STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. JAMES P. NOECKER
Judge, 45th Circuit Court
Centreville, MI 49032

_____/

FORMAL COMPLAINT NO. 73

MSC Docket No. 124477

EXAMINER'S BRIEF IN SUPPORT OF JUDICIAL TENURE COMMISSION'S DECISION AND RECOMMENDATION

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I. STATEMENT OF MATERIAL PROCEEDINGS

On August 20, 2003, the Michigan Judicial Tenure Commission ("Commission") filed a three-count complaint against the Hon. James Noecker ("Respondent"), 45th Circuit Court Judge, Centreville, Michigan. Count I of the complaint alleged that Respondent had persistently abused alcohol, and that the work of the court had suffered as a result. Count II alleged that Respondent had consumed alcohol prior to crashing his vehicle into the Klinger Lake Party Store on March 12, 2003, that alcohol was a factor in that crash, and that Respondent had been covering up the role of alcohol. Count III alleged that Respondent had made false statements to the Commission.

The Respondent filed an answer on or about September 16, 2003. The Michigan Supreme Court entered an order on September 3, 2003 appointing retired 2nd Circuit Court Judge John N. Fields to serve as master in this case. Various telephone conference calls between counsel and the master were held, a pre-trial conference was held, a scheduling order was entered and pre-trial hearings were held at the Calhoun County Courthouse. The public hearing was held on January 13, 14, 15, 20, 21, and 22, 2004 in Kalamazoo, Michigan. Counsel stipulated (a) to submit written closing arguments; (b) to submit proposed findings of fact and conclusions of law; (c) to have the right to file a rebuttal argument; and (d) to

extend the period within which the master should submit his report to April 30, 2004.

On April 30, 2004, the master filed his report, finding that Respondent had engaged in the judicial misconduct alleged in the formal complaint. Based on the findings of fact and conclusions of law contained in that report, the Commission filed a petition for the interim suspension of the Respondent on May 4, 2004. The Supreme Court granted that petition on May 28, 2004, effective June 1, 2004.

Respondent filed objections to the master's report on June 1, 2004, pursuant to MCR 9.215. The examiner filed a response on June 11, 2004. The Commission held a public hearing pursuant to MCR 9.216 to consider those objections on June 24, 2004.

On August 4, 2004, the Commission issued its Decision and Recommendation, calling for Respondent to be removed from the office of judge of the 45th circuit court. A majority of the Commission also recommended that Respondent reimburse the costs of the prosecution as part of that sanction. A minority further recommended that the Court order restitution to St. Joseph County for the cost of visiting judges since the time of Respondent's interim suspension on June 1, 2004. A separate minority recommended that the Court not require Respondent to reimburse the Commission for costs incurred. The Respondent filed

a petition and brief to reject or modify the Commission's recommendation on August 27, 2004.

II. STATEMENT OF FACTS

A. The car crash and subsequent cover-up

1. The crash itself and subsequent events

Respondent is a judge of the 45th Circuit Court, St. Joseph County, Michigan. (MR 9) On March 12, 2003, he left court for the day at approximately 3:30 p.m. and went home. (MR 8; MR 13; Stipulation, T 33) At approximately 5:20 p.m., Respondent drove into the parking lot of the Klinger Lake Party Store at the northwest corner of US-12 and Klinger Lake Road and crashed into the building, causing $15,000 - $20,000 in damages. (Respondent's Answer to Formal Complaint ["Answer"], paragraphs 11-13; T 155-165 [J. Pankey])

Harry West was in the parking lot at the time. (MR 13; T 42 [West]) He saw Respondent drive directly into the building, without slowing down or speeding up. (MR 14; T 42 [West]) When Respondent got out of the car, West could see that Respondent was red-faced. (MR 15; T 49 [West]) West has known Respondent for years, and has seen him drunk in the past. (MR 15; T 50 [West]) West related that Respondent had a distinctive walk when he was sober and another distinctive walk when he was drunk. (MR 15; T 50-51 [West]) West testified that Respondent walked to the store from his car in his drunken manner.

(MR 15; T 51 [West]) Although he could not judge whether Respondent was drunk, West concluded "that [Respondent] had been drinking." (T 82 [West])

There were several people in the store at the time. Three of them testified that Respondent was red-faced. (T 124 [Miller]; T 131 [Bender]; T 137 [Seager].) Denny Seager, himself a former bartender, testified that Respondent was "wobbly" on his feet. (MR 15; T 136 [Seager].) He also testified he thought Respondent had been drinking. (MR 21; T 136 [Seager].)

The owner of the store, Janice Pankey, was upset and wanted "someone to get her husband." (MR 15; T 164-165 [J. Pankey]) Respondent said he would, and then, despite advice from two of the store patrons to the contrary, abruptly left. (MR 15; T 123 [Miller]; T 130 [Bender]) The witnesses testified that Respondent was in the store for no more than five minutes. (T 123 [Miller]; T 131 [Bender]; T 135 [Seager]; T 168 [J. Pankey])

The police arrived and interviewed the various witnesses. Trooper Craig Wheeler received a call from Respondent's wife, and the trooper said he would be coming out to Respondent's house. (MR 16) Trooper Wheeler returned to the post to get back up, and then he and Sergeant Steve Barker proceeded to Respondent's home. (MR 16)

When they arrived at approximately 7 p.m., Respondent was already outside. [Answer, Paragraph 16; T 238-239 (Wheeler); T 285 (Barker)] Barker stayed

outside with Respondent and interviewed him, while Wheeler went inside to talk separately with Respondent's wife. (MR 16; T 239 [Wheeler]; T 286 [Barker]) Respondent took a preliminary breath test ("PBT"), which yielded a blood alcohol result of .10 at 7:22 p.m. (MR 16; Answer to the formal complaint, Paragraph 18; T 241 [Wheeler]; T 291 [Barker])

2. Respondent's story

Respondent testified that he was working on an opinion at home that afternoon. (T 1224; 1243 [Noecker]) He then left his home at approximately 5 p.m. to obtain firewood from his wife's warehouse located next to the Klinger Lake Trading Post in White Pigeon Township, St. Joseph County, Michigan. (MR 13; T 1245 [Noecker].) He admitted crashing into the party store at 5:20 p.m. (Answer to the formal complaint, Paragraph 12)

Respondent claimed he took it upon himself to go find the husband of the store owner, Mr. Pankey. (T 1254 [Noecker]; Answer, paragraph 15.) Respondent testified he drove to three separate locations on Middle Lake to look for Mr. Pankey.[1] (T 1256-7 [Noecker]) At each location, Respondent got out of the car, walked down towards the water's edge, contemplated whether the ice was strong enough to hold him, decided it was not, returned to the car, turned it around and

[1] Respondent conceded he did not know what color coat Mr. Pankey was wearing, how many people he was with, where he might be out on the ice, or any other necessary identifying characteristics. (T 1287 [Noecker])

drove on. (T 1257-1258; 1289-1299 [Noecker]) He repeated this process two more times. (T 1259; 1289-1299 [Noecker]) After the third stop, he went home rather than back to the store because, he claimed, it was easier to go home and call the store than to drive back there. (T 1260 [Noecker])

Respondent arrived home "no later than 5:40 p.m." (Answer, Paragraph 16.) He told his wife what had happened and then called the Klinger Lake Party Store. (T 1262-1263 [Noecker]) His wife took his blood pressure, and his systolic reading was 220. (T 1263 [Noecker]) He repeated that test after two minutes, but the results were still 220. (T 1263 [Noecker]) Respondent drank vodka, allegedly to reduce his blood pressure. (T 1264 [Noecker])

When the police arrived, Respondent told Sgt. Barker that "his foot had slipped off of the brake, and hit the gas and he had struck the side of the building." (T 286 [Barker]) Respondent told Barker he had had mud on his shoes. (T 287 [Barker]) Respondent did not show his shoes to Barker, and Barker did not look to see if they were muddy. (T 287 [Barker]) Wheeler testified he did not recall the Respondent's car being muddy. (T 280 [Barker]) Respondent related how Mrs. Pankey wanted someone to get her husband, so Respondent decided to be that person. (T 286 [Barker])

3. Additional facts

Barker testified Respondent would "pace, walk away" whenever Barker tried to get close enough to smell the presence of intoxicants. (T 290 [Barker]) It seemed to Barker that the walking and pacing were calculated to prevent that. (T 290 [Barker]) Nevertheless, Barker detected a slight smell of alcohol. (T 290 [Barker])

Barker had asked Respondent whether he had had anything alcoholic to drink. (T 288 [Barker]) Respondent paused, looked away, and then said "yes." (T 288-289 [Barker]) Respondent said his wife had poured him a glass of vodka. (T 310 [Barker]) He then said that he had poured the glass of vodka himself. (T 310 [Barker])

Barker then interviewed Respondent's wife "to try and confirm with what Judge Noecker told me about him having a drink when he arrived home." [T 291 (Barker)] Having done that, Barker advised Respondent that "after speaking with him and speaking with [Respondent's wife] that I did not think someone was telling me the truth about his activities upon returning home after the crash, in reference to him having a glass of vodka." [T 292 (Barker)] Respondent then told Barker that he [Barker] "was in a position to fry him." [T 292 (Barker)]

B. Respondent's persistent abuse of alcohol and its impact on the caseload and Respondent's administrative duties

Respondent's administrative and adjudicatory difficulties extend back a long way. Kevin Bowling, the SCAO Region II Administrator from December 1985 through May 1998, had many problems with Respondent. (MR 9-11) Respondent was not consistent in his filings of the 8.107 reports (which are used as a caseflow management tool). (T 424, 429 [Bowling]) He also lagged in his speedy trial reports. (T 430 [Bowling]) He refused or failed to attend meetings with other judges in St. Joseph County, where he was the chief judge, attending perhaps only 10-15% of such meetings. (MR 9; T 436 [Bowling]) Similarly, he failed or refused to attend meetings on a regional basis, attending perhaps only 10-15% of them. (T 437 [Bowling].)

Respondent also kept inconsistent hours: he would come in late or leave early. Those same problems continued under Bowling's successor, James Hughes. (T 634 [Hughes]) Judge Schaefer, the acting chief judge of the circuit for most of 2003, noted the same problems. He had many comments from other judges that Respondent was frequently away from his duties. (T 510 [Schaefer])

Hughes further testified that the Respondent had a much higher number of cases that had been pending over two years than other judges similarly situated. [T, 623 (Hughes).] Hughes charted this information out in a graph received into

evidence as Exhibit 56.[2] In 1998, the Respondent had more than 50 cases pending over two years, which was very high. [*See* Examiner's Exhibit 56.] Similarly, in 1999, the Respondent had some 60 cases that had been pending over two years, which was higher than anyone else similarly situated. In the years 2000 and 2001, Respondent had more than 50 cases pending over two years in each year, which is higher than anyone else similarly situated.

Dr. Harvey Ager, a psychiatric expert in the field of alcoholism, testified that alcoholics have work problems, including absence, tardiness, avoidance, and, meeting deadlines. (T 392 [Ager]) They also tend to be disorganized, and there is instability in their performance. (T 392 [Ager]) Even Respondent's expert witness, Dr. Norman S. Miller, testified that more than the general population, alcoholics tend towards absenteeism, irregular hours, lack of focus, and lack of attention. (T 1194 [N. Miller])

III. ARGUMENT

A. STANDARD OF REVIEW

The Supreme Court reviews the Commission's findings of fact on a *de novo* basis. *In re Chrzanowski*, 465 Mich 468 (2001). The Court also reviews the

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[2] He compiled the information for the graphs from the caseload reports filed with SCAO. [T, 625 (Hughes).] Copies of the caseload reports were received into evidence as Examiner's Exhibits 62 (for the year 1999), 63 (for the year 2000), 64 (for the year 2001), and 65 (for the year 2002).

Commission's sanction recommendations on a *de novo* basis. *Id; In re Jenkins*, 437 Mich 15 (1991).

B. STANDARD OF PROOF

The standard or proof in judicial discipline proceedings is by a preponderance of the evidence. *In re Chrzanowski, supra.*

C. REMOVAL FROM OFFICE IS THE EQUIVALENT AND PROPORTIONAL SANCTION REQUIRED IN THIS MATTER

1. Respondent's statements and testimony that he had not consumed alcohol prior to the crash are false; he has been lying about this matter from the beginning.

The gravamen of Respondent's offense is the lying,[3] and he has been lying about this matter since the day of the crash on March 12, 2003. He lied to the police that night, saying he had not consumed alcohol prior to the crash, and he propagated that lie to the media over the next few days, to the Commission, and again to the master under oath during the hearing on the formal complaint.

Based on the findings of the master and the Commission, it is reasonable to conclude that the Respondent was under the influence of alcohol at the time of the

[3] Respondent points out that neither the Commission nor the master used the word "lie." That is lexically correct, but it does not change anything. Even a cursory review of their findings shows the complete rejection of Respondent's testimony and theory. The inescapable conclusion is that Respondent lied. The Commission and master were apparently reluctant to be so blunt as to characterize the testimony and statements as "lies," couching their own findings instead in diplomatic niceties.

crash.[4] Under the law applicable at the time, a reading of .10 allowed for the presumption that the person had the same blood alcohol at the time of driving. *See* MCL 257.625a(9); *People v Campbell*, 236 Mich App 490 (1999). Respondent's blood alcohol level was at least .10 at the time of the crash.[5]

Moreover, the precise level of Respondent's blood alcohol is not the *sine qua non* of these proceedings. Because Respondent maintains that he had nothing to drink beforehand, the presence of *any* alcohol in his system at the time of the crash vitiates his protestations of innocence. Based on the witnesses at the scene, as well as the scientific evidence of the PBT and Dr. Adatsi's testimony (and Dr. Bryde's concurrence in Dr. Adatsi's calculations), it is clear that Respondent had consumed alcohol prior to the crash. As the master found, alcohol was a factor in this matter. (MR 22, paragraph 40)

Thus, Respondent's statements disputing the use of alcohol prior to the crash were deliberate falsehoods. For example, his tortured tale of searching for the owner of the party store – yet not even knowing where the man was or what he was wearing – is utterly incredible.

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[4] Although neither the master nor the Commission made this specific finding, it is, nonetheless, consistent with the master's finding that alcohol was a factor in the crash. (MR 20, paragraph 40)

[5] Dr. Felix Adatsi, Ph.D., a toxicologist with the Michigan State Police who is an expert regarding blood alcohol level, testified that Respondent's blood alcohol level could have been as high as .12-.14 at the time of the crash. (T 582 [Adatsi]) Dr. Bryde, the expert produced by the Respondent, though not a toxicologist himself, (T 709 [Bryde]), testified that Dr. Adatsi's calculations were correct. (T 707 [Bryde])

Similarly, his story that he took a drink to reduce his blood pressure is also not believable. Although the experts' testimony conflicted on this point,[6] even Respondent's expert, Dr. Norman Miller, testified that someone with a reading as high as Respondent's was in danger of an acute stroke and should "go to the physician and/or the emergency room." (T 1199, 1203 [N. Miller]) However, Respondent did not call his doctor. (T 1299 [Noecker]) He did not call an emergency room or any other urgent care facility. (T 1302 [Noecker]) He did not do anything that could be construed as therapeutic. Rather, it is clear that Respondent was lying about his use of alcohol that day. He had, in fact, consumed alcohol prior to crashing into the Klinger Lake Party Store.

Over time, Respondent has given a number of different versions about that crash. He told Sgt. Barker and Dr. Ager that his foot slipped off the brake due to the mud on his shoe. (T 286 [Barker]; T 388 [Ager]) On March 13 or 14, 2003, Respondent told Kathy Jessup, a free-lance journalist whose articles appear in the Kalamazoo Gazette, that he had been straddling the vehicle's console and had stepped on the accelerator when he had meant to step on the brakes. (Stipulation of Facts, T 29-30, 33) He did not tell her that his foot had allegedly slipped off the correct pedal onto the wrong one.

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[6] The examiner's expert, Dr. Harvey Ager, testified that alcohol would tend to aggravate hypertension. (T 394 [Ager]). Respondent's expert opined that it "probably would bring the blood pressure down." (T 1199 [N. Miller])

Respondent told Mark Alberts, a reporter for News 3 based in Kalamazoo, that he had inadvertently hit the gas pedal instead of the brake pedal. (Stipulation of facts, T 31, 33.) He did not tell Alberts anything about straddling the console.

Respondent proffered neither the "straddling-the-console" theory nor the mud-on-my-shoes theory to the Commission during the investigative phase of this matter. (Examiner's Exhibits 50 and 51.) Similarly, he made no such reference in his answer to the formal complaint.

Respondent returned to the straddling-the-console theme at the hearing in this matter. (T 1248-1249 [Noecker]) However, all the witnesses who saw Respondent said he was seated normally in the driver's seat. (T 43-44 [West]; T 106-107 [Carpenter]; T 135, 150 [Seager]; T 161 [Pankey].) There is no evidence (other than Respondent's slavishly self-serving story) that he was seated in an unusual manner. The master, having a better opportunity to observe the witnesses and their demeanor, rejected Respondent's testimony. (MR 20-22) The Commission correctly adopted that finding, and the Court should as well.

Respondent's foot did not slip off the brakes on to the gas, or hit the gas by accident. The witnesses at the scene testified that Respondent's car did not speed up or slow down. (T 42 [West]; T 105-106 [Carpenter]). An accident reconstruction expert confirmed that the evidence was not consistent with the driver's foot slipping off the brake onto the accelerator. (T 330-331 [Brown]).

Given the master's superior opportunity to observe the witnesses and their demeanor, the Commission properly adopted that finding as well.

There can be no serious challenge to the master's finding that Respondent consumed alcoholic beverages before he crashed into the Klinger Lake Party Store on March 12, 2003 and that alcohol was a factor in the crash. Respondent's statements to the police, the media, the Commission, and the master that he had not been drinking were simply untrue. Respondent made the false statements with full knowledge of their falsity.

2. Respondent's false statements require his removal from office.

A judge who lies is not fit to be a judge. This Honorable Court has stated that truism more than once. Where a judge lied, and even tried to fabricate an exhibit for the hearing on the complaint, the Supreme Court spoke harshly:

> Her statements to the press and the public, as well as to the Master and this Court, have clearly prejudiced the administration of justice, evidence a fundamental lack of respect for the truth-seeking process, and, furthermore, if left unrebuked, threaten to severely compromise the public's confidence in the judiciary's integrity. Accordingly, we find Respondent's actions to constitute misconduct in violation of Canons 1, 2A, 2B and MCR 9.205(C)(4). *In re Ferrara*, 458 Mich 350, 364-365 (1998).

See too In re Ryman, 394 Mich 637 (1975)[7,8]

That same sentiment is echoed in other jurisdictions. In *In re Judge C. Hunter King*, 857 So2d 432 (La 2003), the respondent denied forcing his staff to sell tickets to his re-election fundraiser. However, his court reporter had recorded him doing so. Respondent was cited for lying to the Commission, as the Louisiana Supreme Court noted:

> "Upon review of the record, we conclude that the most severe discipline is warranted in this case. Judge King's campaign misconduct, and his lying to the Commission twice, over a period of fourteen months when he had ample chance to admit his misconduct, is so prejudicial to the administration of justice, not only in his section of the court, but throughout the judicial system, that he cannot be allowed to remain on the bench. In our view, any discipline less than removal would undermine the entire judicial discipline process and diminish the strict obligation of judges to be truthful in the investigation by the Commission." 857 So2d at 450-451 (emphasis supplied).

In New York, a judge was removed from office for promising a former political leader that a case would be adjourned at his request and for exacerbating his misconduct by lying to the FBI. *In re Levine*, 545 NE 2d 1205 (1989).

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[7] Respondent's false testimony before the master and the attorney disciplinary agency resulted in his removal from office.

[8] The Michigan Supreme Court also suspended a judge for one year for, among other things, making false statements to police. The judge was interviewed in connection with a criminal investigation and made false statements. The court took disciplinary action even though the Respondent Judge had provided correct information to the police two days later. *In re Chrzanowski*, 465 Mich 468, 471, 490 (2001).

However, *Chrzanowski* differs from this matter in that former Judge Chrzanowski made her false statements to the police (not under oath in a court setting) and she corrected those false statements within two days. While that does not ennoble her conduct, the Court may well have found that the need for removal was lessened by the respondent's recantation and implied contrition. Respondent in this matter has shown no such remorse. He continues to maintain his false statements and testimony today.

Another New York judge was removed for a variety of improper conduct which was ". . . compounded further by petitioner's lack of candor . . ." with respect to the motivation underlying his actions, including testimony that was evasive, incredible and false. *In Matter of Gelfand*, 70 NY2d 211, 215 (1987).

A Florida judge's lying to the commission about his involvement in an *ex parte* communication with another judge also resulted in his removal. *In re Leon*, 440 So2d 1267 (Fla. 1983). Although the judge later recanted his misstatements, the Florida Supreme Court removed him and stated:

> The integrity of the judicial system, the faith and confidence of the people in the judicial process, and the faith of the people in the particular judge are all affected by the false statements of a judge. 440 So2d at 1269.

Another Florida judge was removed for election campaign improprieties, misuse of accounts while practicing law and "giving willfully deceptive testimony" before the Florida Judicial Qualifications Commission. *In re Berkowitz*, 522 So2d 843 (Fla. 1988). The Florida Supreme Court found the judge's willful deception by itself was sufficient to warrant removal. *Id.*

In the case at bar, the Respondent's conduct is so egregious that only one sanction is appropriate: removal from office. Respondent engaged in a complex cover-up of his improper conduct. A judge who lies under oath is no longer fit to wear the robe that symbolizes the judicial system. Respondent's extensive cover-up and lying require his removal from office. Nothing further need be said.

3. Respondent has not been able to manage his docket.

By Respondent's own admission, he has been an alcoholic since the early 1980's.[9] His status as an alcoholic is not, in and of itself, judicial misconduct. But the master found that Respondent has not diligently discharged his judicial and administrative functions and that Respondent's alcoholism was a factor in that (MR 18-19). The Commission agreed.[10]

Both psychiatric experts in the field of alcoholism testified that alcoholics have work problems, including absence, tardiness, avoidance, and, meeting deadlines. (T 392 [Ager]) They also tend to be disorganized, and there is instability in their performance. (T 392 [Ager]) More than the general population, alcoholics tend towards absenteeism, irregular hours, lack of focus, and lack of attention. (T 1194 [N. Miller])

All of those traits manifest themselves in the Respondent, and, as a result, the administration of justice suffered. Respondent did not even bother to file speedy trial reports (required to be filed monthly by MCR 8.110[C][5] and MCR 8.103[3]), which measure delay in criminal cases, for nearly 15 years. (T 615-616

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[9] He has been in and out of alcohol rehabilitation programs five times since 1994. (MR 18, paragraph 3)

[10] Respondent's apparent claim that the Americans with Disabilities Act ("ADA") somehow pre-empts these judicial disciplinary proceedings is without merit. As Respondent himself concedes, the ADA protects those "who with or without reasonable accommodation, can perform the essential functions of the employment position . . .." Clearly, Respondent *cannot* perform these essential functions. The ADA is simply not applicable here.

[Hughes]; Examiner's Exhibits 28-31) Respondent was similarly lax in his filing of the "matters undecided" reports, pursuant to MCR 8.107.

The speedy trial reports typify Respondent's docket problems. Between the years 1986 and 2003, inclusive, there should have been 216 of these monthly reports.[11] There is no record of the Respondent having filed such a report until October, 2000. [T, 616 (Hughes).] For nearly 15 years, the Respondent simply did not comply with a court rule that was designed to ferret out docket management problems.[12] [T, 616 (Hughes).]

From the evidence, it seems that this was more than just benign neglect. Just examining the last three years through the end of 2002, 36 reports were due. Of those, only 14 were filed "on time."[13] Six of those were late, and 16 were not filed at all.[14] In other words, the Respondent was only on time 39% of the time, he was late 17% of the time, and in 44% of the cases – *i.e.*, in a plurality of those handled – he simply did not file a report at all. [*See* Examiner's Exhibits 28-31; T, 615 (Hughes).]

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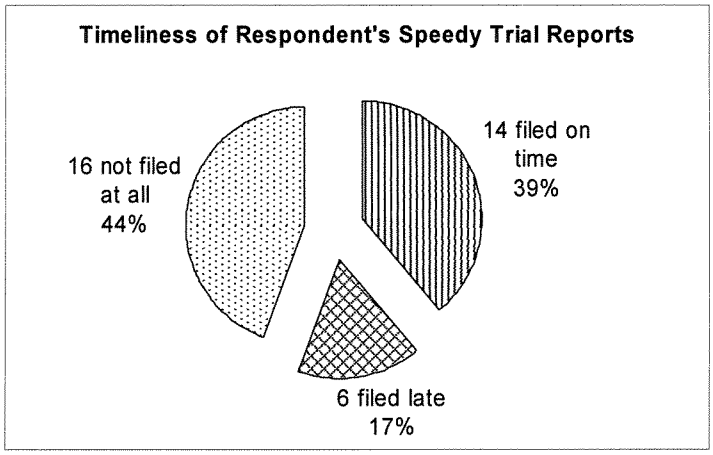
[11] (18 years) x (12 months per year) = 216

[12] The State Court Administrative Office (SCAO) "cannot monitor a judge's case management if the judge neglects to file the reports required by the court rule." *In re Seitz*, 441 Mich 590, 622 (1993).

[13] The reports are due monthly according to MCR 8.110(C)(5). However the form itself (see e.g. Exhibit 28) calls for the report to be filed on the first of each month. For purposes of argument, a report will be deemed "on time" as long as it was filed within the same month it was due.

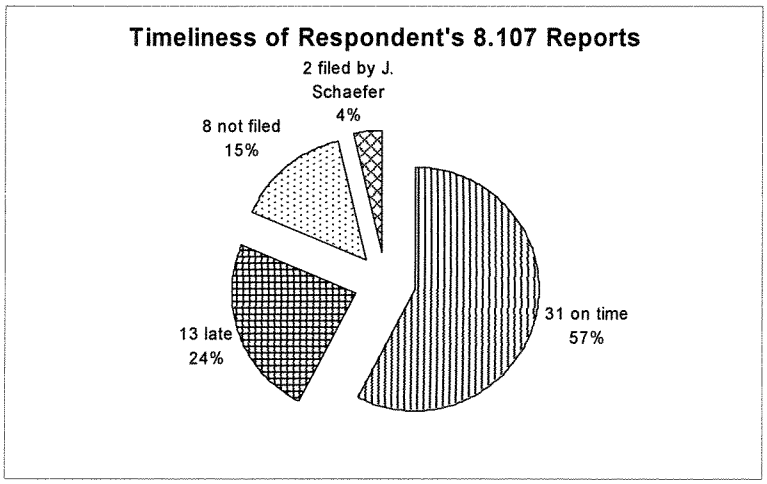
[14] "The fact that the SCAO accepted tardy filings from the respondent does not excuse his failure to comply with the rule." *Seitz, supra*, 441 Mich at 622.



Again, it seems that there is more than benign neglect behind this. For example, in the first report filed during this period, October 18, 2000, the Respondent noted that there were 59 cases that qualified for reporting. Judge Schaefer, a circuit judge of Kalamazoo County (and a former chief judge of that county), was the acting chief judge of the 45th Circuit. (T 506 [Schaefer]) He testified that he could only remember one time where the four Kalamazoo circuit judges ***collectively*** had 20 cases on the speedy trial report, but that they generally hover, ***collectively***, around 10 cases. [T 517 (Schaefer).] James Hughes, the Region II administrator for SCAO, further testified that 18 cases at one time was a number that was far too extreme. Respondent has had as many as 66 cases on the form. [*See* report dated August 20, 2002, which is part of Exhibit 29.] Respondent had more cases reported on the speedy trial report than any other judge in the region. (T 621 [Hughes]).

Similarly, judges are required to file reports known as "matters undecided" reports, pursuant to MCR 8.107. These reports are due on the first business day of January, May, and September of each year. Even if a judge has no cases to report, a report with the word "none" must be submitted.

Between January 1, 1986 and September 1, 2003, 54 such reports were due (18 years multiplied by three reports per year equals 54). Respondent, however, failed to file eight of them, *i.e.*, 15% of the total. [*See* Examiner's Exhibits 27A and 27B.] He filed 13 of them more than one month after they were due, *i.e.*, 24%. Of the 33 Respondent filed timely, two were due to the fact that Judge Schaefer had taken over as chief judge. Thus, Respondent, on his own, only filed 31 of the 54 required reports on time, *i.e.*, less than 60%, which yields him a failing grade.



Respondent's poor work habits are also demonstrated by the number of unresolved matters he had. He had a much higher number of cases pending over two years than other judges similarly situated. (T 623 [Hughes]) Hughes charted

this information onto a graph based on the caseload reports filed with SCAO. (T 625 [Hughes]; Examiner's Exhibits 62 [for 1999], 63 [for 2000], 64 [for 2001]), and 65 [for 2002]; Examiner's Exhibit 56.) Thus, in 1998, Respondent had more than 50 cases pending over two years, and 60 such cases in 1999. These numbers were higher than anyone else similarly situated. In each of the years 2000 and 2001, Respondent had more than 50 cases pending over two years, which is higher than anyone else similarly situated.

In addition, Respondent's "backlog rate" – the number of cases pending at the beginning of a period divided by the number of dispositions in that same period – was much worse than other judges similarly situated.[15] (T 630 [Hughes]) Examiner's Exhibit 57 demonstrates just how much worse Respondent was. For example, in 1999 the Respondent had a backlog rate of .82 while the next worst judge had a backlog rate of .58. Respondent's was consistently and significantly higher than any other judge. His backlog rate was .82 in 1999, .78 in 2000, and .79 in 2001. In the years 1995, 1996, 1997, and 1998, the backlog rate was similarly in the .80's or higher. (T 842 [Hughes])

It is no coincidence that Respondent's backlog rate improved from .79 in 2001 to .5 in 2002 (Examiner's Exhibit 57; T 633 [Hughes]) precisely during the period of his contract with the Lawyers and Judges Assistance Program of the State

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[15] The lower the backlog rate number, the better the judge is doing at processing the case flow. (T 630 [Hughes])

Bar of Michigan in January 2001. (See T 633 [Hughes]) When he could stay sober, it seems, Respondent could get his work done.

4. Respondent's administrative failures likewise call for his removal from office.

The Supreme Court addressed the problems of delay in handling matters and docket management in a couple of cases. In *In re Seitz*, 441 Mich 590 (1993), the respondent, among other things, neglected the adoption docket and refused to respond to requests by the SCAO. The Supreme Court removed Judge Seitz and adopted the Commission's findings as follows:

> The Master found and the Commission agreed that Judge Seitz's behavior in the handling of the adoption cases constituted misconduct in office. More specifically, the Commission found a persistent failure to perform judicial duties pursuant to MCR 9.205(C)(2); . . . a violation of the high standards of conduct necessary to preserve the integrity of the judiciary pursuant to Canon 1 of the Code of Judicial Conduct; a failure to dispose of business promptly contrary to Canon 3A(5); and a persistent failure to diligently discharge his administrative responsibilities, maintain professional competence and judicial administration . . . contrary to Canon 3B(1). *Seitz*, 441 Mich at 620-621. (Footnotes omitted).

Similarly, in *In re Hathaway*, 464 Mich 672, 681 (2001), the Court imposed a six-month suspension without pay, quoting approvingly from the Commission's findings:

> Respondent's constant and repeated adjournments of proceedings without good cause, as exemplified in the case of *People v Ketchings*, as well as repeated unnecessary and unexcused absences from judicial

> responsibilities during normal court hours were inappropriate. *Likewise, Respondent's overall lack of industry and proper management of her court docket as well as an unwillingness to take corrective action or accept constructive suggestions or assistance to improve case management, constituted a hindrance to the administration of justice and gave the appearance of impropriety*, all contrary to Canons 1 and 3 of the Code of Judicial Conduct and MCR 9.205(A) and (C)(2) and (4). (emphasis supplied)

Other jurisdictions have also imposed discipline for repeated, unjustified delay in deciding cases. Discipline has extended to include removal in cases with other exacerbating circumstances. *Matter of Lenney*, 522 NE2d 38 (NY, 1988). *See also: Matter of Anderson*, 252 NW2d 592 (Minn, 1977).

In *Seitz*, the Supreme Court also condemned failure to file required reports despite repeated reminders from the State Court Administrative Office:

> The Commission found that this behavior constituted conduct clearly prejudicial to the administration of justice contrary to MCR 9.205(C)(4); a failure to discharge administrative responsibilities diligently and to facilitate the performance of the administrative responsibilities of court officials contrary to Canon 3B(1) of the Code of Judicial Conduct, *see In re Carstensen*, 316 NW2d 889 (Iowa, 1981); and a violation of MCR 8.107.
>
> This is another factually undisputed charge of misconduct for failure to comply with an explicit routine administrative task. We agree with the Commission's finding of misconduct and accept the recommendation that it should be the subject of disciplinary action. 441 Mich 622-623 (citations omitted).

5. The *Brown* standards

The Michigan Supreme Court set forth the criteria for assessing proposed sanctions in *In re Brown*, 461 Mich 1291, 1292-1293 (1999). A discussion of each relevant factor follows.

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

Respondent pursued a calculated pattern of conduct seeking to cover up his consumption of alcohol prior to his crashing into the building. As a result of his abuse of alcohol, Respondent also engaged in a pattern of administrative failures which are not isolated in nature.

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

Respondent's abuse of alcohol, while largely off-the-bench, had an impact on his ability to hear matters, render timely decisions and file required reports with the State Court Administrative Office.

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

Respondent's abuse of alcohol, the impact on the administration of his court, and his cover-up of the abuse, adversely affected the actual administration of justice.

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

Respondent's involvement in the crash, the cover-up and the impact of alcohol on the performance of his judicial duties violated the actual administration of justice and created an appearance of impropriety.

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

Respondent attempted to conceal his drinking prior to the crash. He also made false statements which were premeditated and deliberate. Such conduct is therefore more egregious than conduct which occurred spontaneously.

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

Respondent deliberately made false statements regarding his conduct, and he made them during the course of the Commission's official investigation into this matter as well as to the media, all for the purpose of covering up his conduct. Worse still, he lied about that conduct under oath during the hearing on the formal complaint. Respondent has had an extremely negative impact on the judiciary and interfered with proper functioning of the disciplinary system.

Respondent has had extensive prior involvement with the disciplinary system.[16] The Commission previously admonished him for taking some sixteen months to decide a divorce case following completion of trial. He was admonished for taking in excess of a year to decide a motion to withdraw a guilty plea and for failing to file any MCR 8.107 reports due in 1991. Respondent was also admonished in four additional matters, which included failure to timely decide applications for leave to appeal and persistent failure to file MCR 8.107 reports. (Exhibit 47) Respondent was further admonished for failing to respond to a motion for re-sentencing. (Exhibit 49) Respondent has been on the bench for over

[16] The Supreme Court stated that factors enumerated in *Brown* were not exclusive and recognized the Commission's ability to consider other "appropriate standards." *Id*, at 1293. The Commission also considered Respondent's discipline record, his reputation, and his years of experience, which are additional factors listed in "How Judicial Conduct Commissions Work," American Judicature Society, 1999, pp 15-16, by the American Judicature Society.

23 years. His extensive judicial experience is another aggravating factor in evaluating his misconduct; he simply should have known better.

D. AS PART OF THE SANCTION, RESPONDENT SHOULD BE REQUIRED TO REIMBURSE THE COMMISSION FOR THE OUT-OF-POCKET COSTS INCURRED IN THIS MATTER

The Michigan constitution provides that "[o]n recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge . . .." Const 1963, Article 6 § 30(1). The constitution also provides for the Court to make rules implementing that section. Const 1963, Article 6 § 30(2) The Court implemented one such rule, MCR 9.225,[17] which provided: "The Supreme Court . . . may direct censure, removal, retirement, suspension, or other disciplinary action, or reject or *modify* the recommendations of the commission." (emphasis supplied.) In *In re Hathaway, supra*, 464 Mich at 696, the Court faced a question of first impression: whether "modify" meant that the Court could increase a sanction recommendation from the Commission. The Court held that it could. It later codified that principle in the redrafted version (current) version of MCR 9.225 ("The Supreme Court . . . may . . . impos[e] a greater, lesser, or entirely different sanction.")

[17] The rules were amended in January 2003. This reference is to MCR 9.225 *before* the amendments.

Under the current rules, there is no specific provision allowing for the imposition of costs as part of a sanction in judicial discipline matters. However, there was no provision pre-*Hathaway* for the Court to increase a Commission recommendation, yet the Court found the authority and then incorporated it into a rule. There have been other instances where the Court has made judicial determinations and then codified those matters into rules. *See e.g.* MRE 609(a) and (b), as prospectively amended by *People v Allen*, 429 Mich 558 (1988), and then the rule itself was amended.

In this matter, the Court has the authority to impose a greater, lesser, or entirely different "sanction." A "sanction" is "the detriment, loss of reward, or coercive intervention annexed to a violation of law as a means of enforcing the law." Webster's Ninth Collegiate Dictionary, p 1040 (1987). Interpreting that definition in a judicial discipline context, a sanction is "the detriment, loss of reward, or coercive intervention annexed to a violation of *Code of Judicial Conduct* as a means of enforcing the *Code*." Thus, a sanction may include a financial measure beyond suspension-without-pay or removal-from-office. It follows, too, that if the Court has the authority to impose such a sanction, the Commission has the authority to recommend it.

In the case at bar, the Commission has done just that. The Commission has recommended that, in light of Respondent's false testimony, false information, and

deception of the Commission, the police and the public, the Court require him to reimburse the Commission for the costs of prosecution as part of the discipline in this matter. The Commission's Decision and Recommendation presents a detailed basis for that recommendation, and the Examiner adopts the analysis of that majority opinion here.

The Court has imposed costs as an element of past sanctions,[18] and the reasons set forth in the Commission's Decision and Recommendation in this matter warrant the imposition of costs here. The Commission found that the imposition of costs for the reimbursement of the proceedings was an element of the discipline recommendation. The Court should adopt that recommendation and impose costs against the Respondent in this matter.

As the Commission noted, the leading case of *Matter of Cieminski*, 270 NW2d 321 (ND 1978), is instructive. The judge argued that there was no authority to impose costs against him in the absence of specific authority. The North Dakota Supreme Court found:

> Disciplinary proceedings are neither civil nor criminal, consequently, the rules pertaining to either do not necessarily apply. Specifically, Rule 54(e), NDRCivP,

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[18] The Court imposed $1,000 in costs as partial reimbursement for the cost of the proceedings in the Commission's very first proceeding, Formal Complaint No 1, *In re Somers*, 384 Mich 320 (1971). *See too* Formal Complaint No. 5, *In re Edgar*, and Formal Complaint No. 6, *In re Blodgett*, where the Court ordered public censures and $1,500 and $1,000 costs, respectively, as partial reimbursement of the costs of the proceedings. (Copies of those decisions were included in the Commission's Decision and Recommendation, as those cases were not reported in the official reporter. *See too, In re Cooley,* 454 Mich 1215 (1997). More recently, the Court ordered the respondents in *In re Trudel*, 468 Mich 1244 (2003) and in *In re Thompson*, 470 Mich 1347 (2004) to pay the Commission costs in the amounts of $12,777.33 and $11,117.32, respectively.

> pertaining to costs and disbursements, does not apply for several reasons. Initially, Rule 54(e) is predicated on the common practice that the prevailing party is entitled to its costs and disbursements. As stated earlier, ***assessment of costs is a part of the disciplinary action and is not the same as awarding costs to either party*** as prohibited by sec. 27-23-11, NDCC, or as contemplated by Rule 54(e), NDRCivP. *Id.* at 334-335. [*Id.,* Emphasis added.]

The court further noted:

> The assessment of costs as a part of a disciplinary action is more than a censure, less than a suspension, but has a useful purpose and serves as a deterrent to conduct not in harmony with the Code of Judicial Conduct. [*Id.* at 335.]

In drawing its conclusion, the court cited the well-established body of law holding that authorization to censure or remove implicitly includes the authority to impose lesser sanctions and considered the imposition of costs a lesser-included sanction.

> We respectfully disagree with our dissenting colleagues' suggestion that the word "censure" in Const 1963, art 6, § 30, cannot be read as broadly as the word "discipline" used in North Dakota constitutional and statutory law. *Cieminski, supra.* Const 1963, art 6, § 30, expressly gives our Supreme court the power to "censure," "suspend," "retire or remove" a judge for misconduct or failure to perform his duties, language that contemplates various forms of discipline. As the partial dissent recognizes, our Supreme Court has imposed costs as part of the overall sanction in other cases, cases which we believe involved conduct less harmful to the judiciary than that found here. *Id* at 333-334.

The Court should adopt the finding of the Commission that the Commission incurred costs in the amount of $22,572.76 solely as the result of having to prosecute this matter to conclusion before the master. Inasmuch as the master found that Respondent had committed judicial misconduct, a finding with which the Commission agreed, and the Respondent engaged in a course of deceitful conduct that propelled this matter forward, the Court should impose the reimbursement of those costs as an element of the sanction in this matter.[19]

IV. CONCLUSION

WHEREFORE it is respectfully requested that the Michigan Supreme Court enter an order finding judicial misconduct as set forth in the Commission's Decision and Recommendation, including misconduct in office and conduct clearly prejudicial to the administration of justice, **REMOVE** the Honorable James Noecker from the office of judge of the 45th circuit court, and order him to

[19] Respondent's footnote 4 (page 18 of his brief) that "[i]t is relevant to note that Judge Noecker has incurred significant out-of-pocket expenses related to his matter" is entirely incorrect. It is not relevant in any manner. It does not make the truth of a matter of consequence to the determination of this matter any more or less probable at all. Rather, it is a desperate cry for pity. However, the Court must remember that it is Respondent's own self-destructive behavior that brought him to this point. It is further evidence of his inability to accept responsibility by thinking he should not have to pay the cost of these proceedings. Rather, he would prefer that the taxpayer pick up the tab for this, as well as for the cost of all the visiting judges who have had to cover for him.

REIMBURSE the Commission for the actual costs stemming from this case in the amount of $22,572.76.

Respectfully submitted,

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