

STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF:

HON. DEBORAH ROSS ADAMS

Supreme Court No. 144985

Judicial Tenure Commission
Complaint No. 89

HON. DEBORAH ROSS ADAMS' PETITION
TO REJECT OR MODIFY THE JUDICIAL TENURE COMMISSION'S
RECOMMENDATION FOR ORDER OF DISCIPLINE

*****ORAL ARGUMENT REQUESTED*****

PROOF OF SERVICE

Submitted by:

DETTMER & DEZSI PLLC

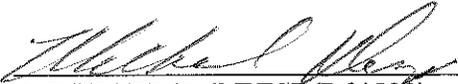
DENNIS DETTMER (P12708)
MICHAEL R. DEZSI (P64530)
Attorneys for Hon. Deborah Ross Adams
615 Griswold Street, Suite 700
Detroit, MI 48226(313) 281-8090



By and through counsel, DETTMER & DEZSI, PLLC, and pursuant to MCR 9.224, the Honorable DEBORAH ROSS ADAMS (“Judge Adams” or “Respondent”), petitions this Honorable Court to reject the Judicial Tenure Commission’s Decision and Recommendation for Order of Discipline. In support of her Petition, Judge Adams submits the accompanying brief.

Respectfully submitted,

DETTMER & DEZSI PLLC

By: 
MICHAEL R. DEZSI (P64590)
Attorneys for Hon. Deborah Ross Adams
615 Griswold Street, Suite 700
Detroit, MI 48226
(313) 281-8090

February 19, 2013

VERIFICATION

I, Judge Deborah Ross Adams, swear that the information in this Petition is true to the best of my knowledge, information, and belief.


Honorable Deborah Ross Adams (P32519)

STATE OF MICHIGAN
IN THE SUPREME COURT

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HON. DEBORAH ROSS ADAMS

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TO REJECT OR MODIFY THE JUDICIAL TENURE COMMISSION'S
RECOMMENDATION FOR ORDER OF DISCIPLINE**

*****ORAL ARGUMENT REQUESTED*****

Submitted by:

DETTMER & DEZSI PLLC

DENNIS DETTMER (P12708)
MICHAEL R. DEZSI (P64530)
Attorneys for Hon. Deborah Ross Adams
615 Griswold Street, Suite 700
Detroit, MI 48226(313) 281-8090

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STATEMENT OF QUESTIONS PRESENTED

- I. Did the Commission Violate Michigan's Separation of Powers Doctrine and Commit Structural Error by Charging Respondent with Felony Violations and Later Recognizing that it Lacked Jurisdiction to bring such Felony Charges?

Respondent answers: "Yes"
The Commission would answer: "No"

- II. Did the Commission's Executive Director Commit Serious Misconduct in this Matter by Coercing Respondent's Former Counsel to Breach Attorney-Client Privilege and Testify Against Respondent During the Hearing on this Matter?

Respondent answers: "Yes"
The Commission would answer: "No"

- III. Did both the Master and the Commission Commit Error by Finding Misconduct Based on Communications Protected by the Attorney-Client Privilege Disclosed by Respondent's Former Counsel Without her Consent?

Respondent answers: "Yes"
The Commission would answer: "No"

- IV. Did the Commission Err in Finding that Judge Adams Committed Misconduct During an Exchange with Judge Brennan During Respondent's Divorce Proceeding?

Respondent answers: "Yes"
The Commission would answer: "No"

- V. Should this Court Adopt the Master's finding that Judge Adams Didn't Commit any Misconduct as Alleged in Count Two of the Formal Complaint?

Respondent answers: "Yes"
The Commission would answer: "No"

- VI. Should this Court reject the Commission's Findings on Count Three that Respondent Made Material Misrepresentations to the Commission During its Investigation?

Respondent answers: "Yes"
The Commission would answer: "No"

STATEMENT OF FACTS

A. PROCEDURAL BACKGROUND

The Judicial Tenure Commission charged Respondent in a three count Formal Complaint asserting generally that Respondent violated the Code of Judicial Conduct and Michigan Court Rules. Additionally, Count I alleges that Respondent violated Michigan's perjury statute, MCL § 750.423; Count II alleges violations of Michigan's Forgery statute, MCL 750.248 and Uttering and Publishing statute, MCL § 750.249; and, Count III alleges that Respondent made several misrepresentations to the Commission during its investigation of this matter (Apx. 218, Complaint).

The Supreme Court appointed the Honorable Donald Miller to serve as Master to hear these proceedings. A pretrial hearing was conducted on May 9, 2012. On May 30, 2012, Respondent filed her Answer to the Formal Complaint denying that her actions, as described in the Formal Complaint, constituted misconduct and further denying that she violated Michigan's perjury, forgery, or uttering and publishing statutes.

On June 25, 2012, Respondent filed two pre-trial motions; a Motion to Strike Surplusage from the Complaint (Apx. 234), and a Motion to Disqualify Examiner Paul Fischer. In her Motion to Strike Surplusage, Respondent asserted that the Judicial Tenure Commission lacked jurisdiction to charge her with violations of Michigan's felony statutes. Respondent claimed that the JTC's charges violated Michigan's separation of powers doctrine because the JTC had no authority to charge a violation of a criminal statute (Apx. 234). In her Motion to Disqualify the Examiner, Respondent alleged that Mr. Fischer had exhibited a personal bias and animus toward her during the investigation phase of this matter based on his comments to Respondent's former

counsel and his interactions with Respondent. Respondent attached to her Motion to Disqualify an Affidavit of her former counsel attesting to Mr. Fischer's comments.

On August 9, 2012, the Master heard arguments from the parties on Respondent's Motions (Apx. 248, Tr. Hearing 8/9/12). On August 15, 2012, the Master issued an Order denying both Respondent's Motion to Strike Surplusage and Motion to Disqualify the Examiner (Apx. 263).

On August 30, 2012, attorney William Brukoff, who represented Mr. Adams in the divorce action, filed a Motion to Quash Respondent's subpoena *duces tecum* that commanded the production of his attorney-client file related to his representation of Respondent's former husband. On September 5, 2012, Respondent filed her Motion in Limine seeking to exclude certain evidence that Respondent asserted was inadmissible (Apx. 265). Most notably, Respondent sought to preclude the Examiner from offering documents and/or testimony of Respondent's former counsel, Andra Dudley, based on the attorney-client privilege. On September 8, 2012, Respondent filed her Response to Petitioner William Brukoff's Objections to Subpoena to Produce Documents, pleading that the attorney-client confidentiality was voided by the crime-fraud exception (Apx. 284). Specifically, Respondent asserted that attorney Brukoff had assisted her ex-husband in concealing his assets for purposes of the divorce proceeding (Apx. 284-92).

On September 11, 2012, the Master commenced a public hearing on the JTC's Formal Complaint against the Respondent that lasted for 5 days, concluding on September 17, 2012. Prior to the presentation of proofs, the Master heard arguments on Respondent's Motion in Limine (Vol. I, Tr. 9-18, Apx. 3-7). The Master reserved ruling on the specific issues raised in Respondent's Motion in Limine (Vol. I, Tr. 15, 27, Apx. 4, 7). Specific to Respondent's

arguments concerning the inadmissibility of communications protected by the attorney client privilege, the Master indicated that he would consider such issues on a case-by-case basis and apply a “narrow” privilege. The Master also heard arguments on Mr. Brukoff’s objections to Respondent’s subpoena *duces tecum* (Vol I, Tr. 28, Apx. 7-11). At the conclusion of arguments, the Master overruled Mr. Brukoff’s objections and compelled him to produce the subpoenaed documents, impliedly finding that the crime-fraud exception vitiated any assertion of the attorney-client privilege that may have attached to Brukoff’s client file (Vol. I, Tr. 44-45, Apx. 11).

Following arguments on the disputed evidentiary matters, the Master heard testimony from several witnesses and received documentary evidence into the record. As part of its proofs, the Examiner called as witnesses three of Respondent’s former divorce counsel to testify against her at the hearing.

B. SUMMARY OF RECORD EVIDENCE

In 2009, Respondent’s former husband filed for divorce in the Wayne County Circuit Court. *Adams v. Adams*, Case No. 2009-112880-DO. Given Respondent’s position as a family judge of the Wayne County Circuit Court, the Adams’ divorce case was transferred by the State Court Administrator’s Office to the Oakland County Circuit Court where it was assigned to Judge Mary Ellen Brennan.

Respondent’s divorce proceeding was extremely acrimonious and protracted. According to the Adams’ daughter, Ashley, Respondent was subjected to physical and emotional abuse by her former husband. Tragically, Respondent lost her other daughter Arin to premature death in October 2006 (Vol. I, Tr. 63-70, Apx. 16-18). The record also revealed that Respondent’s

former husband had engaged in blatant instances of infidelities leading up to the filing of divorce and indicated he wanted to “destroy” Judge Adams (Vol I, Tr. 76, Apx. 19).

During the discovery phase of the divorce, Respondent’s husband had misreported his income and assets for the ostensible purpose of concealing from Respondent his marital estate (See Respondent’s Response to Petitioner William Brukoff’s Objections to Subpoena to Produce Documents, Apx. 284). The record reveals that Mr. Brukoff filed a Request for Investigation of Respondent (Vol. II, Tr. 427-428, Apx. 108). However, the JTC did not call Mr. Brukoff as a witness at the hearing (most likely because the Master found that Brukoff may have assisted his client in fraudulently concealing his assets and income during Respondent’s divorce). Respondent was represented by Jeffrey Sherbow, followed briefly by Janice Burns, and then by Ms. Andra Dudley. Each of Respondent’s former attorneys were subpoenaed as witnesses for the JTC and testified during the hearing.

Pursuant to Judge Brennan’s scheduling order, the Adams’s divorce trial was scheduled to commence on March 21, 2011 (Ex. E2). On March 10, 2011, the parties appeared before mediator Gilbert Gugni, at which time the parties reached a property settlement (Ex. E6). Under the terms of the parties’ settlement agreement, Respondent was to receive the right to early retirement benefits from Anthony Adams’ City of Detroit Pension Plan. The effect of this provision was that Respondent was to receive benefits from Anthony Adams’ retirement plan at his earliest eligibility date even if he himself didn’t elect to receive benefits until a later time (Ex. E6, p.5).

A *pro confesso* hearing was scheduled for March 16, 2011 that Respondent attempted to reschedule due to the short notice and her own pending docket in the Wayne County Circuit

Court (Vol. I, Tr. 155, Apx. 39).¹ Respondent, her ex-husband, and their respective counsel each appeared at the hearing (Ex. E9).

During the hearing, and after taking from Mr. Adams the statutory proofs necessary to find that the objects of matrimony had been destroyed, Judge Brennan placed Respondent under oath for the limited purpose of asking “a couple questions of Judge Adams with regard to pregnancy and that type of thing.” (Ex E9, p. 7). After taking the statutory proofs, Judge Brennan granted the divorce and dissolved the Adams’ marriage of thirty-one years. Judge Brennan adjourned the matter until April 11, 2011, to allow the parties to prepare a Judgment of Divorce (Ex. 9, p. 7).

After the conclusion of the hearing, Judge Brennan admonished Respondent in a demeaning tone that she “can’t call chambers directly.” (Vol. III, Tr. 646, Apx. 163). Judge Brennan’s admonishment set in motion a brief exchange with Respondent about whether Respondent had called the courthouse the day before the hearing to seek to schedule the *pro confesso* hearing to a non-conflicting date. (Ex. E10; Vol. II, Tr. 356-57, Apx. 90). As the video recording of the hearing reveals, Judge Adams repeatedly stated that she did not call “here directly.” At the time, Judge Adams was under the impression that Judge Brennan was accusing her of attempting to contact Judge Brennan directly to engage in *ex parte* contact with the Court.

The back-and-forth between Judges Brennan and Adams lasted several minutes, during which Judge Brennan threatened to have Judge Adams “take a seat in the box.” Judge Brennan then summoned her clerk to the courtroom, swore her in, and began asking her whether a woman had called chambers the day before who identified herself as “Judge Adams.” Throughout this

¹ It is unclear why the *pro confesso* hearing was abruptly moved up to March 16, 2012, when the Adams’ trial date was already schedule for March 21, 2011. Respondent testified that the 3/16 hearing date was scheduled *sua sponte* by the court and without her knowledge or consent.

exchange, Judge Adams repeatedly asked Judge Brennan “why are you doing this?” and “this is so inappropriate.” After receiving testimony from her clerk who indicated that “Judge Adams” had placed a call to the courthouse the previous day, Judge Brennan scolded Judge Adams and said “you just got caught lying to a judge.” (Examiner’s Exhibit 9, Tr. 21, Hearing 3/16/11).

Within days of the March 16, 2011 hearing, Judge Brennan contacted Mr. Fischer of the JTC to inquire about pressing charges against Respondent based on what had transpired during the hearing (Vol. III, Tr. 664, 666-67, Apx. 167-68). Judge Brennan never disclosed her communications with Mr. Fischer to the parties and continued to preside over the remainder of the Adams’s divorce proceedings.²

It is based on these facts that the JTC charged Respondent in Count One of the Complaint with perjury in violation of MCL 750.423 (Apx. 219). Throughout these proceedings, Respondent has admitted that she contacted Judge Brennan’s staff to request an adjournment of the *pro confesso* hearing (Vol. 1, Tr. 182-84, Apx. 46).

After the March 16, 2011 hearing, the parties circulated several drafts of the property settlement, the purpose of which was to document the settlement that was reached before mediator Gilbert Gugni. The record reflects that Respondent did not agree with the several Property Settlement Agreements that were drafted by Mr. Brukoff (Vol. I, Tr. 224-35, Apx. 56-59). Specifically, the record established that Mr. Brukoff repeatedly omitted the provision

² Judge Brennan failed to advise the parties of her communications with Mr. Fischer as required under Canon 3 of the Code of Judicial Conduct until called to testify one and a half years later during the formal hearing against Respondent. It should also be noted that immediately after Judge Brennan testified at the formal hearing in this matter she *sua sponte* issued an order disqualifying herself and the matter was re-assigned to another judge. Respondent only became aware of Judge Brennan’s disqualification through a recent review of the online docket.

relating to Respondent's right to receive retirement benefits from her former husband's City of Detroit pension plan (Vol.1, Tr. 229-30, Apx. 58; Vol. IV Tr. 809, Apx. 204).³

On April 11, 2011, Respondent's attorney, Ms. Andra Dudley, appeared before Judge Brennan at which time she requested on behalf of Respondent additional time to finalize the Property Settlement Agreement (Ex. E14, pp. 7-8, Apx. 375-76). After Judge Brennan denied the request by Respondent's attorney for additional time to finalize the Property Settlement, she ordered Respondent to sign the Property Settlement Agreement and the "Consent Judgment of Divorce" by 5pm that same day, or else Respondent was to appear on April 14, 2011, for a hearing to show cause why she shouldn't be held in contempt of court (Ex. E37, Apx. 385).

After the hearing on April 11, 2011, Ms. Dudley took the Property Settlement Agreement drafted by Mr. Brukoff and the "Consent Judgment of Divorce" to Respondent's office at the Third Circuit Court, where Ms. Dudley advised Respondent that she was to either sign the Property Settlement Agreement by 5pm that day or appear for a show-cause contempt hearing on April 14, 2011 (Vol. II, Tr. 373-74, Apx. 94).

The facts surrounding what occurred during the meeting between Ms. Dudley and Respondent are disputed; Respondent contends that Ms. Dudley directed her to file a motion to set aside the "Consent Judgment of Divorce," while Ms. Dudley, on the other hand, denied that she gave Respondent permission to sign her name to any pleadings or motions (Vol. I, Tr. 269-71, Apx. 68; Vol. III, Tr. 528-35, Apx. 133-35). The record further reflects that Judge Brennan had signed and entered the "Consent Judgment of Divorce" on April 11, 2011, notwithstanding

³ During the hearing, Mr. Felice Iafrate was qualified by the Master as an expert in the area of family law (Vol. IV, Tr. 792-93, Apx. 200). According to the testimony of Mr. Iafrate, Mr. Brukoff included additional language regarding "pop-up" benefits and omitted survivorship benefits that were agreed upon during the mediation before Mr. Gugni on March 10, 2011 (Vol. IV, Tr. 796-99, Apx. 201).

the fact that Respondent neither consented to nor signed the "Consent Judgment of Divorce." Because the property settlement didn't comport with the parties' settlement agreement, Respondent objected to signing the "consent" judgment of divorce (Vol. III, Tr. 713, Apx. 180; Ex. E16, Apx. 386-94). On April 26, 2011, Ms. Dudley sent an e-mail to Respondent stating, "[i]f you want to preserve your appellate rights file a motion." (Ex. E17, Apx. 395).

Consistent with Ms. Dudley's directive, on May 5, 2011, Respondent prepared and filed a Motion to Set Aside or Modify the Judgment of Divorce and a Brief in Support (Ex. E18-E21). Respondent signed the motion and brief in the name of her counsel Andra Dudley. (Vol. I, Tr. 265, Apx. 67). This is the basis of Count Two of the Complaint charging Respondent with forgery and uttering and publishing in violation of MCL §§ 750.248 and 750.249. Respondent has consistently admitted that she signed Ms. Dudley's name to the Motion and Brief to Set Aside or Modify the Judgment of Divorce and it was so stipulated (Vol. I, Tr. 265, 268, Apx. 676).

After Respondent filed the subject motion to set aside the Judgment of Divorce, Mr. Brukoff allegedly questioned Ms. Dudley about the subject motion, at which point Dudley allegedly disavowed knowledge of the motion. Brukoff and Dudley both filed with the Commission Requests for Investigation based on the fact that Respondent had filed the subject motion to set aside the Judgment of Divorce.

After the conclusion of the hearing, the Master issued his report containing his findings of fact and conclusions of law.

C. **MASTER'S REPORT OF HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In his report, the Master noted the difficulties of Respondent's divorce proceeding that was riddled with irregularities. As to Count I (perjury), the Master found that Respondent

violated MCL § 750.423 by making false statements under oath. In reaching his conclusion, the Master accepted Judge Brennan's testimony that "chambers" meant the offices assigned to her and her staff and further that once a judge places a person under oath, that person remains under oath until excused (Apx. 294).

The Master rejected completely Count Two charging Respondent with forgery and uttering and publishing (Apx. 294-95). In reaching his conclusion, the Master noted the ineffectiveness of Respondent's counsel and Judge Brennan's lack of flexibility leading up to the filing of the subject motion (Apx. 295-96). Specifically, the Master found that:

[I]n light of the totality of the circumstances, I find that urgency, lack of flexibility, and difficulty of communication in the setting of a rigid docket call led to confusion, mistrust and eventual animosity between Respondent and Ms. Dudley.

I further find that there was insufficient evidence presented to show, by a preponderance thereof, that Respondent intended to injure or defraud anyone when she filed the . . . motion [to set aside judgment of divorce]. The record indicates that Ms. Dudley (still Respondent's attorney of record) was unavailable for a short, but critical length of time and Respondent, arguably affixed Ms. Dudley's signature to the documents in order to meet a filing deadline, possibly assuming that Ms. Dudley, after the fact, would not object to the act.

As to the documents themselves, I find no language therein which could be construed as false, misleading, or purporting to be something that they are not. They comprise an appropriately drafted motion together with a necessary supporting brief and routine procedural papers. It is well-settled law that forgery is an act which makes an instrument appear to be what it is not with intent to defraud or injure. The key is that the writing itself is a lie. *People v Kaczorowski*, 190 Mich App 165, 171 (1990); *People v Hodgins*, 85 Mich App 62 (1978). (Apx. 295-96)

The Master also rejected the charge that Respondent committed uttering and publishing by finding that "there was no evidence presented to indicate that Respondent violated MCL 750.249, which prohibits the knowing presentation of a false, altered, forged, counterfeited or fictitious instruction with intent to defraud or cheat." (Apx. 296). As to Count Three (misrepresentations to the Commission), the Master found that the Examiner proved only three

of the seven allegations that Respondent made misrepresentations to the Commission (Apx. 296-97).

The Master did find, however, that Respondent misrepresented whether she had permission to file pleadings under Dudley's name based on the Examiner's Exhibit 32,⁴ but rejected the allegation that Respondent misrepresented that she supplied a copy of the motion and notice of hearing to Dudley (Apx. 297). Finally, the Master found that Respondent contacted Judge Brennan's court more than four times during the duration of her divorce proceeding and that she was told by Judge Brennan's staff that it was improper for her to call the court when she was represented by counsel.

D. RESPONDENT'S STATEMENT OF OBJECTIONS TO THE MASTER'S REPORT

On November 6, 2012, Respondent filed her Statement of Objections to the Master's Report. In her Statement of Objections, Respondent asserted that the JTC was without jurisdiction or authority to charge judicial officers with felonious conduct such that the charges were inappropriate on their face. Assuming *arguendo* the jurisdiction of the JTC to do so, Respondent further asserted that the Master erred in finding sufficient evidence that her conduct during the exchange initiated by Judge Brennan rose to the level of felonious perjury.

Respondent also contested the Master's findings regarding Count Three (misrepresentations to the Commission), based on a lack of evidence presented. Specifically, the Examiner relied on Respondent's answers to the Commission to prove his claims but failed to offer her answers into evidence. As such, the record is completely devoid of any evidence

⁴ The Examiner's Exhibit 32 was a compilation of e-mails, some of which were communications between Respondent and her counsel. Respondent objected to the admission of Exhibit 32 as it contained communications squarely protected by the attorney-client privilege. The Master "conditionally" admitted the exhibit into evidence (Vol. II, Tr. 424, Apx. 107).

whatsoever relating to Respondent's answers to the Commission, those upon which the Examiner premises Count Three.

Contemporaneous with her Statement of Objections to the Master's Report, Judge Adams also filed a motion to dismiss based on the established misconduct of the Examiner who, as the record revealed, coerced Respondent's former counsel to breach attorney-client privilege and testify against her at the hearing (Apx. 299).

The Judicial Tenure Commission scheduled a hearing on the matter for December 3, 2012, at which time the parties, through their counsel, presented arguments on the matter. As to Respondent's motion to dismiss based on the Examiner's misconduct, (including his *ex parte* communications with Judge Brennan), the Chairman of the Commission indicated at the start of the hearing that the motion would be taken under advisement (Hearing 12/3/12, Tr. 7, Apx. 320)("The Commission has reviewed these motions and pleadings and has determined to take the motion to dismiss under advisement."). The Commission never ruled on Respondent's motion to dismiss, nor did the Commission address the allegations of misconduct on the part of its Executive Director.

E. JUDICIAL TENURE COMMISSION'S DECISION AND RECOMMENDATION FOR ORDER OF DISCIPLINE

On or about December 28, 2012, the JTC issued its Decision and Recommendation for Order of Discipline in this matter (Apx. 339). It is unclear whether each of the members of the JTC had an opportunity to review and/or agreed with the reasoning set forth in the Decision given that the signatures of several members of the JTC were dated December 21, 2012 while the Chairman's signature is dated December 28, 2012 (Apx. 359-67). In any event, the JTC was "unanimous that Respondent be suspended without pay for a period of 180 days and ordered to pay costs in the amount of \$8,498.40." (Apx. 357).

Notwithstanding its prior decision and authorization to charge Respondent with felony violations, the Commission in its decision and recommendation faulted the Master for analyzing the allegations in the Complaint “under the standards and factors set forth in various criminal statutes, specifically MCL 750.423 (perjury); MCL 750.248 (forgery) and MCL 750.249 (uttering and publishing).” (JTC Decision and Recommendation, pg. 9, Apx. 347). The Commission went on to conclude that it “does not have the authority to lodge such criminal charges or adjudicate their violation. The JTC’s authority is strictly limited to assessing Respondent’s actions in light of the Michigan Rules of Professional Conduct (“MRPC”), the Michigan Court Rules (“MCR”), and the Michigan Code of Judicial Conduct (“MCJC”), and making recommendations to this Court regarding same.” (JTC Decision and Recommendation, pg. 9, Apx. 347).⁵

As to Count One (perjury), the JTC agreed with the Master, who found that Respondent was “untruthful” during an exchange with Judge Brennan. The JTC reached this conclusion based on the video of the in-court exchange with Judge Brennan. As to Count Two (forgery and uttering and publishing), the JTC ignored the findings of the Master who found no misconduct as to Count Two. In its decision, the JTC gave considerable weight to the testimony of Respondent’s former counsel, Andra Dudley, notwithstanding the Master’s contrary finding based on his observation of her and her testimony, during which she asserted her Fifth Amendment right against self-incrimination.

⁵ Respondent had previously filed a motion to strike from the Complaint the felony charges and argued strenuously that the inclusion of such charges denied Respondent her constitutional right to due process (Apx. 234, Motion to Strike; Hearing 8/9/12, Tr. 4-16, Apx. 248-52). Respondent further argued that such felony charges impermissibly mixed the burdens of proof as to what Respondent was defending against (Hearing 8/9/12, Tr. 7, Apx. 249). The Master denied Respondent’s earlier motion to strike without having answered any of the questions about how the charges were to be supported, proven, or defended against (Apx. 263).

The Commission also relied on documents that were never admitted into evidence during the hearing and thus aren't part of the record before the Court. Specifically, the Commission found that Respondent "attempted to replicate Ms. Dudley's signature on those documents." (Commission Decision and Recommendation, pg. 6 n. 28, Apx. 344). To support its assertion, the Commission cited to its "Exhibit O", which purportedly contains "comparisons of Respondent's and Ms. Dudley's signatures."⁶ During the hearing, however, the Master excluded from evidence the Examiner's proposed Exhibit 28 that contained handwriting comparisons (Vol. I, Tr. 268, Apx. 67). Thus, it is a complete mystery how the Commission relied on such documents in its decision. As to Count Three, the JTC accepted in part and rejected in part the Master's findings that Respondent made misrepresentations to the Commission during its investigation.

LEGAL ARGUMENT

Standard of Review

This Court reviews *de novo* proceedings brought by the Judicial Tenure Commission, including its recommendations and findings of fact. *In re Somers*, 384 Mich 320, 323 (1971); Mich Const 1963, art. 6, § 30. Upon *de novo* review of the record, this Court should reject outright the Commission's recommended order of discipline and review the conduct of the Examiner.

⁶ In its Decision and Recommendation, the Commission indicates that its "Exhibits" are attached to its decision. However, because the Commission's "exhibits" are inexplicably identified by letters whereas the Examiner's exhibits at the hearing were identified by numbers, it is impossible to compare all of the exhibits to determine what the Commission relied upon in reaching its decision, and the Commission has never produced its "Exhibit O".

I. THE COMMISSION VIOLATED MICHIGAN'S SEPARATION OF POWERS DOCTRINE AND COMMITTED STRUCTURAL ERROR BY CHARGING RESPONDENT WITH FELONY VIOLATIONS AND LATER RECOGNIZING THAT IT LACKED JURISDICTION TO BRING SUCH FELONY CHARGES

Before the hearing, Respondent filed her Motion to Strike any and all allegations that she committed felonies under Michigan law based on Michigan's Separation of Powers Doctrine. On August 9, 2012, the Master heard arguments on Respondent's motion, during which time Respondent's counsel asserted that the inclusion of the felony charges amounted to a violation of due process given the differing standards in the burdens of proof (Tr. Hearing 8/9/12, pg. 5-12, Apx. 249-50). In response, the Examiner argued repeatedly that "[w]e are not charging Judge Adams with a felony." (Tr. Hearing 8/9/12, pg. 18, Apx. 252).

In its Decision and Recommendation of Discipline, the JTC adopted Respondent's position that it lacked the authority to charge her with felony violations. Specifically, the JTC concluded:

[T]he JTC does not have the authority to lodge such criminal charges or adjudicate their violation. The JTC's authority is strictly limited to assessing Respondent's actions in light of the Michigan Rules of Professional Conduct ("MRPC"), the Michigan Court Rules ("MCR"), and the Michigan Code of Judicial Conduct ("MCJC"), and making recommendations to this Court regarding same.

(JTC's Decision and Recommendation, pg. 9, Apx. 347). For the following reasons, this Court should adopt the JTC's conclusion that it lacks jurisdiction to charge and adjudicate felony violations. This Court should further conclude that Respondent was prejudiced by the structural error of the JTC having charged Respondent with felony violations and forcing her to defend against same.

a. Michigan's Separation of Powers Doctrine

Michigan's Separation of Powers Doctrine is firmly established by the Michigan Constitution. Specifically, Article 3, §2, sets forth the general separation of powers provisions of the Michigan Constitution, which states:

The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const. 1963, Art. 3 §2.

Article V, § 8 of the Michigan Constitution vests exclusively in the executive branch the enforcement of Michigan law. "The governor shall take care that the laws be faithfully executed." Article VII, § 4 establishes "a prosecuting attorney, whose duties and powers shall be provided by law." Under MCL § 49.153, county prosecutors, *and not the JTC*, are charged with the duty of "appear[ing] for the state or county, and prosecut[ing] or defend[ing] . . . all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party or interested."

The second constitutional provision of importance here is Art. 6, § 1, which vests the judicial power of the state exclusively in the courts:

The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by two-thirds vote of the members elected to and serving in each hours.

Const 1963, Art. 6, §1. The JTC's constitutional authority is conferred by Article 6, § 30 of the 1963 Michigan Constitution, which limits the JTC to recommending discipline against a judicial officer "for conviction of a felony . . . [or] misconduct in office . . . or conduct that is clearly prejudicial to the administration of justice." As the plain language of our constitution makes

clear, the Commission’s jurisdictional authority as it relates to felony violations is triggered only “for conviction” of a felony. The Commission cannot claim for itself the role or responsibility of charging or adjudicating felony charges without overstepping its constitutional boundaries.

The Doctrine of Separation of Powers has also been recognized as a fundamental principle of Michigan constitutional law in numerous decisions of our Supreme Court. As early as 1874, Justice Thomas M. Cooley recognized the primary importance that separation of powers principles play in the operation of Michigan’s government:

Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent.

Sutherland v Governor, 29 Mich 320, 324 (1874).

Where the legislative or executive branch has failed to “recognize and respect the limits on its own authority,” and has impeded on the powers entrusted to the judiciary, the Court has not hesitated to strike down these actions as violative of separation of powers principles. *See e.g., In Re 1976 P. A. 267*, 400 Mich 660 (1977); *People v Sierb*, 456 Mich 519, 532 (1998). Here, the JTC turned upside down its constitutional authority by charging Respondent, in the first instance, with committing a felony violation under Michigan law and then proceeding to try her for such a violation.⁷ And while the JTC has now conceded that it lacks the authority to charge and/or adjudicate felony violations, its decision comes too late in these proceedings. Here, Respondent was already charged and forced to defend herself against the JTC’s felony charges.

⁷ In the case of *In re Honorable Steven R. Servaas*, 484 Mich 634, 647-48 (2009), one member of this Court expressed doubt that the JTC has jurisdiction, in the first instance, to charge or adjudicate whether a judicial officer has committed felony violations. However, in *Servaas*, the Court did not consider the separation of powers question as presented herein.

During the hearing on Respondent's motion to strike, Respondent inquired of the Master what standard would apply if the JTC were allowed to proceed on its extra-jurisdictional felony charges and what types of proofs would be necessary to combat the felony charges. As such, the damage was already done by the time the JTC rendered its decision holding that it lacked the authority to do so.

In essence, the JTC overcharged Respondent with felony violations for which it never had the jurisdiction and/or authority to charge or adjudicate. By doing so, the Commission denied Respondent constitutional due process by forcing her to proceed to defend herself against extra-jurisdictional allegations. The JTC's practice as carried out in this case had the effect of expanding the JTC's authority beyond its constitutionally limited jurisdiction. This is a gross abuse of the JTC's jurisdictional authority and should compel this Court to reject the proceedings as fundamentally unfair.

II. THE JTC'S EXECUTIVE DIRECTOR COMMITTED SERIOUS MISCONDUCT IN THIS MATTER BY COERCING RESPONDENT'S FORMER COUNSEL TO BREACH ATTORNEY-CLIENT PRIVILEGE AND TESTIFY AGAINST RESPONDENT DURING THE HEARING

The professional misconduct of the Examiner should compel the dismissal of these charges. The testimony elicited at the hearing established that the Examiner obtained evidence by unethically strong-arming Respondent's counsel to breach her attorney-client privilege. By doing so, the Examiner unethically obtained evidence that was then used against Respondent during the hearing. Respondent filed with the Commission her motion to dismiss, in which she raised significant issues of misconduct. That motion was ignored by the Commission. Respondent hereby renews her request that this Honorable Court consider anew her motion to dismiss that is part of the record.

- a. **The Examiner's proofs in this matter were gathered by unethically coercing Respondent's former counsel to breach attorney-client privilege and testify against Respondent during the hearing.**

During the hearing on this matter, the Examiner called as witnesses three of Respondent's former divorce counsel – Jeffrey Sherbow, Janice Burns, and Andra Dudley. Respondent's divorce attorney, Andra Dudley, testified that after filing her request for investigation with the JTC, she met and/or spoke with members of the JTC on about 8 to 10 occasions and turned over to the Examiner her entire client file, including any and all of her confidential communications with Respondent.⁸ Dudley never sought permission or obtained a waiver from Respondent before turning over her file. When questioned about the propriety of breaching attorney-client privilege, Dudley testified that she was told by Mr. Fischer's office that her duty to maintain attorney-client confidences with Respondent didn't apply.⁹

Specifically, Ms. Dudley testified as follows:

Q [Respondent's counsel] – You recognize that you violated [MRPC, sic Rule] Canon 1.6 when you turned over confidential information to the Judicial Tenure Commission; correct?

A [Dudley] – No.

Q – You don't recognize that?

⁸ Prior to the commencement of the public hearing, Respondent filed a motion in limine to exclude from evidence any and all of her communications with her former counsel as protected by the attorney-client privilege (Apx. 265). At the start of the hearing, the Master indicated that he would consider each objection on a case-by-case basis and apply a 'narrow' attorney-client privilege (Vol. I, Tr. 14, Apx. 4). In any event, Respondent *never* waived her right to assert the attorney-client privilege.

⁹ Mr. Sherbow was the first of Respondent's counsel to be called to testify. When asked by the Associate Examiner about his discussions with Respondent, Mr. Sherbow replied: "if it has to do with a discussion I may have had with Judge Adams, I would have to assert a privilege, unless otherwise waived." (Tr. Vol. II, pg. 301). Sherbow further testified that he recognized under MRPC 8.3(b)-(c), even in the context of JTC proceedings he had an obligation to maintain Respondent's attorney-client privilege. (Tr. Vol. II, pg. 310-11).

A – No.

Q – Did anyone at the Judicial Tenure Commission – lawyers, staff – tell you that it was improper to turn over information to the Judicial Tenure Commission?

A – They told me I had to.

Q – They told you you had to. And did you raise the question of your professional obligation under 1.6?

A – I did.

Q – You did?

A – Yes.

Q – And they told you?

A – That it did not apply.

Q – And who told you that?

A – Ms. Rynier.

Q – Did she cite any authority to you that would support that proposition?

A – Not that I recall.

(Vol. II, Tr. 434-35, Apx. 109-10). Dudley’s testimony reveals a significant act of misconduct by Mr. Fischer and his staff in the manner in which they conducted this investigation. Such professional misconduct tainted beyond measure these proceedings.

III. BOTH THE MASTER AND THE COMMISSION COMMITTED ERROR BY FINDING MISCONDUCT BASED ON COMMUNICATIONS PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE DISCLOSED BY RESPONDENT’S FORMER COUNSEL WITHOUT HER CONSENT

Here, both the Master and the Commission erred by relying on communications between Respondent and her counsel that were squarely protected by the attorney-client privilege. “The attorney-client privilege attaches to direct communications between a client and his attorney as well as communications made through their respective agents.” *Leibel v Gen’l Motors Corp*, 250

Mich App 229 (2002). This occurred as a result of Ms. Dudley's breach of her ethical duties, which equally tainted the entire proceedings below. This Court should consider the highly unethical nature of these proceedings given the misconduct of both the Examiner and Respondent's former counsel who breached attorney-client privilege.

Specifically, MRPC 8.3(b) makes clear that an attorney has a duty to report a judge if the attorney has knowledge that the judge "committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office[.]" The exception to this rule, applicable here, is triggered where the information is protected by MRPC 1.6, which provides that, "Except when permitted under paragraph (c),¹⁰ a lawyer shall not knowingly: (1) reveal a confidence or secret of a client; (2) use a confidence or secret of a client to the disadvantage of the client; (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure."

Here, there can be no dispute that Ms. Dudley had a duty to maintain her client's (Respondent's) confidences even if Dudley had knowledge that Respondent may have committed a significant violation of the Code of Judicial Conduct. This is exactly what MRPC 8.3(b) commands. Ms. Dudley violated these rules at the behest and direction of Mr. Fischer's office. The record is replete with instances of Dudley's testimony that was elicited by the Examiner and that was squarely protected by the attorney-client privilege. Examples of such included, but are not limited to, Respondent and Dudley's conversations and e-mails about the preservation of Respondent's appellate rights and the necessity of having to file a motion to set aside the Consent Judgment of Divorce.

¹⁰ None of the exceptions set forth in subsection (c) are applicable here.

Perhaps the most egregious evidence that was entered by the Examiner, and relied upon by both the Master and the Commission, were the Examiner's Exhibits 17 and 32, which were e-mails between Respondent and Dudley. These e-mails contain communications between Respondent and Dudley addressing how Respondent should handle the issue of the Consent Judgment that was entered by Judge Brennan. Such communications as described herein were squarely protected by the attorney-client privilege and should have been inadmissible as proof against Respondent.

The court rules governing these proceedings compels following "as nearly as possible [] the rules of procedure and evidence governing the trial of civil actions in the circuit court." MCR 9.211(A). If this were a civil matter in circuit court, there is no doubt that obtaining evidence illegally, by professional misconduct, or through counsel's breach of the attorney-client privilege would render such evidence inadmissible and would trigger appropriate consequences.

In analogous circumstances, Michigan Courts have zealously enforced the exclusionary rule in civil cases where evidence has been unlawfully obtained. *Gilbert v Leach*, 62 Mich App 722, 726 & n3 (1975)(noting that the Michigan Supreme Court has long applied the exclusionary rule to civil cases)(The exclusionary rule has been applied in noncriminal proceedings in other jurisdictions. *See, e.g., One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693 (1965), and the cases cited in Annotation, ADMISSIBILITY IN CIVIL CASES OF EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE, 5 ALR 3d 670)). Given the overt breach of attorney client privilege, neither the Master nor the JTC should have considered or relied on communications protected by the attorney client privilege as a basis for finding any misconduct. Such a procedural defect warrants a dismissal of these charges.

By the Examiner's manipulation, Dudley's duty of loyalty to her client, Judge Adams, became compromised. Such a scheme squarely conflicts with MRPC 1.7. The Examiner can no more induce another to violate the Rules of Professional Conduct than he may do so himself. Indeed, MRPC 8.4(a) imposes liability on both attorneys who "violate or attempt to violate the Rules of Professional Conduct [*or*] knowingly assist *or induce* another to do so, or do so through the acts of another." MRPC 8.4 (emphasis added).

Specifically, Respondent's former counsel, Andra Dudley, testified that she was advised by Mr. Fischer's staff that she didn't have to comply with MRPC 1.6. Such advice by Mr. Fischer's office is troubling to say the least. Mr. Fischer and his staff violated their ethical duties and responsibilities by manipulating Respondent's counsel to align her interest with the JTC's interest; that is, *to obtain Respondent's client file from her counsel to use it as evidence against her.*

Respondent had every reason to expect that her counsel would abide by the ethical obligations and duties imposed on her by MRPC 1.6. Judge Adams certainly had no reason to expect that the Executive Director would secretly inveigle her own counsel, Dudley, to breach her duty to maintain in the strictest of confidences information protected by the attorney-client privilege. By compelling Dudley to breach confidence and turn over to the JTC Respondent's entire client file, which Dudley was ethically obligated to maintain in confidence, the Examiner sowed seeds of manipulation that poisoned Respondent's attorney-client relationship with Ms. Dudley.

It is beyond dispute that the Examiner obtained his evidence by professional misconduct and unethical means. In this regard, the Court should also consider that this isn't the first time that the Commission's Executive Director has crossed the bounds of fairness. *See In re*

Honorable Steven R. Servaas, 484 Mich 634 (2009)(declining to follow the JTC's recommendation of removal, issuing public censure, and sharply criticizing Mr. Fischer's actions in investigating and filing the JTC complaint).¹¹

In this case, the Examiner's professional misconduct and personal bias has infected the entire course of the JTC's investigation and proceedings. As an attorney, advocate, and officer of the court, Ms. Dudley's sworn duty was to protect, in all respects, Respondent's interest. As one of the highest ethics officers of the state, Mr. Fischer is well aware of Dudley's sworn duties and responsibilities. There can be no justification for the Executive Director and his associates to induce any counsel to violate the rules of ethics for the JTC's advantage and interests.

IV. THE COMMISSION ERRED IN FINDING THAT JUDGE ADAMS COMMITTED MISCONDUCT DURING AN EXCHANGE WITH JUDGE BRENNAN.

Upon *de novo* review, this Court should decline to adopt the findings and recommendation of the JTC that Judge Adams committed misconduct during an exchange improperly initiated by Judge Brennan after finalizing her divorce. Contrary to the JTC's findings, the record evidence does not support that Respondent had the requisite intent of committing misconduct during the exchange with Judge Brennan.

The record evidence reveals, and Respondent admits, that on March 15, 2011, Respondent contacted the Oakland County Circuit Court regarding the scheduling of the *pro confesso* hearing on March 16, 2011. According to Respondent, she sought an adjournment of the March 16, 2011 hearing due to her pending docket in the family division of the Third Circuit Court. (Vol. I, Tr. 155, Apx. 39).

¹¹ In *Servaas*, it was discovered that Mr. Fischer attempted to force Judge Servaas off the bench by telling him that he could save himself the embarrassment of a JTC complaint if Servaas would resign from the bench.

During the hearing, Respondent's deputy court clerk, Ms. Sharon Parr, testified that on March 16, 2011, Respondent had several matters pending on her docket, one of which was an in camera review with a minor child (Vol. IV, Tr. 787-88, Apx. 198-99). Ms. Parr testified that Respondent did, in fact, conduct the in camera review on March 16, 2011. *Id.* Thus, Respondent was forced to manage her own docket while facing the pressure of having to appear in Oakland County before Judge Brennan for the *pro confesso* hearing scheduled on short notice.

After Ms. Parr's late afternoon attempt to clear Respondent's docket (Vol. IV, Tr. 771-73, Apx. 194-95), Judge Adams asked her counsel, Ms. Dudley, to attempt to reschedule the *pro confesso* hearing (Vol. I, Tr. 162, Apx. 41). According to Respondent, Dudley was unable to reschedule the hearing and suggested that Respondent call the courthouse herself to inquire about moving the date. *Id.* Throughout these proceedings, Judge Adams has never denied that she did, in fact, contact the Oakland County Circuit Court to inquire about rescheduling the *pro confesso* hearing from March 16, 2011 (Vol. I, Tr. 178-80, Apx. 45).

The video recording of the *pro confesso* hearing on March 16, 2011, reveals that Judge Brennan first placed Mr. Anthony Adams under oath in order to take the proofs necessary to grant the divorce. After taking such proofs from Mr. Adams, the video reveals that Judge Brennan placed Respondent under oath for "a couple of questions for Judge Adams with regard to pregnancy and that type of thing." (Ex. E9, p. 7).

After taking the necessary proofs and granting the divorce and thus concluding the proceedings, Judge Brennan advised Respondent that she was "not to contact chambers *directly*." (Ex. E9, p. 16)(italics added). The video recording reveals that, in response to Judge Brennan's admonishment, Respondent stated, "I didn't call chambers directly." *Id.* Respondent repeated again, "I didn't call your chambers directly." *Id.*

Respondent testified that, at the time of the hearing on March 16, 2011, she believed that Judge Brennan was accusing her of attempting to engage in ex parte contact with Judge Brennan (Vol. I, Tr. 214-15, Apx. 54). In any event, the video recording clearly demonstrates that a colloquy occurred between Respondent and Judge Brennan about whether or not Respondent had contacted the court to reschedule the *pro confesso* proofs (Ex. E10).

- a. **Assuming, *arguendo*, that this Court rejects the JTC's conclusion that it lacks jurisdiction to charge and adjudicate felony violations, this Court should reject the Master's finding that Judge Adams committed perjury in violation of MCL 750.423.**

Although the Master found that Judge Adams committed perjury based on her in-court statements, the JTC correctly concluded that it lacks the jurisdiction and authority to charge and/or adjudicate felony violations. For the reasons set forth herein, this Court should affirm the JTC's conclusion that Judge Adams was improperly charged.

Assuming, *arguendo*, that this Court disagrees with the JTC's conclusion on the constitutional separation of powers question, this Court should conclude based on the totality of the circumstances and the evidence presented that Respondent's actions do not constitute perjury or actionable misconduct. Michigan's perjury statute, MCL § 750.423, provides that

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[.]

As the statute makes clear, one of the key elements of perjury is willfulness; that is, something that is said or done on purpose. *See generally Galanos v United States*, 49 F2d 898, 899 (CA6 1931)(reversing conviction for perjury explaining that the defendant "cannot be convicted of perjury merely because his literally accurate answer might have been somewhat modified in effect if he had been asked to state all the circumstances. Perhaps, if he had been asked

specifically, he would have answered truly.”); *see also United States v Wall*, 371 F2d 398, 400 (CA6 1967)(reversing a conviction for perjury because the “question propounded admits of several plausible meanings”); *Bronston v United States*, 409 US 352, 360 (1973)(“The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry.”). Here, Respondent’s comments don’t rise to the level of “willfulness” given the ambiguity of the question.

Nor do Respondent’s in-court statements fall within the reach of Michigan’s perjury statute, MCL § 750.423. Judge Brennan’s questioning of Respondent occurred as an aside after she granted the divorce. At that point, the purpose for which Judge Brennan had placed Respondent under oath had been fulfilled. As Judge Brennan acknowledged during her testimony, “[t]he oath was required for [Respondent’s] assent under oath to the terms of the mediation and the settlement agreement.” (Vol. III, Tr. 727, Apx. 183).

In order to constitute perjury, the allegedly false statements must be “in regard to any matter or thing, respecting which such oath is authorized or required[.]” MCL § 750.423 (emphasis added). Given that the purpose for which Judge Brennan had placed Respondent under oath had been completed, Respondent’s answers to Judge Brennan’s line of questioning doesn’t fall within the plain language of the perjury statute. This exchange, initiated by one judge against a grieving and stunned litigant simply doesn’t arise to the level of perjury.

b. This Court should reject the JTC’s finding of misconduct related to Judge Adams’ statements during an exchange with Judge Brennan.

This Court should also reject the JTC’s findings relating to Judge Adams in-court statements during the colloquy with Judge Brennan. As the video makes clear, Judge Adams and Judge Brennan were seemingly not communicating about the same thing. Based on Judge

Brennan's admonishment "not to call chambers directly," Judge Adams responded several times that "I didn't call chambers directly." (Ex. E9, pg. 16).

Throughout these proceedings, Judge Adams has never denied that she did, in fact, contact the court on March 15, 2011, to seek an adjournment of the *pro confesso* hearing. But the more relevant question is whether, during the in-court exchange, Judge Adams willfully spoke falsely in response to Judge Brennan's accusation that Respondent had called "chambers directly." It is not disputed that Judge Adams was never attempting to speak "directly" with Judge Brennan. (Vol. IV, Tr. 756, Apx. 191).

Respondent's conduct in court was an isolated, one-time instance during which Respondent was under the extreme pressure of her divorce. Judge Brennan seemingly agreed that Respondent's conduct did not rise to the level of actionable misconduct. During the hearing, Judge Brennan disclosed that, after the March 16, 2011 hearing, she contacted Mr. Fischer of the JTC to inquire as to whether she was duty bound to file a request for investigation against Respondent (Vol. III, Tr. 664-68, Apx. 167-68).

Judge Brennan further testified that she recognized that MRPC 8.3(b) allowed her the discretion to determine whether Respondent's actions met the threshold sufficient to trigger her reporting duty under the rule¹² (Vol. III, Tr. 668-69, Apx. 168-69). Judge Brennan testified that after having reviewed MRPC 8.3(b) and after having spoken with Mr. Fischer, she decided not to proceed with filing a complaint against Respondent (Vol. III, Tr. 669, Apx. 169). The import of Judge Brennan's testimony is that she didn't believe that Respondent's conduct "raise[d] a

¹² A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

substantial question as to the [Respondent's] fitness for office[.]” MRPC 8.3(b). Judge Brennan was correct.

Nor does the record contain any evidence sufficient to support a finding that Respondent's in-court statements were motivated by a calculated design to deceive the court. When questioned during the hearing by the Associate Examiner, Respondent testified:

Counsel, the proceeding was over with. I'm crying. My nose is running. I'm overwhelmed. I don't even understand why the judge is even engaging in this line of inquiry. She had granted the divorce. I'm trying to walk out of the courtroom. I'm humiliated. I'm tired. [] Everything was a blur at this point. I'm simply trying to leave the courtroom in one piece.

(Vol. I, Tr. 200, Apx. 50). Given Respondent's interpretation of Judge Brennan's admonishment, coupled with her state of mind at the time of the hearing, it is difficult if not impossible to conclude that Respondent acted with the necessary willfulness to constitute misconduct during the March 16, 2011 hearing. Respondent was shaken, stunned, and lacking in the pensive composure necessary to more artfully understand and respond to the accusations lobbied by Judge Brennan.

Additionally, this Court should consider strongly that, during the hearing on March 16, 2011, Respondent had no indication, idea, or notice that Judge Brennan was going to engage her in such an inquiry regarding calls to “chambers directly.” It was Respondent's belief that “chambers directly” was an accusation of her attempt to engage in ex parte contact (i.e., wrongdoing) directly with Judge Brennan. Respondent's interpretation of “chambers directly” meant the private space of the judge, not including the judge's staff or courtroom personnel. It was entirely by surprise that Respondent found herself the subject of an *ad hoc* contempt proceeding that was planned and initiated by Judge Brennan. Certainly Respondent did not stand to gain anything by first saying that she had not called chambers and then freely admitting the

opposite. In this particular context, the JTC failed to consider the circumstances in which Judge Adams found herself situated at the time of the hearing.

Even more puzzling is Judge Brennan's testimony that Respondent's call to the courthouse regarding scheduling matters was a nefarious and inappropriate act. To the contrary, the Code of Judicial Conduct specifically allows for a litigant to contact the court (including *ex parte*) regarding scheduling matters. See Canon 3A(4) of the Code of Judicial Conduct ("A judge may allow *ex parte* communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits[.]")

Indeed, the Master questioned the legitimacy of Judge Brennan's policy of prohibiting calls to her staff regarding scheduling matters. During the hearing on this matter, the Examiner called Judge Brennan's staffer Kirsten Turner to testify about Judge Brennan's policy of prohibiting all calls to the court regarding scheduling matters. According to Ms. Turner, any and all such calls were inappropriate and prohibited (Tr. Vol IV, pg. 748-51, Apx. 189). After hearing her testimony, the Master questioned Ms. Turner as follows:

Q [by the Master] – I'm just curious, just for a moment. It seems like that's a hard-and-fast rule, right, that you don't allow any of that happening without – if somebody is represented by counsel?

A [by Ms. Turner] – The phone calls?

Q – uh-huh.

A – We get so many phone calls, we have to be trying to eliminate as – some, you know, as we can.

Q – Sure. But that's a real hard-and-fast rule; right?

A – It is.

Q – So if Brooks Paterson called you and said, "I want to change that date," you would say, no can't do it. Right?

A – If he’s represented, we’d have to tell him no.

Q – Is that right?

A – Yep.

Q – How about Chief Judge Robert Young, Chief Justice Robert Young?

A – Same way. If they’re represented, they need to go through their attorney.

Q – You’d say, “Sorry, Justice Young, can’t help you”?

A – Correct.

(Tr. Vol. IV, pg. 757-58, Apx. 191)(questioning of Turner by Master).

Seemingly, as the Master implied by his questioning of Judge Brennan’s staff, the important point that has been lost in these proceedings is the fact that the Code of Judicial Conduct specifically allows for calls (including *ex parte*) to the courthouse regarding scheduling matters. The Master’s questioning also illustrates the extent to which the Commission has sought to make chargeable offenses from otherwise *de minimis* activity.

In viewing the record, the Court should also consider the fact (ignored by the JTC) that Judge Brennan had planned, on March 15, 2011, to admonish Respondent during the *pro confesso* hearing on March 16, 2011 regarding Respondent’s call to the court for the purpose of seeking an adjournment (Tr. Vol III, pg. 638-39, Apx. 161); Vol IV, pg. 750, Apx. 189). Respondent, however, had no idea or knowledge of what or why Judge Brennan was admonishing her given that Respondent’s call to the court regarding scheduling was wholly permitted under the Code of Judicial Conduct.

At most, Respondent’s conduct was a momentary transgression brought on by the overwhelming circumstances of that particular moment. The video recording shows that, during

the colloquy in question, Judge Brennan and Respondent were talking over each other and perhaps were not as mindful as should have been the case.

For all of these reasons, this Court should reject the findings of the JTC and find that Respondent's conduct during the March 16, 2011 hearing did not rise to the level of judicial misconduct.

V. THIS COURT SHOULD ADOPT THE MASTER'S FINDING THAT JUDGE ADAMS DIDN'T COMMIT MISCONDUCT AS ALLEGED IN COUNT TWO OF THE COMPLAINT

In his Report, the Master found that Judge Adams' actions in signing her attorney's name to the motion to set aside the judgment of divorce did not constitute any misconduct as alleged in Count Two. Relying almost entirely on the testimony of Respondent's former counsel (who the Master found to lack credibility), the JTC rejected the Master's findings. This Court should adopt the Master's finding as to Count Two for the following reasons.

The Master considered the entire record and found Ms. Dudley's testimony to be lacking credibility for several equally significant reasons. In rejecting the Master's decision, the Commission faulted the Master's conclusion as to Count Two for "not stat[ing] a basis as to why [he] gave limited weight to the testimony of Respondent and Ms. Dudley." (Commission's Decision, pg. 8, Apx. 346). However, the record provides ample justification as to why the Master rejected Dudley's testimony as lacking credibility.

Significantly, Dudley admitted to breaching the attorney-client privilege. That admission, on its face, constitutes ethical misconduct. Furthermore, during the hearing Dudley asserted her right against self-incrimination and at one point refused to answer questions posed by Respondent's counsel (Vol. II, Tr. 476, Apx. 120)("Because I have a right against self-incrimination, and therefore I'm invoking that right, and I refuse to answer any additional

questions.”). It was also evident that Dudley failed to object to Judge Brennan’s entry of a “consent judgment of divorce” where Respondent had advised Dudley that the judgment (prepared by Mr. Brukoff) failed to comport with the parties’ settlement agreement. Accordingly, the Master rightfully rejected Dudley’s testimony and concluded that “there was insufficient evidence presented to show, by a preponderance thereof, that Respondent intended to defraud anyone when she filed the above motion.” (Master’s Report, pg. 4, Apx. 296). The Master’s finding on Count Two was correct and should be affirmed by this Court.

Furthermore, the Master correctly noted that Judge Adams filed the subject motion on her own behalf, in her own divorce action, to preserve her own appellate rights. Nothing suggests that she was trying to injure her attorney or anyone else by signing Ms. Dudley’s name. The motion itself fully reflected Respondent’s position and she would have nothing to gain by signing her attorney’s name instead of her own.¹³ To the contrary, Judge Adams was acting on her understanding, based on her communications with her attorney and their pattern and practice, that she had permission to sign her attorney’s name to the motion in question, especially given that Dudley was “unavailable for a short, but critical length of time” during which Respondent filed the motion (Apx. 296).

The Examiner claims that because Respondent had not signed any other pleadings for Ms. Dudley, such “evidence” corroborates his claim that Respondent did not have permission nor a reasonable belief that Ms. Dudley had approved or would approve signing her name. However, the record actually shows that Respondent had drafted documents that were filed on

¹³ The subject motion in question was never scheduled for hearing because, according to Judge Brennan, the motion “wasn’t accepted” because it was filed using a Wayne County praecipe (Vol. III, Tr. 660, Apx. 166). Contrary to Judge Brennan’s testimony, the praecipe that was submitted was a standard form approved by the State Court Administrator’s Office, not a “Wayne County praecipe” as testified to by Judge Brennan (Examiner’s Exhibit E20).

her behalf and that she had participated in the preparation of the two earlier documents filed under Ms. Dudley's name (i.e., the Witness and Exhibit List)(Vol. I, Tr. 260-62, Apx. 65-66). These events show that, even if Ms. Dudley had ultimately signed those two documents, Ms. Dudley's and Respondent's pattern and practice was that Respondent was doing the actual drafting work in her divorce matter.

The record also reveals at least one other time when Respondent drafted and submitted a document to opposing counsel, which Ms. Dudley ratified by her actions after the fact. On April 7, 2011, Respondent had faxed to the opposing attorney, Mr. Brukoff, under a coversheet ostensibly from Ms. Dudley, changes to one of the drafts of the proposed settlement agreement and the judgment of divorce. Then, on April 8, the parties' two attorneys held a telephone conference discussing those proposed changes to the proposed Judgment — an action which is an after-the-fact ratification by Ms. Dudley of Respondent's actions in making changes to Mr. Brukoff's proposed Judgment and faxing them to Mr. Brukoff under Ms. Dudley's name.

The Examiner also points to two e-mails between Ms. Dudley and Respondent as "proof" that Respondent did not have permission to sign Ms. Dudley's name to the motion. However, those e-mails are, at best, ambiguous on this point, and do not prove that Respondent did not have, or (as the Master found) have reason to believe she had, permission to sign Ms. Dudley's name. Respondent's May 5th e-mail (Ex. E32) says no more than that she had tried to contact Ms. Dudley to get her approval before filing. This short, fairly cryptic note does not speak to whether Respondent had reason to believe she already had permission based on their prior practices, and that had Respondent had contacted Ms. Dudley essentially as a professional courtesy as would commonly be done between colleagues who had a history of drafting documents together.

Respondent claims that she believed Ms. Dudley “directed” her to file the subject motion. Consistent with her testimony, Ms. Dudley sent an e-mail to Respondent on Tuesday April 26, 2011 stating that “if you want to preserve your appellate rights file a motion.” (Ex. E17, Apx. 395). The motion in question was filed on May 5, 2011.

The Commission rejected Respondent’s testimony based on the e-mail that Respondent sent to Dudley dated May 5, 2011, in which Respondent wrote that “I tried contacting you earlier this week to obtain permission to file a quick pleading on my behalf under your name regarding the pension matter.” (Vol. I, Tr. 282-83, Apx. 71). This e-mail does not, however, provide a complete picture of the events, given Dudley’s e-mail dated April 26, 2011, which directed Respondent to “file a motion” if she wished to preserve her appellate rights. The Master properly considered all of these facts in reaching his conclusion that the Examiner failed to prove the allegations contained in Count Two.

The question before this Court is whether Respondent had a good faith belief that Ms. Dudley directed her to file a motion to set aside the judgment of divorce. This question is separate and distinct from whether Ms. Dudley, in fact, provided Respondent with permission to sign her name to the pleading. The focus is on Respondent’s intent given the circumstances as they were presented.

The circumstances surrounding the filing of the motion support Respondent’s belief that she had implied permission to file the motion under her attorney’s signature. The record reveals that on April 11, 2011, Judge Brennan entered a “Consent Judgment of Divorce” notwithstanding the fact that Respondent did not consent to the property settlement that had been prepared by Mr. Brukoff (Apx. 386-94). Given that Judge Brennan entered a “Consent Judgment of Divorce,” Respondent was placed in the precarious predicament of having to

preserve her rights. As Mr. Iafrate testified, a party cannot appeal or set aside a “Consent Judgment” without the consent of the parties (Vol. IV, Tr. 807, Apx. 203). Respondent, out of necessity, had to file a motion to set aside the “Consent Judgment of Divorce” as it was her only means of preserving her rights.

Contrary to the Commission’s analysis, the May 5th e-mail did not stand alone. Rather, the Master had to, and did, view it in the context of all the evidence in the record. The Master had before it the evidence of the past practice and course of dealing between Ms. Dudley and Respondent. That course of conduct clearly could lead Respondent to believe she was drafting the document for Ms. Dudley as she had done previously. As the Master found, this fact, combined with the urgency of the Motion, and all the other evidence, lead to his conclusion that Respondent reasonably believed that she had authority, whether explicit or implicit, to sign Ms. Dudley’s name to the Motion.

The Commission also relied on the testimony of Janice Burns, who preceded Dudley as Respondent’s divorce counsel. Although the Commission never charged Respondent or alleged any wrongdoing with regard to Ms. Burns, the Examiner accused Respondent of wrongdoing. Specifically, the Examiner argued that Respondent had also signed the name of Ms. Burns, and asked the Master to consider its “evidence” as additional proof that Respondent forged Ms. Dudley’s name. The Master outright rejected all of the allegations relating to Ms. Burns.

During the hearing, the Examiner called Ms. Burns to testify against her. The Examiner sought to elicit testimony from Burns that Respondent signed Burns’s signature to an emergency motion to substitute counsel. The emergency motion to substitute counsel was necessary because Judge Brennan refused to accept a stipulation to substitute counsel without the approval of Mr. Brukoff who, of course, refused to sign the stipulation (Vol. III, Tr. 546-48, Apx. 138).

Due to the impending mediation, Ms. Burns wanted to ensure that she was substituted out of the case before the mediation date, a task that became difficult given Judge Brennan's refusal to accept a substitution of counsel with Mr. Brukoff's approval.

Against this backdrop, Respondent and Burns had discussed the issue and determined that an emergency motion to substitute counsel needed to be filed, for Ms. Burns's benefit, forthwith so that the court could hear the motion and enter an order allowing Burns to be substituted out before the scheduled mediation date of March 10, 2011.

At Burns's direction, Respondent prepared and filed the emergency motion to allow for the substitution of Ms. Dudley in place of Ms. Burns (Vol. I, Tr. 101-02, Apx. 26). Burns testified that she didn't sign the motion nor had she seen it until after it had been filed (Vol. III, Tr. 549-51, Apx. 139). However, on cross-examination, Burns acknowledged that she had sent an e-mail to Respondent that made clear that Burns had expected the motion to be filed without her review and/or signature (Vol. III, Tr. 564-65, Apx. 142-43)¹⁴. The only logical inference to be drawn from Burn's communication with Respondent was that she assumed the motion was going to be filed without her review and without her signature. Accordingly, the Master outright rejected Burns's testimony as a basis to find or support any alleged misconduct.

The Court should also consider the rigidity of Judge Brennan's actions in presiding over Respondent's divorce case. In January 2011, Judge Brennan refused to accept a stipulated order allowing Respondent to substitute counsel which caused both Respondent and attorney Burns to be placed in the precarious situation of facing an impending mediation hearing. On March 16,

¹⁴ Based on Respondent's position that any and all of her communications with her former counsel were covered by attorney-client privilege, Respondent did not offer into evidence the communication between Burns and Respondent. Burns's testimony further illustrates the depth of the Examiner's misconduct in coercing Respondent's counsel to testify against her knowing that Respondent could not fully combat the charges without waiving her right to assert the attorney-client privilege.

2011, Judge Brennan engaged Respondent in a hostile and unnecessary confrontation about whether Respondent had called the courthouse the prior day to request an adjournment.

Following the March 16th hearing, Judge Brennan inquired of Mr. Fischer about the possibility of filing a Request for Investigation against Respondent, a fact that Judge Brennan never disclosed until the public hearing in this matter. On April 11, 2011, Respondent's attorney advised Judge Brennan that Respondent objected to the proposed settlement agreement, as it did not comport with the parties' settlement, after which Judge Brennan simply ordered Respondent to sign the judgment by 5pm that day or appear for a show cause hearing.¹⁵ Under these circumstances, Respondent opted to sign the settlement agreement under the threat of contempt and had to later file the motion to set aside the Judgment of Divorce.

Having considered these facts, the Master correctly described the circumstances as marked with a "lack of flexibility . . . in the setting of a rigid docket call[.]" Seemingly, the Commission gave no consideration whatsoever to the circumstances as created by Judge Brennan's acts. As the Florida Supreme Court has noted:

We recognize that it is easy . . . to lose one's judicial temper, but judges must recognize the gross unfairness of becoming a combatant with a party. A litigant, already nervous, emotionally charged, and perhaps fearful, not only risks losing the case, but also contempt and a jail sentence by responding to a judge's rudeness in kind. The disparity in power between a judge and a litigant requires that a judge treat a litigant with courtesy, patience and understanding. Conduct reminiscent of the playground bully of our childhood is improper and unnecessary.

In re Eastmore, 504 So 2d 756, 758 (Fla. 1987). Here, Respondent appeared as a litigant in an emotionally charged setting while Judge Brennan yielded the power of the bench in an arbitrary

¹⁵ There can be no doubt that had Respondent known that Judge Brennan had contacted Mr. Fischer regarding the events that transpired on March 16, 2011, she would have had sufficient grounds to seek Judge Brennan's disqualification. Judge Brennan's contact with Mr. Fischer raised a substantial conflict of interest between her and Respondent given Judge Brennan's duty to preside over the divorce proceedings because at this point Judge Brennan's interest intersected with that of Respondent.

and somewhat capricious manner. The cause and effect of this exchange cannot be overlooked in assessing the factual circumstances of Respondent's actions. This Court should understand this context, as the Master did, in evaluating Respondent's lack of culpability.

In light of all the evidence in the record, this Court should conclude, as did the Master, that Respondent's and Ms. Dudley's prior practices, along with the urgency of the matter, ultimately led to confusion in their agreed-upon or implicit roles, and eventually led to mistrust and animosity about the signing of the final document, the May 5, 2011 Motion to Set Aside (Master's Report p. 3-4, Apx. 295-96). Because the Master was correct in his assessment of the record facts and testimony, this Court should adopt his findings that Respondent didn't commit any misconduct as alleged in Count Two of the Complaint.

VI. THIS COURT SHOULD REJECT THE COMMISSION'S FINDINGS ON COUNT THREE THAT RESPONDENT MADE MATERIAL MISREPRESENTATIONS TO THE COMMISSION DURING ITS INVESTIGATION

- a. The Examiner offered no record evidence to support the findings that Respondent made misrepresentations to this Commission.**

In Count Three of the Complaint, Respondent was charged with making material misrepresentations in her Answers to the Commission's request for information during its investigation. Specifically, the Examiner relies on Respondent's Answers to the Commission dated October 14, 2011 and February 21, 2012. However, the Examiner never offered into evidence Respondent's Answers to the Commission 28 day letters dated October 14, 2011 or February 21, 2012. As such, the record is *completely devoid* of any evidentiary basis to support the allegations contained in Count Three of the Formal Complaint. For this reason alone, the Court should dismiss Count Three in its entirety.

Specifically, in Count Three of the Complaint, the Examiner asserts that Respondent made material misrepresentations when answering the Commission's investigatory 28 days letters. Neither the 28 days letters, dated October 14, 2011 or February 21, 2012, nor the answers to such 28 days letters, are contained anywhere in the record before this Court. Therefore, it is impossible for this Court to consider the factual basis of Count Three. When questioned about this record deficiency at the Commission's hearing on December 3, 2012, the Examiner avoided the question and instead relied on Respondent's Answer to the formal Complaint as a sufficient basis to prove the factual representations contained in Count Three (i.e., that Respondent's answers to the Commission's 28-day letters contained misrepresentations)(Hearing 12/3/12, Tr. 73-74, Apx. 337). However, the Answer to the Complaint does not recite the allegations nor answers to the Commission's 28 day letters. At most, the formal Complaint contains only general allegations. As such, neither the Master nor the Commission had any evidentiary basis upon which to rely in concluding that Respondent made material misrepresentations to the Commission in her answers to its 28 day letters dated October 14, 2011 or February 21, 2012.

It is elementary that a party cannot cite to nor rely on facts not in evidence. Here, the Examiner failed to offer into evidence any of Respondent's answers to the Commission, which form the bases of its allegations in Count Three. Nor did the Examiner elicit any testimony from Respondent during the hearing relative to her Answers to the Commission. Indeed, the entire transcript reveals that the Examiner never offered or elicited any evidence or testimony relating to Respondent's Answers to the Commission.

Because it is the Examiner's burden to prove the allegations of the Formal Complaint, Respondent did not have to respond to his failure to support Count Three. Having failed to offer

such evidence, the Master and the Commission were without any evidence or testimony whatsoever to support their finding that Respondent made any misrepresentations to the Commission.

For this reason, this Court should reject the Commission's finding that Respondent made misrepresentations to the Commission as alleged in Count Three. Having no evidentiary basis to support Count Three, the Commission should dismiss such Count in its entirety.

b. The record evidence does not support the Commission's conclusion that Judge Adams made material misrepresentations to the Commission during the course of these proceedings.

Aside from the Examiner's failure to offer evidence to support Count Three, the Court should reject the Commission's findings that Respondent made material misrepresentations to the Commission. The legal definition of "misrepresentation" denotes "[an] intentional false statement representing a matter of fact." *See* Black's Law Dictionary 4th Ed. The majority of the Commission's alleged misrepresentations are *de minimis* in nature and should be rejected out of hand as a basis for alleged misconduct.

For example, in paragraph 84 of the Complaint, the JTC alleges that Respondent misrepresented whether or not she was "walking away" from counsel's table on her way out of the courtroom on March 16, 2011, after Judge Brennan granted her divorce. The JTC alleges that Respondent was "seated at the defense table." This is an example of what the Commission alleges as a basis for the misrepresentation Count. The Master rejected outright these allegations as "too vague and subjective" to serve as a basis for a charge of misconduct. The Master was correct, and this Court should similarly consider the Commission's tactics in bringing charges based on such *de minimis* allegations.

This Court should also reject the Commission's charge of misrepresentation based on how many calls Respondent had placed to the court over the course of her divorce proceeding. In viewing the record evidence in this matter, this Court should consider the fact that Respondent gained absolutely no benefit whatsoever from answering whether she contacted the courthouse 3, 4, 8, or more times throughout her divorce proceeding.

There is no evidence to support the Commission's findings that Respondent made "material misrepresentations" as to how many times she called the courthouse or what specifically Judge Brennan's office said during such calls. During the hearing, Respondent testified that she didn't remember exactly how many calls she made to the court (Vol. I, Tr. 196, Apx. 49). The fact that Respondent did not know how many calls she made to the Court regarding scheduling matters throughout the years of her divorce proceeding is understandable and shouldn't serve as a basis for misconduct. The same holds true as to whether Judge Brennan's staff told her that such contacts with the court were improper.

Furthermore, as Judge Brennan testified during the hearing, the Judicial Code of Conduct expressly allows for calls to be made to a court regarding scheduling (Vol. III, Tr. 674, Apx. 170). Neither of Judge Brennan's clerks, Ryan Matthews nor Kristen Turner, testified to any improper conduct by Judge Adams relating to her telephone calls to the Court regarding scheduling. Ryan Matthews acknowledged that Judge Brennan had no written protocol regarding such calls, that Judge Brennan's court had 8,000-9,000 calls during the period the Adams case was pending and he did not keep track of the calls (Vol. III, Tr. 619-22, Apx. 156-57); and Ms. Turner had absolutely no recollection at all as to the specifics of the telephone calls she claimed she took from Judge Adams (Vol. IV, Tr. 753-56, Apx. 190-91). Additionally, there

is no evidence in the record suggesting that Respondent's calls to the court were for any improper purpose.

To the contrary, the testimony elicited during the hearing confirmed that Respondent's calls to the courthouse were solely for scheduling purposes. As Respondent testified, she found out late in the afternoon on March 15th that Dudley was unable to secure additional time. "I just needed time to make arrangements to come into court for my proceeding." (Vol. I, Tr. 181, Apx. 46). According to Respondent, the clerk said that Judge Brennan "wasn't available the next day" nor was she available the two days following (Vol. I. Tr. 182-83, 46). Respondent was also told that the court wouldn't hold the hearing on the scheduled trial date of March 21, 2011. *Id.* at 183, Apx. 46. Respondent also heard laughing in the background during her conversation with Judge Brennan's clerk (Judge Brennan testified that she was standing next to her clerk at the time of Respondent's phone call to the court).

In short, neither Respondent nor Judge Brennan's staff had any specific recollection as to how many times Respondent may have called the courthouse and there was no testimony that Respondent had made any improper demands other than inquiring about an adjournment. Furthermore, contrary to the Commission's unfounded assertion that Respondent was attempting to leverage her position as a judge to garner favor by the court, there is absolutely no record evidence that Respondent attempted to do so.

This Court should also reject the JTC's finding that she misrepresented to the Commission whether she had permission to affix Dudley's signature to the motion to set aside the judgment. In his report, the Master rejected entirely Count Two (forgery and uttering and publishing) of the Complaint finding that Respondent lacked the necessary intent to injure or defraud anyone. The Master also emphasized that Respondent's attorney "was unavailable for a

short, but critical length of time and Respondent, arguably, affixed Mr. Dudley's signature to the documents in order to meet a filing deadline[.]”

Notwithstanding his rejection of Count Two in its entirety, the Master found that Respondent misrepresented to the Commission whether she had permission to affix Dudley's signature to the Motion. In reaching his conclusion, the Master relied on the Examiner's Exhibit 32 as “adequate enough to prove the allegation[.]” However, the Master also pointed out that Respondent's actions were justified based on “urgency, lack of flexibility, and difficulty of communication in the setting of a rigid docket call [that] lead to confusion, mistrust and eventual animosity between Respondent and Ms. Dudley.” (Master's Report, pg. 3-4, Apx. 295-96). The Master's finding as to Count Two should apply with equal force to Count Three and whether Respondent misrepresented to the Commission whether she had permission to file the subject motion. The record is clear that Ms. Dudley was absent for a “critical length of time” during which Respondent had to file the motion to preserve her appellate rights.

There is also evidence in the record that Dudley indicated to Respondent that “[i]f you want to preserve your appellate rights file a motion.” (Examiner's Exhibit 17; E-mail from Dudley to Respondent dated April 26, 2011, Apx. 395). Consistent with Dudley's instructions, Respondent prepared and filed the subject motion to set aside her judgment of divorce on May 5, 2011. Throughout these proceedings, Judge Adams believed (and still does) that she did in fact have permission, implied or otherwise, to sign Dudley's name to the motion.

In finding that the Respondent misrepresented her answer to the Commission on this subject, the JTC failed to consider Respondent's subjective intent and perception at the time she filed the motion, including the record evidence of Dudley's instructions to Respondent that if she wished to preserve her appellate rights she should file a motion.

In overlooking such evidence, the Commission relied on Examiner's Exhibit 32, which is an e-mail Dudley sent to Respondent after the motion had been filed. Because the Examiner's Exhibit 32 was sent after the motion in question, it fails to address Respondent's subjective intent in filing the motion under Dudley's signature. In this regard, the JTC erred in relying on Dudley's after-the-fact e-mail that does not support the conclusion that Respondent made a material misrepresentation.

Additionally, this Court should strongly consider that the Master found that Dudley's testimony lacked credibility (not the least of reasons for doing so was Dudley's invocation of the right against self-incrimination, at which point she refused to answer any questions). Having rejected Dudley's testimony as lacking veracity, there is no other record evidence to support the JTC's finding that Respondent intentionally misrepresented to the Commission whether she had Dudley's permission to affix her signature to the motion to set aside the judgment of divorce.

As set forth herein, the Examiner has failed to demonstrate that Respondent acted in bad faith as to the allegations alleged in Count Three. The Examiner cannot simply seize upon a hyper-technical, fact-specific allegation without any showing of scienter to prove that Respondent made misrepresentations to the Commission. *US Fid & Guar Co v Black*, 412 Mich 99, 118-19 (1981)(noting that the "innocent misrepresentation rule differs [from traditional misrepresentation] in eliminating scienter and proof of the intention that the misrepresentation be acted upon."). For these reasons, the Court should find that there is insufficient evidence that Respondent committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the Respondent's fitness for judicial office.

VII. POSSIBLE SANCTIONS

a. Based on the evidence of Respondent's isolated, off-the-bench conduct during her extremely acrimonious divorce, no discipline is warranted under the criteria set forth by the Michigan Supreme Court

For the reasons set forth herein, the Examiner failed to prove any of the counts of the Complaint by a preponderance of the evidence. Assuming, however, that the Court were to disagree, the Commission's heavy-handed recommendation of a 180-day suspension is not warranted nor consistent with this Court's prior precedents.

This Court has repeatedly stated that the purpose of judicial disciplinary proceedings is to protect the integrity of the judicial system and not to punish a judicial officer. Any discipline imposed should seek to meet this objective. Consistent with this philosophy, the Court has identified several factors to consider when deciding what level of discipline to impose, including whether the conduct at issue occurred on or off the bench, whether it was part of a pattern and practice, implicated the actual administration of justice, and whether the conduct occurred spontaneously. *In re Brown*, 461 Mich 1291, 1292-93 (2000). Here, the JTC grossly misconstrued the relevant *Brown* factors and recommended an unduly punitive suspension of 180 days. This Court should reject the Commission's recommendation.

The record evidence establishes that Judge Adams faithfully serves the Wayne County Circuit Court bench Family Division, and has done so without incident. At the time of her divorce, Judge Adams carried a substantial caseload of more than 800 pending cases in the family division and none of her cases were out of "time-standards." (Vol. IV, Tr. 764-67, Apx. 193) The import of these facts is that Judge Adams competently and proficiently handles her docket for the public who has repeatedly elected her to serve them. It should be underscored again that the matter pending before this Court has absolutely nothing to do with Judge Adams' performance as a duly elected judicial officer.

To the contrary, this matter focuses solely on Judge Adams as a litigant in a protracted, intensely acrimonious divorce from her husband of 31 years. In this regard, the Court should consider the overwhelming stress and anxiety of her divorce under which Respondent is now being scrutinized. In this sense, the actions before this Court were brought on by heat of the moment and limited to Respondent's intimately personal divorce from her husband.

Here, all of the above factors militate in favor of rejecting the Commission's recommended discipline. Contrary to the JTC's conclusion, Judge Adams' actions were confined to her divorce case and do not represent a pattern or practice of any misconduct. In its recommendation, the JTC contends that Respondent's "repeated" calls to Judge Brennan's chambers and "unauthorized signing the names of her attorneys" constituted a pattern and practice of misconduct "during that period." (JTC recommendation, pg. 17, Apx. 355). The Court should reject the Commission's analysis as misguided. Judge Adams has never been subject to any disciplinary proceedings, and the facts relied upon by the Examiner are confined solely to Judge Adams' setting in an emotionally charged divorce proceeding.

A 180-day suspension does little to promote the goal of preserving the public integrity of the judicial system given Respondent's isolated, off-the-bench conduct. This matter was instigated by two disgruntled attorneys (her lawyer and her ex-husband's lawyer each with their own incentives, bias, and motives) in the context of Judge Adams' personal divorce. None of the acts alleged in the Complaint deal with Judge Adams's performance as a judicial officer on the Wayne County Circuit Court bench. To this end, a 180-day suspension doesn't promote the goal of protecting the judiciary but rather seeks to punish Judge Adams for her actions as a private litigant in a private, bitter divorce in which two members of the bench ultimately came to be at odds.

The Court should also reject the Commission's unfounded assertion that Judge Adams' actions were "premeditated and deliberate." To the contrary, the events on March 16, 2011 occurred as an aside *after* Judge Brennan had dissolved Respondent's marriage. Judge Brennan's sua sponte admonishment triggered the entire event such that Judge Adams' response was spontaneous and without plan or design. Obviously Judge Adams had absolutely no idea that Judge Brennan would launch into such an inquiry about whether Respondent had called the courthouse to seek an adjournment.

The Commission also concluded, without any evidence whatsoever, that Judge Adams was attempting to "leverage her position as a WCCC judge in order to obtain special treatment not available to other non-judicial litigants." (JTC Recommendation, pg. 18, Apx. 356). There is absolutely no record evidence of that Judge Adams had attempted curry favor based on her position as a judge. The Commission's conclusion is entirely without any factual basis. Nor did Respondent's actions have any effect whatsoever on the justice system or her case. Against the record evidence and without any further elaboration, the Commission concluded that Respondent's actions were "more prejudicial to the administration of justice than the appearance of propriety." Respondent respectfully disagrees. Again, this matter arose out of Judge Adams' own personal divorce. She was a litigant who, under the stress of the situation, was placed in a precarious situation of having to defend her rights after her attorney failed to be her advocate.

Judge Adams gained no advantage nor was she attempting to do so by the course of events at issue. The important fact that seems to be overlooked here is that the dispute on March 16, 2011 centered on whether Respondent had called the court to seek an adjournment. The Commission's assertion that Respondent was attempting to leverage her position as a judge to obtain special treatment (i.e., an adjournment due to her own docket) is untenable.

It is also just plain wrong for the Commission to contend that Judge Adams acted with a purpose and design to “prevent Judge Brennan from learning the truth about who called her staff on March 15, 2011 to request an adjournment of the *pro-confesso* hearing.” (JTC Recommendation, pg. 19, Apx. 357). Again, this Court should not overlook the fact that the entire dispute concerned whether Respondent had called the court to request an adjournment, not a substantive issue of fact or law relating to the merits of a case.

This Court has on many occasions imposed public censure in judicial discipline cases involving spontaneous, isolated, off-the-bench conduct by a judicial officer. For instance, *In re Bradfield*, 448 Mich 1229 (1995), this Court imposed a public censure after respondent Bradfield purposefully ran his vehicle into a security officer after a dispute arose between the respondent and another motorist. Notwithstanding Judge Bradfield’s extreme and violent conduct, this Court concluded that a public censure was sufficient discipline, given that Judge Bradfield’s conduct was both isolated off-the-bench.

Similarly, In *In Matter of O’Brien*, 441 Mich 1204 (1992), the respondent received only a censure after verbally and physically abusive conduct to an airline representative. *See also Matter of Thomas*, 441 Mich 1206 (1992)(public censure for judge convicted of malicious use of a telephone to threaten and to make obscene calls and for assault and battery); *Matter of Brennan*, 433 Mich 1204 (1989)(public censure imposed on respondent for act of plagiarism in article submitted for publication in law review). While the aforementioned conduct should not be taken lightly, these cases exemplify the Court’s policy that judicial discipline is not intended to punish but rather to preserve the integrity of the judicial system. In instances where the alleged conduct occurred off-the-bench, in isolation, or under spontaneous circumstances and

without prejudicing the administration of justice, this Court has found that public censure is often sufficient discipline.

This Court has imposed public censures in cases involving more serious allegations of misconduct relative to the bench. For example, in the case of *In re Binkowski*, 420 Mich 97 (1984), this Court imposed only a public censure on a district court judge who altered a letter sent to him by the JTC in order to give his colleagues the false and misleading impression that the JTC had dismissed the grievances against him. There, this Court found that the respondent's conduct was "clearly prejudicial to the administration of justice and misconduct in office, warranting public censure."

Likewise in *In re Haley*, 476 Mich 180 (2006), this Court imposed a public censure on a judge for accepting in open court football tickets from an attorney appearing before him. As the *Brown* factors make clear, misconduct on the bench is more serious than misconduct off the bench. In *Haley*, the respondent's on-the-bench conduct also implicated the appearance of impropriety, which is another factor under *Brown* that isn't present here.

In this case, Judge Adams' alleged misconduct does not involve, whatsoever, her duties as a judicial officer or her treatment of the public in serving them. As the above cases demonstrate, the goal of judicial discipline is not to punish but rather to preserve the judiciary. The Commission's heavy-handed recommendation is inconsistent with the purpose of these disciplinary proceedings. For these reasons, Respondent respectfully requests that this Honorable Court find that no discipline is warranted given the facts and circumstances of this case.

b. The imposition of costs is unconstitutional.

There is no constitutional authority for the Court to impose costs on a judicial officer in a JTC proceeding. As one Justice of the Court has previously noted:

[T]here is no constitutional authority to assess costs against a judge. Subsection 2 of Const 1963, art 6, § 30 provides that “the supreme court may censure, suspend with or without salary, retire or remove a judge . . .” Nothing in this constitutional provision gives this Court any authority to discipline the judge by assessing the judge the costs of the Judicial Tenure Commission proceedings against him or her.

In re Nettles-Nickerson, 481 Mich 321, 324 (2008)(internal citations omitted). In the absence of any constitutional authority to do so, the Commission’s request for costs should be denied.

CONCLUSION

Judge Adams has a more than thirty-year career as an attorney and judicial officer with an exemplary record. She has been recognized by numerous awards and has served as a pillar of judicial excellence and integrity. She has never been disciplined in any fashion. She has faithfully handled a heavy docket in the family division of the Wayne County Circuit Court even while under the most extreme of circumstances. The Commission’s picking apart of her divorce as a basis for these charges is both unwarranted and inappropriate.

The charges brought against Respondent in the instant case do not reflect the actual events that gave rise to this matter. Moreover, the underlying events do not call into question Judge Adams’ fitness to serve or implicate the appearance of impropriety. For all the reasons contained herein, Respondent requests this Court dismiss the charges and reject the Commission’s recommendation for an order of discipline.

Respectfully submitted,

DETTMER & DEZSI PLLC

February 19, 2013

By:



MICHAEL R. DEZSI (P64590)
Attorney for Respondent