, p. 8) The above language clearly nullifies the Master's finding that on May 5, 2011 Ms. Dudley was "still Respondent's attorney of record." (MR, p. 4) Although Ms. Dudley may have been the *last* attorney of record, the negotiated and agreed to "Release of Attorneys" provision released her from being considered as *the* attorney of record.

Respondent's contention that the continuous "interactions and dialogue" between herself and Ms. Dudley was tantamount to an agreement for Ms. Dudley to continue representing her was disproved by the evidence. (TX, Vol. 1, p. 258) Not only did Ms. Dudley testify that the JOD released her from further representing Respondent, two emails she had sent after April 11, 2011, confirm that to be the case. (TX, Vol. 2, p. 400) As the Commission noted in their D&R, on April 25, 2011, Ms. Dudley transmitted an email to Respondent as well as to the Plaintiff's counsel and the mediator, in which she stated:

In addition, with respect to my representation of Judge Adams, I am assisting Judge Adams in getting this matter scheduled. *If she decides to retain my services* to appear to the arbitration, I will notify both Mr. Gugni and Mr. Brukoff.

(Emphasis provided) (E's Exh. 31, Vol. 2, p. 403-404) In a second email, transmitted by Ms. Dudley to Respondent on April 26, 2011, she told her former client "if you want to preserve your appellate rights, file a motion." (E's Exh. 17, TX, Vol. 2, p. 410) Respondent's argument that Ms. Dudley's comment somehow translates into giving Respondent permission to sign Dudley's name to a legal document without the opportunity for Ms. Dudley to review its contents is absurd.

As the Commission noted, Respondent demonstrated that she was well aware that Ms. Dudley no longer represented her in any post-judgment proceedings when she informed her former counsel on May 5, 2011 that she planned to "retain an appellate person to handle the [post

judgment] matter” (E’s Exh. 32), and when she appeared on her own behalf at a post-judgment arbitration meeting held on May 6, 2011. (D&R, p. 13; TX, Vol. 2, p. 405; E’s Exh. 32)

These facts proved that Respondent knew Ms. Dudley was no longer her attorney when she prepared the Motion to Set Aside and a Brief in Support. (E’s Exh. 18, 19, 20, 21; R’s Ans. to FC 89, par. 66) in Ms. Dudley’s name.⁸ Respondent admitted that she prepared these documents and affixed Ms. Dudley’s signature on each of them, and caused them to be filed on May 5, 2011 with the Sixth Circuit Court and with Judge Brennan’s court. (R’s Ans. to FC 89, par. 66; 68, TX, Vol. 1, p. 276). Respondent also admitted to serving copies of the Motion on the offices of Mr. Brukoff and Mr. Gugni. (TX, Vol. 1, p. 274-275)

Respondent testified at the formal hearing that she had Ms. Burns’ permission to sign Ms. Dudley’s name based on their long-standing relationship. (TX, Vol. 1, p. 271-272) In her brief to this Court, Respondent contends that she had an implied permission to file the Motion under her attorney’s name based on the established practice she had with Ms. Dudley. (R’s Brief, p. 34-35) In the alternative, she argues that she had a reasonable belief that she had the authority to sign Ms. Dudley’s name. (R’s Brief, p. 33) Once again, the evidence presented at the formal hearing, and adopted by the Commission, established that Respondent’s testimony was false. Respondent’s arguments are baseless.

Although Respondent testified she “thought” she had signed Ms. Dudley’s name to other pleadings, she ultimately admitted no such documents existed. (TX, Vol. 1, p. 272-273). In fact, since entering the case, Ms. Dudley filed only two pleadings on Respondent’s behalf, to wit,

⁸ This Motion should also put to rest Respondent’s red herring that the judgment of divorce is erroneously labeled a “consent judgment.” Even assuming that to be true, Respondent had the opportunity to address that issue with the trial court, but she apparently chose not to. She cannot re-litigate the underlying divorce here, as this is neither an action for legal malpractice nor the divorce case itself.

Defendant's Amended Lay and Expert Witness List and Defendant's Exhibit List (E's Exh. 24 and 25), both of which were reviewed, signed and filed by Ms. Dudley. (TX, Vol. 2, p. 262)

As the Commission concluded in its Decision and Recommendation, if Respondent truly believed that she had permission to affix Ms. Dudley's signature on the Motion, she would have so indicated by employing her own writing style to write Ms. Dudley's name, followed by either her own initials or the phrase "with permission." (D&R, p. 14; TX, Vol. 2, p. 273, p. 335) The Commission found that the absence of the "with permission" designation and the attempt to "mimic" Ms. Dudley's signature were "tell-tale indications that Respondent harbored no belief that she had Ms. Dudley's authorization to sign her name."⁹ (D&R, p. 14)

The Commission also noted that Respondent could not possibly believe she had Ms. Dudley's permission to sign and file pleadings under Ms. Dudley's signature based on her attempt to obtain permission *after* the Motion had been filed. (D&R, p. 13) The Commission's reference is to an email sent by Respondent to Ms. Dudley on Thursday, May 5, 2011 at 4:03 PM, almost two hours after the Motion had been filed, in which she stated,

I tried to contact you to obtain permission to file a quick pleading on my behalf under your name regarding the pension matter.

(E's Exh. 32) On May 6, 2011, after learning of the existence of the Motion, Ms. Dudley sent the following email to Respondent:

I did not receive any contact from you this week and hopefully you did not file any pleadings with my name without me first reviewing them and without my permission.

⁹ The exhibit to which the Commission referred in their D&R in making this conclusion, labeled by the Examiner as No. 28 and by the Commission as "O," was a comparison of Respondent's and Ms. Dudley's true signatures to Respondent's forgery. Although exhibit No. 28 was not admitted at the formal hearing, it consisted of the signature pages of two admitted exhibits (E's Exh. 21 and 24) and the signature page of Respondent's Answer to FC 89. This should solve the "mystery" that Respondent refers to in her brief to this Court. (R's Brief, p. 13)

(E's Exh. 32). In replying to the above email, Respondent repeated that she had *unsuccessfully* attempted to contact her during the previous week. (E's Exh. 32) At no point did Respondent indicate that she *had* Ms. Dudley's permission or that she *believed she had permission* to sign the Motion to Set Aside or to file it in court. (R's Ans. to FC 89, par. 78) Respondent's emails clearly demonstrate that she did not have Ms. Dudley's permission to sign or file any pleadings on her behalf and that she was well aware that she did not have it. In short, if she had such permission, or believed that she had it at the time she filed the motion, she would not have sought it thereafter.

The evidence also demonstrated that Respondent's forgery of Ms. Dudley's signature was not an isolated incident. In fact, Respondent had forged the name of her previous attorney Janice Burns (hereinafter "Ms. Burns") on another pleading Respondent had also filed with the Sixth Circuit Court. (E's Exh. 3) The evidence proved that while Ms. Burns was still the attorney of record, but after Respondent had taken possession of her file (TX, Vol. 3, p. 546), Respondent prepared an ex parte substitution motion under Ms. Burns' name.¹⁰ (E's Exh. 3; TX, Vol. 3, p. 550-551) Although Ms. Burns was aware that Respondent was preparing the substitution motion, she did not give Respondent permission to sign her name to it or to file it with the court on her behalf. (TX, Vol. 3, p. 549-550) In fact, on February 24, 2011 Ms. Burns arranged for a process server, Mr. Collins, to be available to obtain the motion from Respondent for Ms. Burns' review and signature. (TX, Vol. 1, p. 114; Vol. 3, p. 551, pgs 565-566) Not only did Respondent fail to utilize that process server (TX, Vol. 3, p. 552), she forged Ms. Burns' signature, and on the afternoon of February 24, 2011, Respondent personally filed the motion at the Oakland County Circuit Court. (TX, Vol. 1, p. 115) Further, as with the motion containing Ms. Dudley's forged signature, Respondent did not provide a copy of the Substitution Motion to Ms. Burns (TX, Vol.

¹⁰ Respondent wanted Ms. Dudley to enter the case as her attorney. This motion was rejected by Judge Brennan.

3, p. 554-553), nor did she mention its existence or filing status when answering Ms. Burns' emailed inquiry about it on February 25, 2011. (TX, Vol. 3, p. 571) The first time that Ms. Burns became aware of the motion's existence or that it contained a forgery of her signature was when she was shown a copy of it by the Commission's staff on June 19, 2012. (TX, Vol. 3, p. 554) By forging the signatures of Ms. Burns and Ms. Dudley, Respondent exhibited a complete disregard for MCR 2.114 (D) which provides that a signature affixed to a pleading "constitutes a certification" that the pleading was read by the person whose signature appears on it."

In her brief to this Court, Respondent admits that Ms. Burns testified that she did not sign the Ex Parte Motion and did not see it until after it had been filed. (R's Brief, p. 36) Respondent claims, however, that on cross-examination Ms. Burns acknowledged sending Respondent an email that "made it clear that she expected the motion to be filed without her review and/or signature." (R's Brief, p. 36) Respondent contends that based on that testimony,

The only logical inference to be drawn from Burn's (sic) communication with Respondent was that she assumed the motion was going to be filed without her review and without her signature.

(R's Brief, p. 36). Respondent concludes by stating, "Accordingly, the master outright rejected Burns' testimony as a basis to find or support any alleged misconduct." (R's Brief, p. 36) Respondent's argument is wrong and distorts the evidence, the formal hearing testimony, the findings of the Master and the decision of the Commission.

First, Ms. Burns' testimony was not "rejected" or in any way determined as unreliable by the Master. Further, although Respondent's counsel repeatedly attempted to have Ms. Burns agree with him that a reasonable inference from her February 24, 2011 email to Respondent was that Ms. Burns did not expect to see the substitution motion before it was filed, Ms. Burns refused to do so, stating:

If you're asking my intent, in terms of what I was saying and why I was saying it, is that Mr. Collins [the process server] was available. A motion was going to be given to him. He would bring it to me. ... and he then take it out to the court.

(TX, Vol. 3, p. 565) Respondent's misrepresentation of the evidence is nothing more than a deliberate attempt to justify her repeated acts of misconduct in forging the names of her former attorneys.

MCL 750.248 defines forgery as *any* act which fraudulently makes an instrument purport to be what it is not. In his report, the Master concluded that Respondent's act was not a forgery because the Motion comprised an "appropriately drafted" document. (MR, p. 4) Relying on *People v Kaczorowski*, 190 Mich App 165, 171 (1990) and *People v Hodgins*, 85 Mich App 62 (1978), the Master stated that the *content* of the document must be false before it may be considered a forgery. (MR, p. 4) Noting that "[t]he key is that the writing itself is a lie," the Master concluded that the *body* of the document, rather than the signature alone, must be a lie. (MR, p. 4) The Master's finding demonstrates an improper interpretation of the forgery statute as well as an improper reading of the case law he relied upon.

The principle that the "key [to a forgery offense] is that the writing itself is a lie" comes from the Michigan Supreme Court decision in *People v Susalla*, 392 Mich 387 (1974), which was cited in *People v Kaczorowski, supra*. In *Susalla, supra*, the defendant made a purchase by signing his own name to a check of a business with which he was not associated. Under those facts, the Michigan Supreme Court stated,

...[t]he check would not have been negotiable without a signature, therefore *the signing was itself the act which made the false instrument*. [The defendant] had no authority to do so, therefore, he acted with fraudulent intent." (Emphasis added.)

Id. at 393.

If one was to adopt the Master's interpretation, a check with a forged signature could never be in violation of the forgery statute because the content of the check is a properly drafted financial document. As the Michigan Supreme Court in *People v Susalla, supra*, stated, the act of signing the document "is precisely the kind of false making punishable by our forgery statute." *Id.* at 393. In the present case, by placing Ms. Dudley's signature on the Motion, Respondent committed forgery.

As to Respondent's filing of that fraudulent motion with the court, MCL 750.249 provides as follows:

Any person who shall utter and publish as true, any false, forged, or counterfeit record, deed, instrument, or other writing ... knowing the same to be false, altered, forged, or counterfeit ... with intent to injure or defraud ... shall be guilty of a felony.

Although the uttering and publishing statute is usually applied in situations where a check is presented for payment, it has also been applied to the preparation and presentation of a forged license to purchase a handgun as well as a false credit sales slip. *People v Carter*, 106 Mich App 765 (1981); *People v Hester*, 24 Mich App 475 (1970).

Respondent argued that insufficient evidence exists to show that by forging Ms. Dudley's name on the Motion she did not intend to defraud anyone. It is undeniable that by filing the forged pleadings, Respondent intended to have the Plaintiff's counsel, William Bruhoff, the mediator, Mr. Gil Gugni, and the court itself believe that the Motion, filed on May 5, 2011, was the work product of attorney Andra Dudley, and that the signature thereon was genuine.

C. COUNT III – Misrepresentations to the Commission

The Court should adopt the Commission's findings that Respondent made material misrepresentations to the Commission during the course of this investigation. (D&R, p. 14-16) Although the Master found sufficient proof on only three of the seven misrepresentations alleged

in the formal complaint, the Commission determined that the evidence presented by the Examiner proved that all of the alleged misrepresentations were committed by Respondent. (D&R, p. 14-16) The evidence admitted at the formal hearing clearly proves that the Commission's finding of misrepresentations in the answers Respondent provided to the Commission and which she affirmed in her Answer to the Formal Complaint, was well founded.

Respondent's claim that she had contacted Judge Brennan's court on only four occasions during the course of her divorce case and that those contacts were made when she was unrepresented by counsel was refuted by the testimony of Judge Brennan's court clerk, Ryan Matthews and the judicial secretary, Kirsten Turner. These witnesses testified to having received numerous calls from Respondent while she had legal representation. As the Commission noted, Respondent had called the court so many times during the course of the divorce proceedings that Judge Brennan's staff was familiar with her voice. (D&R, p. 3) Mr. Matthews and Ms. Turner also testified that each time Respondent had called, they informed her that all contact with the court should be made by counsel. This evidence clearly proved that Respondent denial to the Commission of ever having been advised by the court staff that it was inappropriate to personally contact the court, was a misrepresentation.

Respondent's representations to the Commission that she had Ms. Dudley's permission to file pleadings on her behalf as well as to sign Ms. Dudley's name to the motion filed on May 5, 2011, and that she had provided Ms. Dudley with a copy of the May 5, 2011 motion were also proven false. The evidence proved that Respondent never had Ms. Dudley's permission to file pleadings on her behalf. The evidence also proved that Respondent did not seek Ms. Dudley's permission to file the May 6, 2011 Motion until after she had filed it with the court. (E's Exh. 32)

EXTRANEOUS ISSUES RAISED BY RESPONDENT

A. Separation of Powers Doctrine

Respondent's argument that the Separation of Powers Doctrine deprives the Commission of the jurisdictional authority to charge or adjudicate felony charges against her is without merit. Furthermore, Respondent's claim that the Commission agreed with that argument is a misrepresentation of the Commission's decision.

Respondent's argument has been previously addressed and rejected by the Michigan Supreme Court which has repeatedly made it clear that the Judicial Tenure Commission not only has the jurisdiction, it has an obligation to investigate and adjudicate the conduct of judicial officers, including conduct that may involve violations of criminal laws. The Court has also made clear that the investigatory and adjudicative jurisdiction of the Commission in no way violates Michigan's separation of powers doctrine, nor any due process rights.

In *In re Mikesell*, 396 Mich 517 (1976), respondent argued that judicial removal proceedings are quasi-penal in nature and as such, violate the federal and state constitutional mandates requiring a separation of powers, fair hearing and due process of law. In rejecting that argument, the Michigan Supreme Court cited with approval the case of *Keiser v Bell*, 332 F.Supp. 608 (E.D.Pa. 1971) wherein the United States District Court stated as follows:

The proceedings of the Judicial Board are investigatory and advisory and are not binding upon the Supreme Court. No determination of guilt is made, but merely a determination of the Judicial Board's view of the conformity of the subject of investigation to the state constitutional standards for judicial officers.

Numerous judicial disciplinary decisions dealt with situations where judges had engaged in conduct which violated criminal laws. In the case of *In re Seitz*, 441 Mich 590 (1993), one of the allegations in the formal complaint centered on respondent's installation of a telephone

listening device in violation of the criminal eavesdropping statute. Following a hearing, the master concluded, and the Commission agreed, that the eavesdropping statutes, MCL 750.539c and MCL 750.539f, have been violated. Finding no impropriety and no violation of any constitutional principles, the Michigan Supreme Court stated:

...[t]he undisputed facts demonstrate Judge Seitz' embroilment in his employee's marital dispute, use of his own recording device to surreptitiously record conversations, and his knowledge that his employee also intended to commit, and had commenced to commit, what he believed to be a felony.

Id., at 599.

The Court also did not find any constitutional or any other violations in the case of *In re Gilbert*, 469 Mich 1224 (2003), which involved respondent puffing on a marijuana cigarette as it was passed down the row of seats at a Rolling Stones concert. Although no criminal charges were ever filed, the Commission conducted an investigation, ultimately resulting in a settlement agreement. The Court stated that respondent's action constituted misconduct in office as well as a violation of a criminal law of the state contrary to MCR 9.104(5). Again, the fact that no criminal prosecution had been initiated and no felony conviction secured was in no way an impediment to the commission's disciplinary proceedings.

Perhaps even closer to the facts of the present case is the case of *In re Nettles-Nickerson*, 481 Mich 321 (2008) where respondent made false statements under oath in connection with her divorce proceedings. Following a formal hearing, the master found that respondent breached the standard of judicial conduct by, among other things, engaging in perjury, contrary to MCL 750.422. In ordering respondent's removal, the Michigan Supreme Court noted that,

...the primary function of the judiciary is to discover the truth. Perjury directly undermines this function, and as such, is an affront to the entire process.

In *In re Noecker*, 472 Mich 1 (2005), a respondent attempted to deceive the police and the commission in order to cover up the fact that he had been driving under the influence of alcohol resulting in an accident. Once again, the fact that no criminal charges were ever filed against respondent did not preclude the commission from initiating disciplinary proceedings, which ultimately lead to his removal from the bench.

It is well established that the primary purpose of judicial discipline is to help repair the damage done to the public trust and confidence in the judicial system by judicial misconduct. One of the obligations that the Code of Judicial Conduct imposes on all members of the judiciary is to “follow and observe the law.” (Canon 2B) As the Supreme Court stated in *In re Probert*, 411 Mich 210 (1981), “this certainly means that a judge should not violate criminal laws.”

B. Misconduct, Privilege and the Exclusionary Rule

Respondent’s claims of misconduct against the Examiner and the Associate Examiner are not supported by law or facts, and the Court should ignore them. Likewise without merit are Respondent’s arguments relating to the applicability of the exclusionary rule and attorney-client privilege.

Respondent claims that the Examiner committed misconduct by engaging in a telephonic contact with Judge Mary Ellen Brennan after Respondent’s March 16, 2011 under-oath perjury. The formal hearing record is clear that Judge Brennan, and not the Examiner, initiated the telephone call. (TX, Vol. 3, p. 664-667) The record is also clear that the call consisted of a brief conversation in which the Examiner informed Judge Brennan that the decision whether to file a request for an investigation with the Commission was within her discretion. (TX, Vol. 3, p. 667) Respondent’s attempt to turn that brief, innocuous contact into something unethical or improper is not only without merit, it is disingenuous.

Next, Respondent claims that the Associate Examiner told Respondent's former attorney, Andra Dudley, that her (Dudley's) professional obligation under Rule 1.6 of the Michigan Rules of Professional Conduct ("MRPC") did not apply and that she "had to" provide the Commission with information and documents. It must be noted that Respondent had raised the attorney-client privilege issue in a Motion in Limine, argued before the Master on September 11, 2012. The Master ruled that he would determine the applicability of the privilege during the formal hearing itself as each piece of evidence and each witness was presented. As such, the master precluded the Examiner from making certain inquiries of witnesses and denied the admission of a number of exhibits. The master also barred one witness from taking the stand. (TX, Vol. 3, p. 582) Thus, even assuming the Associate Examiner made that assertion to Dudley, the Master sifted through the evidence to determine what he believed was admissible.

Next, Respondent's representations as to Ms. Dudley's testimony and her reliance on the alleged statements of the Associate Examiner are incomplete and inaccurate. Ms. Dudley testified that immediately after Respondent's March 16, 2011 in-court perjury, she was informed by opposing counsel, William Brukoff, that he was filing a grievance with the JTC. Mr. Brukoff advised Ms. Dudley that she also had a duty to file a grievance. (TX, Vol. 2, p. 427-428, 484-485) Ms. Dudley testified that she "immediately" contacted the ethics hotline for the State Bar of Michigan and spoke to an attorney who confirmed that she had a duty to report Respondent's actions to the JTC. (TX, Vol. 2, p. 429, 483) Ms. Dudley was very clear in her testimony that during her conversation with the ethics hot line attorney, she disclosed that she had an attorney-client relationship with Respondent. (TX, Vol. 2, p. 484) Next, Ms. Dudley testified that she spoke to an attorney, Al Holtz, about the issue. Finally, Ms. Dudley consulted the Canons of the

Michigan Code of Judicial Conduct as well as the MRPC, and herself came to the conclusion that she was under a duty to report the incidents to the JTC. (TX, Vol. 2, p. 429, p. 432)

It is based on these events that Ms. Dudley filed her request for investigation, which according to her testimony was a significant length of time prior to her first conversation with the Associate Examiner. (TX, Vol. 2, p. 431, 436) At the time of the formal hearing before the Master, Ms. Dudley testified that she still believed that it was her duty to report Respondent's conduct to the JTC and that turning over documents was not in violation of MRPC 1.6 (TX, Vol. 2, p. 434). Clearly, any *alleged* statements of the Associate Examiner in no way influenced her decision.

Furthermore, Ms. Dudley is mistaken that she had received any advice from the Associate Examiner regarding the attorney-client privilege as no such advice was given.¹¹ In fact, Ms. Dudley had retained the services of a private attorney, with whom she had consulted as late as during a recess in the formal hearing proceedings. (TX, Vol. 2, p. 477) Clearly, no "strong-arm" tactics were used by the Examiner or Associate Examiner.

Respondent's claim that Ms. Dudley turned over her "entire" file to the JTC is also inaccurate. Ms. Dudley's testimony was that prior to her meeting with the Associate Examiner, she had returned the file to Respondent, retaining only "some" of the documents. (TX, Vol. 2, p. 545) Ms. Dudley further indicated that she had erased her emails and was not certain whether she could retrieve them. It was only after she had received Respondent's subpoena, that she,

...went looking to see if there was another way to get them [emails] and I was able to get more. So I gave – I wanted to make sure I gave both sides the same thing.

¹¹ The Master did not find Dudley's passing comment of sufficient moment to make any further record of the issue. If there is any doubt, the Court may remand the matter to the Commission for an evidentiary hearing on this limited (and irrelevant) topic.

It must also be noted that of the 36 exhibits admitted by the Master, 22 were obtained from the Sixth and Third Circuit Courts and as such are public records. Of the remaining 14 exhibits, two were obtained from Respondent through her answers to the JTC's requests for comments and/or the 28-day letter and four were obtained from other sources. As to the remaining eight exhibits, emails and letters obtained from Ms. Dudley, the attorney-client privilege is inapplicable as they deal with scheduling and administrative matters.

The law is clear that the attorney-client privilege does not extend to all conversations between an attorney and the client. As the Michigan Court of Appeals stated in *Krug v Ingham County Sheriff's Office*, 264 Mich App 475 (2005), the scope of the privilege is narrow, and applies only to confidential communications by the client to his attorney, which are made for the purpose of obtaining legal advice. See also, *In re Costs and Attorney Fees*, 250 Mich App 89, 98-99 (2002).

In *People v Compeau*, 244 Mich App 595;597 (2001), the Michigan Court of Appeals addressed the requirement for the privilege to apply as follows:

Communications from a client to an attorney are privileged when they are made to counsel who is acting as a legal adviser and *made for the purpose of obtaining legal advice*. (Emphasis added)

It is also well established that the attorney-client privilege is waived if the communication in question is disclosed to a third party. In *People v Compeau, supra*, the court determined that the defendant "failed to take reasonable precautions to keep his remark confidential" and therefore, a statement made to his attorney, in the presence of a court bailiff, was not privileged.

In the present matter, the information contained in the eight admitted exhibits provided by Ms. Dudley, does not meet the *Compeau, supra*, standard. These exhibits do not refer to the

content of the subject matter for which Ms. Dudley was retained, to wit, Respondent's divorce action. Rather, the emails and letters transmit information provided by the Sixth Circuit Court, refer to attached documents, without any reference to the content of the documents themselves, request that certain messages be delivered to third person, are "copied" to third persons who were not Respondent's legal advisers, or are transmitted after Ms. Dudley's representation had ended. As such, Respondent did not have the right to expect that any of these communications would be kept in strict "confidence."

Respondent is also incorrect in stating that because Ms. Dudley was her attorney, MRPC 1.6 barred her from disclosing all improprieties or illegalities Respondent had committed. In fact, MRPC 1.6 (c) (2) specifically provides that a lawyer may reveal confidences or secrets when "permitted or required by these rules, or when required by law or by court order." Furthermore, MCR 9.208 obligates members of the bar to comply with a reasonable request made by the Judicial Tenure Commission in its investigation. It would be illogical to permit the argument that although an attorney must inform the Judicial Tenure Commission of a significant violation of the Code of Judicial Conduct and must cooperate in the investigation of that information, that the attorney may not provide any information requested by the Judicial Tenure Commission during its investigation. MCR 9.227 specifically affords an attorney an absolute immunity from civil suit for

...statements and communications transmitted solely to the commission, its employees, or its agents or given in an investigation or proceeding on allegations regarding a judge...

Not only is the attorney-client privilege inapplicable in this case, Respondent has effectively waived its application by not raising it in her first responsive pleading. MCR

9.209(B), which addressed the content of an answer in a judicial disciplinary proceeding, states in relevant part as follows:

(2) The answer must be in a form similar to an answer in a civil action in the circuit court and must contain a full and fair disclosure of all facts and circumstances pertaining to the allegations regarding the respondent.

(3) Affirmative defenses, including the defense of laches, must be asserted in the answer, or they will not be considered.

Michigan case law addressing affirmative defenses defined them as supporting the requirement that they must be plead in a first responsive pleading, or they are waived. In *Kelly-Nevils v Detroit Receiving Hospital*, 207 Mich App 410 (1995), the Court of Appeals provided a definition of an affirmative defense under the Michigan Rules of Court. The Court stated:

In addition to those affirmative defenses specifically listed in MCR 2.111(F)(3)(a), an affirmative defense includes any defense that seeks to foreclose a plaintiff from continuing a civil action for reasons unrelated to the plaintiff's prima facie case. A party waives an affirmative defense unless the defense is set forth in its first responsive pleading (Citations omitted).

In the present case, Respondent failed to raise the attorney-client privilege in her first responsive pleading, her response to the request for comment or the 28-day letter. As such, any defense based on that theory is waived.

Finally, Respondent's argument for this Court to suppress the evidence against her by applying the exclusionary rule is not only without legal support, it is completely illogical. The exclusionary rule, created by the Supreme Court in 1914 in *Weeks v United States*, 232 US 383 (1914), is a court-made principle that any violation by the police of the procedural safeguards of the Fourth Amendment mandates the exclusion of the evidence produced by such *illegal* search or arrest. Although the exclusionary rule had been applied to some civil cases, which sought to

use evidence previously obtained illegally by the police, the exclusionary rule is inapplicable to these proceedings.

This Court's decision in *In re Jenkins*, 437 Mich 15 (1991) is clearly on point. In *Jenkins, supra*, the respondent judge, like Respondent in the present case, relied on the exclusionary rule in claiming that the master had erred by not suppressing the surreptitiously recorded conversations which lead to the judicial misconduct proceedings.

Recognizing that such recordings would be inadmissible in state criminal proceedings, and that Michigan exclusionary rule has in certain cases been applied to civil proceedings,¹² the Michigan Supreme Court noted that judicial disciplinary proceedings are fundamentally distinct from all other proceedings, whether civil or criminal. Citing *In re Mikesell, supra*, the court stated:

The purpose of these proceedings is not to impose punishment on the respondent judge, or to exact any civil recovery, but to protect the people from corruption and abuse on the part of those who wield judicial power.

In re Jenkins, supra, at 28. The Michigan Supreme Court continued as follows:

While such proceedings resemble civil proceedings in many respect, see MCR 9.211 (A), they also partake of an administrative character...It is well established that they are not in any sense criminal proceedings. (Citations omitted)

Although the Supreme Court ultimately determined that it did not need to reach a decision on the issue of the applicability of the exclusionary rule in judicial misconduct proceedings due to the presence of overwhelming evidence of misconduct, the court specifically stated that:

...the unique character and purpose of judicial disciplinary proceedings might incline us not to apply the exclusionary rule in this context.

¹² The Michigan Supreme Court noted, but found unpersuasive, the case of *Gilbert v. Leach*, 62 Mich App 722 (1975), on which Respondent places great emphasis in support of this argument.

In re Jenkins, supra, at 29. Similarly, there is no basis for the application of the exclusionary rule in the present case.

DISCIPLINARY ANALYSIS

A. Introduction

The evidence proved that Respondent committed misconduct involving violations of state criminal statutes and court rules as well as provisions of the Michigan Code of Judicial Conduct. Respondent's argument that this matter has "absolutely nothing to do with her performance as a duly elected judicial officer" (R's Brief, p. 45) is a clear indication that she fails, or refuses, to appreciate the seriousness, and wrongfulness, of her misconduct. Respondent's misconduct involved the most basic and central principle of justice – truth and judicial integrity. Respondent's repeated acts of perjury by providing false testimony under oath in open court, forgery by affixing forged signatures to legal documents, and uttering and publishing by filing the forged documents in court demonstrate her complete disregard for the integrity of the judicial system.

Respondent's actions clearly place her fitness to be a judge in question. As is stated in Canon 1 of the Judicial Code of Conduct, "an independent and honorable judiciary is indispensable in our society." Canon 1 further requires a judge to participate in "establishing, maintaining and enforcing, and should personally observe, high standards of conduct, so that the integrity and independence of the judiciary may be preserved." Canon 2 warns that "public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, that a judge must avoid all impropriety and appearance of impropriety, and that a judge must expect to be the subject of constant public scrutiny." The same section obligates a judge to respect and observe

the law and to accept restrictions on conduct that might be viewed as *burdensome* by the ordinary citizen.

B. The Brown Factors

The Michigan Supreme Court set forth the criteria for assessing proposed sanctions in *In re Brown*, 461 Mich 1291, 1292-1293, 625 NW2d 744 (1999).

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

Respondent's actions involved numerous breaches of the Canons and appropriate ethical conduct including violations of criminal statutes. Although Respondent's March 16, 2011 perjury occurred on a single date, it involved repeated false denials of not having called the court, not having spoken to "anyone" on the court staff, not calling "here" [the court], and even suggesting that a clerk or *someone else* had made the March 15, 2011 call. As to the forgery and the filing of fraudulent pleadings with the Sixth Circuit Court, Respondent's actions consisted of twice affixing the names of her attorneys to pleadings without permission and filing the fraudulent documents with the court. Respondent also failed to provide notice of the pendency of the motions to those whose signatures she had forged. In fact, one attorney was unaware of the fraudulent use of her name and signature until the Commission's investigation uncovered the fraudulent pleading in the Sixth Circuit Court's case file.¹³ Accordingly, Respondent's conduct is not an isolated instance of misconduct. This factor weighs heavily in favor of the imposition of a more severe sanction.

¹³ In February of 2011, Respondent forged the name of her attorney, Janice Burns, to an Ex Parte Motion for Substitution of Attorney, a pleading of which Ms. Burns was made aware by the Commission's staff on June 19, 2012 (TX, Vol. 2, p. 553).

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

Respondent's misconduct, while not committed when Respondent was on the bench in *her own court*, was nevertheless committed in *a court* and directly related to the most fundamental function of the judiciary, the discovery of the truth. Respondent's conduct was also contrary to the law. As the Michigan Supreme Court stated, a judge's conduct must not undermine the public's faith that judges are as subject to the law as those who appear before them. *In re Noecker*, 472 Mich 1, 13; 691 NW2d 440 (2005). Respondent's conduct clearly did not instill such belief in those who became aware of her actions through the media coverage of this matter. This factor weighs heavily in favor of the imposition of a severe sanction.

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

Respondent's misconduct was clearly prejudicial to the actual administration of justice. Although its direct impact on Respondent's divorce case is unknown, clearly her commission of perjury, forgery, uttering and publishing as well as her misrepresentations to the Commission and to the master during the formal hearing is contrary to the proper administration of justice.

As the Court stated in *In re James*, 492 Mich 553 (2012), the provision of false testimony or evidence in a JTC proceeding has generally led to removal from office. Citing *In re Ferrara*, 458 Mich 350; 582 NW2d 817 (1998), Justice Markman explained the importance of the oath as follows:

Judges, occupying the watchtower of our system of justice, should preserve, if not uplift, that standard of truth, not trample it underfoot or hide in its shady recesses. This is precisely why judges should be exemplars of respectful, forthright and appropriate conduct.

Id. at 372. This factor weighs heavily in favor of the most extreme sanction.

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

As stated in Factor 3, the nature of Respondent's misconduct reflects a lack of respect for justice and the courts and goes to the very heart of the proper administration of justice.

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

Respondent's misconduct is certainly part of a pattern of deliberate behavior. The March 16, 2011 perjury before the Hon. Mary Ellen Brennan is a prime example of Respondent's complete disregard for very laws that she was entrusted to enforce and which the litigants appearing before her own bench are expected to obey. The following acts clearly establish the deliberate, unethical and illegal courses of conduct by Respondent:

1. Forgery of the signatures of her attorneys to various court documents.
2. Filing of fraudulent pleadings with the Sixth Circuit Court.
3. Failure to seek permission of her attorneys to file pleadings under their name.
4. Failure to provide notice of the pendency of the motions fraudulently filed.
5. Repeated disregard of clear instructions not to contact the court of the Hon. Mary Ellen Brennan while being represented by counsel.
6. Multiple misrepresentations to the Commission during the investigation of this matter.

This factor again weights heavily in favor of the imposition of the most extreme sanction.

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

The perjury committed by Respondent on March 16, 2011, was a clear intent to obstruct Judge Brennan from discovering the truth about the identity of the person who made the March

15, 2011 phone call. This factor weighs heavily in favor of the imposition of the most extreme sanction.

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

There is no evidence that Respondent's conduct was based on any consideration of a class of citizenship. This factor is not an issue in this case.

The totality of the *Brown* factors weighs extremely heavily to the severest sanction available - removal.

C. Other Considerations

As suggested by the American Judicature Society, the following factors may also be considered in determining the appropriate sanctions against a judicial officer.¹⁴

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

The Michigan Supreme Court has previously addressed this issue in its consideration of sanctions, although it is not identified in *Brown, supra*, as a specific factor. Misrepresentations, lies and deceitful testimony by a judge constitute a sufficient basis for removal from office. As the Michigan Supreme Court has stated in *In re Justin*, 490 Mich 394, 809 NW2d 126 (2012),

[S]ome misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.

Id. at 424. A judge who lies under oath is unfit to be a judge. *In re Justin, supra*, at 424.

Respondent in the present matter has never acknowledged that she had committed *any* misconduct. At the formal hearing before the master, Respondent repeatedly provided testimony

¹⁴ "How Judicial Conduct Commissions Work," American Judicature Society, 1999, pp. 15-16.

that was discredited by other witnesses and by undisputed video evidence. Respondent clearly does not appreciate the serious nature of the charges against her or the overwhelming evidence in support of those charges. In fact, in her "Statement of Objections to the Master's Report" Respondent asserts that at the time that she provided answers to the Commission, which were proved to be false, she "had no idea that the Commission would seek to make *much ado about such a trivial matter.*" (R's Objections to the Master's Report, p. 31) This factor weighs heavily in favor of the imposition of the most extreme sanction.

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

Respondent's misconduct has been the subject of media coverage, which casts not only Respondent but also the judiciary as a whole in a negative light.

(3) Years of judicial experience.

Respondent has been a judge since 1997. There is no mitigation because of inexperience. To the contrary, Respondent's length of service only exacerbates the wrongfulness of her behavior.

D. Proportionality

As the Michigan Supreme Court stated in the case of *In re Ferrara*, 458 Mich 350; 582 NW2d 817 (1998);

Our primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public.

In the most recent case involving judicial misconduct, Justice Stephen J. Markman emphasized that our judicial system "is only as good as its constituent judges." *In re James*, 492 Mich 553, 572 (2012) In support of that principle, Justice Markman relied on the case of *In re Probert*, 411 Mich 210; 308 NW2d 773 (1981) wherein the Supreme Court declared that:

[W]hen one commits judicial misconduct he not only marks himself as a potential subject of judicial discipline, he denigrates an institution. Accordingly, a decision on judicial discipline must also be responsive to a significant institutional consideration, “the preservation of the integrity of the judicial system.” Institutional integrity, after all, is at the core of institutional effectiveness. *Id.*, at 231

Similarly, as was expressed by then Justice (now Chief Justice) of the Michigan Supreme Court, Robert P. Young, Jr., our judicial system recognizes the sanctity and importance of the oath. Pointing out that a judge is the focal point of the administration of justice, then-Justice Young stated that:

[a] judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. When a judge lies under oath, he or she has failed to internalize one of the central standards of justice, and becomes unfit to sit in the judgment of others.

In re Noecker, 472 Mich 1, 17 (2005) The entire Court now subscribes to that position. A judge who lies under oath is unfit to be a judge. *In re Justin, supra*, at 424; *In re James, supra*, at 582.

The Supreme Court has previously removed judges who have lied. The Court removed Judge Andrea Ferrara from office in large part because she twice attempted to submit evidence to the Commission under false pretenses. *In re Ferrara*, 458 Mich 350, 365-369; 582 NW2d 817 (1998). In accepting the Commission’s recommendation for removal, the Supreme Court opined that “deception of this sort is ‘antithetical to the role of a judge who is sworn to uphold the law and seek the truth.’” *Ferrara, supra*, at 369. Likewise, the Court removed Judge James P. Noecker because he attempted to deceive the police and the Commission in order to cover up the fact that he had been driving under the influence of alcohol. *In re Noecker*, 472 Mich 1, 17; 691 NW2d 440 (2005)

In the present matter, Respondent had clearly failed to internalize these central standards of justice. Respondent's conduct is inexcusable. Respondent violated the Code of Judicial Conduct by making misrepresentations to the opposing counsel as well as the court, by forging an attorney's name on legal documents, by filing such fraudulent documents with a court, and by committing perjury while under oath. Respondent also provided false and misleading answers to the Commission's inquiries and continued to provide perjured testimony during the hearing before the Master. It is abundantly clear that Respondent has absolutely no respect for the very law that she is entrusted to enforce in her own court, and which she is obligated to observe in all activities. Respondent's misconduct conveyed the message that those who are in power are free to disregard the very laws that govern our society and which the less powerful must follow. The misconduct of the kind in each count alone would be the basis for the imposition of the most serious sanction. Together with Respondent's continued refusal to admit the wrongfulness of her actions, the misconduct is so extreme and extensive that only the severest sanction of removal is appropriate.

E. Costs

MCR 9.205 provides in part:

In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

The evidence overwhelmingly supports the conclusion that Respondent engaged in numerous instances of misconduct and violations of law. Respondent also made intentional misrepresentations and misleading statements to the Commission and to the master during the

formal hearing. Respondent should be ordered to pay the costs incurred by Commission in the amount of \$8,498.40, as recommended in the D&R.

CONCLUSION

Respondent's misconduct is persistent and deliberate. As noted above, there is overwhelming evidence to support the Commission's finding of misconduct with reference to the allegations in each of the counts in FC 89 as well with reference to Respondent's false testimony during the Formal Hearing of FC 89 itself. Respondent, in various manners of misconduct is responsible for:

1. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205.
2. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205.
3. Conduct which is prejudicial to the proper administration of justice, in violation of MCR 9.104 (1).
4. Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1.
5. Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A.
6. Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A.

7. Failure to respect and observe the law and to conduct yourself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B.
8. Failure to be faithful to the law, contrary to the Code of Judicial Conduct, Canon 3A (1).
9. Conduct, which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2).
10. Conduct, which is contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(3).
11. Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).
12. Conduct in violation of the Code of Judicial Conduct, Canon 2C, that a judge should not use the prestige of office to advance personal business interests or those of others.
13. Conduct in violation of the Michigan Perjury Statute, MCL 750.423.
14. Conduct in violation of the Michigan Forgery Statute, MCL 750.248.
15. Conduct in violation of the Michigan Uttering and Publishing Statute, MCL 750.249.

SANCTIONS

The Commission recommended that Respondent be suspended without pay for a period of 180 (one hundred eighty) days and that she pay the costs incurred in the prosecution of this matter. Although the Commission's decision is clearly justified by the nature and extent of Respondent's misconduct, measured by the pertinent case authority Respondent's misconduct merits imposition of the most severe sanction by this Court.

Temporary removal of Respondent does not appear to be in accordance with the Supreme Court's pronouncement in *In re Noecker, supra*, in which then-Justice (now Chief Justice) Robert P. Young, Jr., joined in the lead opinion to remove the respondent, and wrote a concurring opinion stating that "[w]hen a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others." (emphasis supplied.) "[L]ying under oath[] goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege." *Id.* "Lying under oath...makes [a judge] unfit for judicial office." *Id.*, at 18.

In *In re Nettles-Nickerson*, 481 Mich 321 (2008), the Court removed the respondent for a variety of offenses, including the fact that she had twice made false statements under oath in her divorce proceeding. The opinion was a memorandum opinion, with all seven justices concurring on the removal from office and the ground for that removal.

In *In re Justin*, 490 Mich 394 (2012) the Court spoke even more forcefully, as a majority of justices confirmed – and the remaining justices concurred in the result – that "Respondent's act of lying under oath categorically renders him unfit for office." *Id.*, at 424. Thus, it is clear that the Court's view on lying, deceitful judicial officers has evolved to the current state: such a judge must be removed from office.

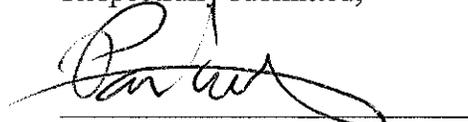
In the present matter, Respondent has repeatedly lied under oath before the Hon. Mary Ellen Brennan. Respondent has also engaged in deceit by filing forged and fraudulent pleadings with the 6th Circuit Court. These actions render Respondent unfit for office. Clearly, she will remain unfit after the expiration of the 180 days recommended by the Commission.

RELIEF REQUESTED

This Court should remove Respondent from the office of Judge of the 3rd Circuit Court.

Further, the Court should order Respondent to pay costs in the full amount of \$8,498.40.

Respectfully submitted,



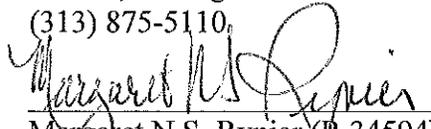
Paul J. Fischer, (P-35454)

Examiner

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Margaret N.S. Rynier (P-34594)

Co-Examiner

Dated: March 12, 2013

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