STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. MICHAEL J. HALEY
Judge, 86th District Court
328 Washington Street
Traverse City, MI 49684
_____/

DOCKET NO. 127453

FORMAL COMPLAINT NO. 77

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

PROOF OF SERVICE

JUDICIAL TENURE COMMISSION
OF THE STATE OF MICHIGAN

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STATEMENT OF PROCEEDINGS

1. On November 18, 2004 the Michigan Judicial Tenure Commission ("JTC") issued Formal Complaint No. 77 against Hon. Michael J. Haley, which included 25 paragraphs charging him with Impropriety and/or the Appearance of Impropriety and Misrepresentation/Lack of Candor with the Commission.

2. On November 18, 2004, the JTC requested the Supreme Court appoint a Master pursuant to the provisions of MCR 9.210(A).

3. On December 3, 2005, Respondent filed his Answer in which he admitted paragraphs 1 – 11, 14, and 16-17 of the 25-paragraph Formal Complaint.

4. On January 5, 2005, the Supreme Court issued an Order appointing Hon. Casper O. Grathwohl as Master to hear Formal Complaint No. 77.

5. The first pre-hearing conference took place in the Kent County Circuit Court, Grand Rapids, on January 20, 2005.

6. On January 25, 2005, the Examiner filed a Proposed Witness List, List of Potential Exhibits with copies, and Proof of Service.

7. A joint pre-trial statement was submitted pursuant to the master's Pre-Trial Order No.1 on February 11, 2005.

8. The hearing on Formal Complaint No. 77 commenced April 6, 2005, continued April 7, 2005 and concluded with oral closing arguments April 8, 2005.

9. On April 28, 2005, the court reporter filed the completed transcript of the formal hearing.

10. On May 9, 2005 the master filed a six-page report containing his findings of fact and conclusions of law.

11. On May 9, 2005, the JTC issued its Order Setting Briefing Schedule and Hearing Date.

12. On June 15, 2005, Examiner filed Objections to the Master's Report and a Brief in Support.

13. On July 1, 2005, Respondent filed his Brief in Support of Request to Adopt Master's Report.

14. On July 11, 2005, the JTC heard oral argument on Objections to the Master's Report at the Hall of Justice in Lansing.

15. On September 12, 2005, the JTC filed its Decision and Recommendation and Certification of the Record, original record and appendix.

16. On October 10, 2005, Respondent filed his Petition and Brief In Support To Reject the Judicial Tenure Commission's Decision and Recommendation and Respondent-Petitioner's Appendix.

17. On October 31, 2005, the Examiner filed a Brief in Support Of the Commission's Decision and Recommendation For Order Of Discipline, Motion to Strike Respondent's Appendix and Brief In Support.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I WHETHER THE CHARGES IN COUNT I OF FORMAL COMPLAINT NO. 77 WERE PROVED BY A PREPONDERANCE OF THE EVIDENCE?

The JTC answers "YES."

II WHETHER RESPONDENT'S ACCEPTANCE OF FOOTBALL TICKETS FROM AN ATTORNEY APPEARING BEFORE HIM WAS PERMISSIBLE "ORDINARY SOCIAL HOSPITALITY"

The JTC answers "NO."

III WHETHER RESPONDENT'S CONDUCT WAS IMPROPER AND CREATED AN APPEARANCE OF IMPROPRIETY?

The JTC answers "YES."

IV. WHETHER RESPONDENT'S REFERENCE TO SETTLEMENT NEGOTIATIONS WAS IMPROPER?

The JTC answers "YES."

V. WHETHER RESPONDENT CAN ARBITRARILY ENLARGE THE RECORD BY FILING AN APPENDIX WITH LETTERS WRITTEN MONTHS AFTER THE HEARING?

The JTC answers "NO."

VI. WHETHER THE JTC'S UNITARY SYSTEM VIOLATES DUE PROCESS?

The Commission answers "NO."

VII. WHETHER THE JTC'S RECOMMENDATION FOR DISCIPLINE IS APPROPRIATE?

The Commission answers "YES."

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COUNTER-STATEMENT OF FACTS

On October 14, 2003, Respondent presided over a plea hearing in Bellaire, Michigan, in *People v Teresa Elizabeth Porter*, Case No. 03-1259-SM-3. Richard J. Benedict represented Ms. Porter. Charles H. Koop was the prosecuting attorney and Terry Skurnit was the court officer. The defendant, while operating a vehicle owned by S&S Leasing, lost control of the vehicle, striking and damaging a florist's sign. The sign owner claimed it paid or was obligated to pay $4,116.35 to repair the sign.

Ms. Porter was charged with two counts of operating a vehicle without security or insurance (MCLA 500.3102) and one count of using a vehicle with improper license plates (MCLA 257.2551). A plea agreement was reached between Ms. Porter and the prosecutor whereby defendant Porter would enter a guilty plea to the improper plate charge and agree to make restitution for the damages to the sign. The original two charges against her, as well as similar charges against S&S Leasing Company would be dismissed. The restitution amount was the only contested issue remaining, and that would be determined by the Court. The People were seeking $4,100. The defendant argued the amount should be $2,700.

Judge Haley accepted the guilty plea, stated on the record that a pre-sentence investigation and report would not be necessary and advised that restitution would be determined at a formal hearing on November 6, 2003 or the parties "could submit written materials in lieu of an actual hearing." Thereafter, Ms. Porter's defense attorney, Mr. Benedict, asked Respondent, "Approach the bench?" without stating a reason for approaching. Upon being permitted to approach, Mr. Benedict placed two University of Michigan football tickets on the bench.

The following discussion ensued between Mr. Benedict and Respondent:

MR. BENEDICT: You got to promise to go.

THE COURT: It's a week from Saturday?

MR. BENEDICT: No, Saturday.

THE COURT: This Saturday. Hmm, I could go.

MR. BENEDICT: Promise?

THE COURT: I promise to go? I've got to make a phone call. Today's Tuesday, where are you tomorrow?

MR. BENEDICT: The office. No, I'm in Kalkaska. If you want it, take it.

THE COURT: Okay. If there's anybody else that –

MR. BENEDICT: When you said you were interested, I indicated that I still have to ask another. If you can't go, somebody's got to go.

THE COURT: I'll make sure somebody goes and that you get paid.

MR. BENEDICT: I don't need to get paid.

THE COURT: Okay. All right.

MR. BENEDICT: I need to make sure there's [sic] two people sitting in the seats. (EXH 1, p. 11)

After the above exchange Respondent, who had continued to look at the file and concluded the only remaining issue was the amount of restitution the defendant was going to be assessed, stated, "I'll just sentence her right now and save you the trip back." *Id.* at 12. Mr. Benedict responded, "I don't know." *Id.* Respondent proceeded to sentence Ms. Porter to a fine of $100, court costs of $250, $40 state fee, restitution in an amount to be determined, and six months probation. *Id.* at 13.

Respondent ultimately determined the amount of restitution to be paid by the defendant to be $4,116.35, the amount requested by the victim and the Prosecutor. He made the decision based on written materials submitted by the parties, without a hearing, on November 6, 2003.

The court officer, Sergeant Terry Skurnit, surprised by what he had witnessed, raised the matter to the Prosecutor, Charles Koop. (TR VOL 1A, 35, 57) Mr. Koop claimed there was nothing wrong, and declined to investigate further. Mr. Skurnit also reported it to his superior, Sheriff Johnson, who declined to take any action based on Mr. Koop's opinion, but advised Mr. Skurnit he was free to do what he felt was appropriate. *Id.* at 35 – 36, 86. Officer Skurnit discussed the matter with other members of the Sheriff's staff. *Id.*

Respondent learned Officer Skurnit was criticizing his actions. (TR VOL 2A, 389 – 390) He was furious. *Id.* On October 31, 2003, he sent a letter to Sheriff Terry Johnson in which he stated Mr. Skurnit had made statements showing a lack of respect and contempt for the court and advised Sheriff Johnson he was banning Mr. Skurnit from serving as court officer for any judge of the 86th District Court. *Id.* at 391 – 392. On February 13, 2004 Respondent's comments to the Request for Investigation filed by Mr. Skurnit were requested. Paragraph 13 of the letter sought Respondent's comments regarding his letter to Sheriff Johnson and paragraph 19 sought a copy of the letter. In his reply, dated February 24, 2004, Respondent denied ever writing a letter to the sheriff or anyone else about this and reiterated there were no letters and that none were ever created or sent to anyone.

Respondent did not rebuff Mr. Benedict's offer of the tickets, refuse the tickets, inform him of the impropriety of his action, or admonish him. Respondent gave the tickets, valued at $92.00, to a court employee.

INTRODUCTION

The issues in this case are straightforward: (1) Did Respondent, while on the bench, accept two University of Michigan football tickets from defense attorney Richard Benedict who was then appearing before him; and (2) Did Respondent's acceptance of those tickets constitute judicial misconduct? The master concluded that the Respondent had accepted the tickets, and that his doing so was inappropriate. He then concluded that such actions do not constitute judicial misconduct.[1]

There is no dispute that Judge Haley, while presiding over *People v Teresa Elizabeth Porter*, Case No. 03-1259-SM-3, accepted two football tickets from attorney Richard Benedict, who was representing the defendant in the matter; that Respondent was on the bench at the time; that he did not pay for or return the tickets, which he gave to a court employee; and that he failed to reprove Mr. Benedict in any way. (Exhibit 1, Answer, TR 375 – 376, 383) Respondent's actions violated several canons of the Code of Judicial Conduct and relevant ethical standards.

The master found the "indiscrete act of Attorney Benedict toward Judge Haley at the bench conference on October 14, 2003 was inexcusable." (MR 5) He also found Judge Haley's acceptance of the tickets was "inappropriate" and displayed "poor judgment," yet did not find impropriety or the appearance of impropriety. (MR 5 - 6) Notwithstanding Respondent's admissions in his Answer to the complaint, his testimony during the hearing, corroborating evidence, including the record in the *Porter* case, and witness testimony, the master concluded the Examiner did not carry "his burden of proving by a preponderance of the evidence the allegations in Count I and Count II of the complaint." (MR 6) The master's failure to find Judge

[1] Formal Complaint No. 77 consisted of two counts. Count I alleged Respondent was guilty of impropriety and/or the appearance of impropriety for accepting football tickets from a defense attorney appearing before him. Count II alleged Respondent falsely claimed to the JTC that he had not written a letter to Sheriff Johnson to ban Sergeant Skurnit, who reported his actions to the JTC, from appearing in his courtroom. The Examiner did not agree with, but did not contest, the master's finding with respect to Count II, and it was dismissed by the JTC.

Haley committed misconduct directly conflicts with Judge Haley's admissions and testimony as well as applicable ethical and disciplinary standards. The Commission ("JTC") does not dispute the majority of the master's findings, but finds many are irrelevant to the issues to be resolved. For example, the master's finding that "witnesses praised Judge Haley for the formation of a Drug Treatment Court" (MR Report 3) is irrelevant in determining whether he accepted football tickets from an attorney who appeared before him. The JTC does dispute the master's conclusions of law, which are unsupported by any controlling law and are inconsistent with his own findings.

The JTC is not compelled to defer to the master's findings of fact, but may review them and the conclusions of law *de novo*. *In re Chrzanowski*, 465 Mich 468, 480, 482 (2001). It is the conclusions and recommendations of the *Commission*, not the master, that are ultimately subject to review by the Supreme Court. *Id.* at 481.[2] Because of the JTC's expertise in evaluating judicial misconduct, "great weight" is given to its conclusions of law. *Broadman v Commission on Judicial Performance*, 18 Cal.4th 1079, 77 Cal Rptr2d 408 (1998).

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[2] In *Chrzanowski*, the JTC adopted most of the master's findings of fact, but not his conclusions of law. The Supreme Court agreed with the JTC that Judge Chrzanowski's statements were "false" and "deliberately made, and with a full understanding of their implication," and disagreed with the master that such statements were mere "inaccuracies," which did not rise to the level of judicial misconduct. Id. 482-483. The same analysis applies here: the JTC agreed with the master's finding that Respondent took the tickets and that doing so was inappropriate. The JTC further concluded, unlike the master, that Respondent's action does constitute judicial misconduct.

SUMMARY OF ARGUMENTS

I. THE ALLEGATIONS IN COUNT I OF FORMAL COMPLAINT NO. 77 WERE PROVEN BY A PREPONDERANCE OF THE EVIDENCE

Count I of Formal Complaint No. 77 consists of 17 paragraphs setting forth factual allegations, generally admitted by Respondent in his Answer, Joint Stipulation of Facts, his testimony and Exhibit 1. The master's findings that it was "inexcusable" for defense attorney Richard Benedict to give football tickets to Judge Haley and "inappropriate" for Respondent to accept them is irreconcilable with his conclusion that no misconduct occurred.

II. RESPONDENT'S ACCEPTANCE OF FOOTBALL TICKETS FROM AN ATTORNEY APPEARING BEFORE HIM WAS NOT PERMISSIBLE "ORDINARY SOCIAL HOSPITALITY"

The Michigan Code of Judicial Conduct ("MCJC"), Canon 5C(4), provides that a judge should not accept a gift from anyone, subject to the following exceptions:

> (a) A judge may accept a gift or gifts not to exceed a total value of $100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.
>
> (b) A judge or a family member residing in the judge's household may accept ***ordinary social hospitality***; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.
>
> (c) ***A judge*** or a family member residing in the judge's household ***may accept any other gift***, bequest, favor, or loan ***only if the donor is not a party or other person whose interests have come or are likely to come before the judge,*** and if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6C. (emphasis added)

None of the exceptions apply in Respondent's case.

III. RESPONDENT'S CONDUCT WAS IMPROPER AND CREATED AN APPEARANCE OF IMPROPRIETY

Respondent improperly accepted a gift from an attorney who regularly appears before him, in violation of Canon 5C(4)(c). By so doing he engaged in conduct involving impropriety and the appearance of impropriety, in violation of Canon 2A, and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2B. Respondent's claim that the defendant did not receive any special consideration is irrelevant to the appearance of impropriety created by his acceptance of the tickets from the defense attorney in the case before him. The Ohio Court found no merit to the same defense in *Office of Disciplinary Counsel v Lisotto*, 94 Ohio St3d 213, 761 NE2d 1037 (2002), in which the judge accepted football tickets from an attorney who appeared before him but there was no evidence of any favor, preference or improper action between the judge and the attorney in any of the cases.

IV. RESPONDENT'S REFERENCE TO SETTLEMENT NEGOTIATIONS IS INACCURATE, INAPPROPRIATE, AND INADMISSABLE

Evidence of offers to compromise or possible concessions and negotiations are inadmissible. MRE 408. Respondent's arguments should be ignored by the Court. The Examiner is constrained not to reveal what may or may not have happened during any settlement discussions, but if a hearing were conducted on the matter, there would be evidence and testimony directly contradicting Respondent's version.

V. RESPONDENT CANNOT ARBITRARILY ENLARGE THE RECORD BY FILING AN APPENDIX WITH LETTERS WRITTEN MONTHS AFTER THE HEARING

Pursuant to MCR 9.224 (1), regarding review by the Supreme Court, within 28 days after being served with the JTC's Decision and Recommendation and Certification to the Supreme Court, a respondent judge is provided with the opportunity to file a petition to reject or modify the recommendation, which *must be based on the record*, specify the grounds relied on, be verified, and include a brief in support. Sub-rule (2) provides that a respondent may file an appendix *presenting portions of the record not included in the commission's appendix* that the respondent believes necessary to fairly judge the issues. Respondent disregarded the court rule and improperly attempts to expand the official record by including an appendix that has nothing to do with the record in this matter.

VI. CASE AUTHORITY UNIFORMLY UPHOLD THE COMBINATION OF INVESTIGATIVE AND ADJUDICATIVE FUNCTIONS IN JUDICIAL DISCIPLINARY PROCEEDINGS AGAINST DUE PROCESS CHALLENGES

Respondent's attack on the JTC's combined functions lacks merit and is not supported by any authority. It is particularly surprising that Respondent raises this tired argument yet again, when Respondent's counsel is well aware he failed to persuade this Court when he raised the identical argument in *In re Chrzanowski*, 465 Mich 468, 483 - 487 (2001). This Court has repeatedly upheld the constitutionality of the combined investigative and adjudicative functions of the JTC.

VII. RESPONDENT'S CHALLENGE TO THE JTC'S RECOMMENDATION FOR DISCIPLINE LACKS MERIT

The JTC considered the criteria for assessing an appropriate sanction as set forth by the Supreme Court in *In re Brown*, 461 Mich 1291, 1292-1293; 624 NW2d 744 (1999). The

Commission applied the relevant *Brown* standards. It also considered disciplinary measures taken in other states that have been confronted with virtually identical ethical issues. The Commission focused in particular on three cases, *In re Daghir*, 657 A2d 1032 (Pa 1995), *Inquiry Concerning Judge Luzzo*, 756 So.2d 76, 25 Fla. L. Weekly S343 (2000), and *Office of Disciplinary Counsel v Lisotto*, 94 Ohio St3d 213, 761 NE2d 1037 (2002), that judges accepting free tickets to sporting events by a party or attorney appearing before them. All three judges were publicly censured. Judge Daghir was also suspended for seven days without pay. Respondent ignored relevant disciplinary case law supporting the JTC's recommendation for discipline in his brief.

ARGUMENT

I. THE ALLEGATIONS IN COUNT I OF FORMAL COMPLAINT NO. 77 WERE PROVEN BY A PREPONDERANCE OF THE EVIDENCE

A. Standard Of Proof

The standard or proof in judicial discipline proceedings is by a preponderance of the evidence. *In re Noecker*, 472 Mich 1, 8 (2005); *In re Jenkins*, 437 Mich 1, 18; 464 NW2d 703 (1991); *In re Loyd*, 424 Mich 514, 521-522; 384 NW2d 9 (1986).

B. The Respondent Admitted As Facts The Essential Elements That Establish Judicial Misconduct

Respondent admitted the following facts in the Joint Pre-Trial Statement (Index to the Record, No. 8), all of which may be taken as true:

1. Michael Haley is, and at all material times was, a judge of the 86th District Court in Traverse City, Michigan.

2. On October 14, 2004, Judge Haley presided over a plea hearing in Bellaire, Michigan, in the case of *People v Teresa Elizabeth Porter*, Case No. 03-1259-SM-3. Richard J. Benedict, Esq., represented Ms. Porter; Charles H. Koop, Esq., was the prosecuting attorney; and Officer Terry Skurnit was the court officer.

3. The defendant, Ms. Porter, while operating a vehicle (owned by S&S Leasing) lost control of the vehicle striking and damaging a sign. The sign owner (a florist) claimed that it paid or was obligated to pay $4,116.35 to repair the sign.

4. Ms. Porter was charged with two counts of operating a vehicle without security or insurance (MCLA 500.3102), and one count of using a vehicle with improper license plates (MCLA 257.2551).

5. A plea agreement was reached between Ms. Porter and the Prosecutor whereby defendant Porter would enter a guilty plea to the improper plate charge and agree to make restitution for the damages to the florist's sign. The original two charges against her, as well as similar charges against S&S Leasing Co., would be dismissed. The restitution amount was the only contested issue remaining, and that would be determined by the Court. The People were seeking $4,100. The defendant argued that the amount should be $2,700.

6. Judge Haley accepted the guilty plea, stated on the record that a pre-sentence investigation and report would not be necessary and then indicated that restitution would either be determined at a formal hearing on November 6, 2003 or that the parties "could submit written materials in lieu of an actual hearing." (EXH 1, 10).

7. Thereafter, defense counsel, Richard Benedict, said "Approach the bench?" (EXH 1, 10) and did so.

8. Mr. Benedict had not indicated the reason he wanted to approach the bench.

9. Upon being given permission to approach the bench, Mr. Benedict placed two University of Michigan football tickets on the bench and at the same time engaged in the discussions set forth in number 10 below.

10. Judge Haley engaged in the following discussion with Mr. Benedict:

MR. BENEDICT:	You got to promise to go.
THE COURT:	It's a week from Saturday?
MR. BENEDICT:	No, Saturday,
THE COURT:	This Saturday. Hmm, I could go.
MR. BENEDICT:	Promise.
THE COURT:	I promise to go? I've got to make a phone call. Today's Tuesday, where are you tomorrow?
MR. BENEDICT:	The office. No, I'm in Kalkaska. If you want it, take it.
THE COURT:	Okay. If there's anybody else that--
MR. BENEDICT:	When you said you were interested, I indicated that I still have to ask another. If you can't go, somebody's got to go.
THE COURT:	I'll make sure somebody goes and that you get paid.
MR. BENEDICT:	I don't need to get paid.
THE COURT:	Okay. All right.
MR. BENEDICT:	I need to make sure there's [sic] two people sitting in the seats.

11. Judge Haley, who had continued to look at the file and having concluded that the only issue remaining to be decided was the question of the amount of the restitution the defendant was going to be assessed, stated "I'll just sentence her right now and save you the trip back." Judge Haley proceeded then to sentence Ms. Porter to a fine of $100, court costs of $250, $40 state fee, restitution (in an amount to be determined) and six months probation.

12. Judge Haley ultimately determined the amount of restitution to be $4,116.35, the amount requested by the victim and the Prosecutor. This was decided on written materials submitted by the parties and without a hearing, on November 6, 2003.

13. Judge Haley gave the tickets (valued at $92.) to a Court employee.

The master made the following relevant conclusions, which are well supported by the record:

1. The indiscrete act of Attorney Benedict toward Judge Haley at the bench conference on October 14, 2003 was inexcusable. (MR 5)

2. Judge Haley's acceptance of the tickets was inappropriate. It displayed poor judgment for a Judge with a reputation in the community for integrity. (MR 5)

C. The Master Erred In Finding No Judicial Misconduct With Respect To The Allegations In Count I

Count I of Formal Complaint No. 77 consists of 17 paragraphs setting forth factual allegations, which have been generally admitted by Respondent in his Answer,[3] in a Joint Stipulation of Facts, his testimony during the hearing and Exhibit 1. Respondent denied paragraph 18, which sets forth the violations of legal and ethical standards resulting from the alleged conduct, on the basis his conduct did not constitute judicial misconduct of any sort. Judge Haley, while on the bench, accepted football tickets from defense attorney Richard Benedict while he was appearing before him in a case. Judge Haley accepted the tickets and did

[3] In his Answer, Respondent admitted paragraphs 1 through 17, with minor exceptions. In paragraphs 12 and 13, Respondent did not deny the factual assertions, but extrapolated non-existent allegations that Respondent made scheduling accommodations for the defendant and her counsel because of the University of Michigan/Illinois game tickets he received from defendant's counsel. The complaint contained no such allegations, but Respondent denied them anyway to the extent there may have been such a suggestion.

not pay for them or reprove Mr. Benedict in any way. (Exhibit 1) The master's findings that it was "inexcusable" for defense attorney Richard Benedict to give football tickets to Judge Michael Haley ("Respondent") and "inappropriate" for Respondent to accept them, are irreconcilable with his conclusion that no misconduct occurred. The JTC accepted the master's findings of fact as to what happened, but rejected his *conclusions* that no judicial misconduct had occurred. The Court should do likewise.

D. Disciplinary Proceedings Apply An Objective Standard That Precludes The Use Of "Good Faith" As A Defense To Charges Of Misconduct

The master appears to have incorrectly based his conclusion of no misconduct on a subjective appraisal of Mr. Skurnit's motivation in reporting Judge Haley's conduct, rather than an objective appraisal of Judge Haley's actions. For example, he makes a "conclusion of law" that "Officer Skurnit's animus toward the judicial system and in particular toward the 86th District Court provided the motive for his complaints." (MR 5)

However, the master concluded that attorney Benedict's "indiscrete act" in giving the tickets to Judge Haley at the bench conference on October 14, 2003 was "inexcusable," that Judge Haley's acceptance of the tickets was "inappropriate" and displayed "poor judgment for a judge with a reputation in the community for integrity." (MR 5) He then failed to cite any controlling law or provide any explanation for his unsupported conclusion that "Judge Haley's acceptance of the tickets does not rise to the level of an impropriety and/or the appearance of impropriety as defined by Art VII [sic], Sec. 30 of the Michigan Const or the Code of Judicial Conduct, Canons 1, 2A, 2B, 2C, 5C(4)(C), or MCR 9.104." (MR 6) In fact, there are at least three judicial disciplinary cases *on point*, discussed later herein, which hold such conduct violates the canons in question, including *Office of Disciplinary Counsel v Lisotto*, 94 Ohio St3d 213, 761 NE2d 1037 (2002), *Inquiry Concerning Judge Luzzo*, 756 So.2d 76, 25 Fla. L. Weekly

S343 (2000), and *In re Daghir*, 657 A2d 1032 (Pa 1995). See also Shaman, Lubet, Alfini, *Judicial Conduct & Ethics*, 3rd Ed., 137, citing in part, *In re Vaccaro*, 409 NYS2d 1009 [1977]), which concludes a judge, or his or her relatives, should *not* accept gifts or favors from individuals who are likely to appear in the judge's court as a party.

There is nothing to excuse or justify Respondent's acceptance of the gift or his failure to return it and to reprove Mr. Benedict. The master's conclusion appears to be based solely on the fact that he believed Sergeant Skurnit was motivated by anger or a desire for retaliation for a prior unrelated matter involving his contacts with Respondent when he brought the incident to the JTC's attention, essentially echoing one of Respondent's positions. Both Respondent and the master fail to recognize the need for an objective evaluation that has nothing to do with who or why the incident was reported, or the fact that it was initiated by someone else, or how many people observed it, or what some people thought of it, but rather with legal and ethical standards.

The Michigan Supreme Court has held that judicial misconduct proceedings must utilize an objective approach to evaluate conduct. *In re Hocking*, 451 Mich 1, 13 (1996). In *In re Ferrara*, 458 Mich 350, 362 (1998) the Court reaffirmed its adoption of an objective standard in judicial disciplinary cases, pointing out that it had recognized in *In re Tschirhart,* 422 Mich 1207, 1209-1210; 371 NW2d 850 (1985):

> [t]hat the ***proper administration of justice requires that the Commission view the Respondent's actions in an objective light***. The focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers. Although the Respondent's subjective intent as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such ***individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary***.' (Emphasis added)

See also *In re Chmura*, 461 Mich 517, 542-544 (2000).

Other jurisdictions also recognize the need for an objective analysis of the conduct at issue. Consistent with the holding of the Michigan Supreme Court, California's highest court observed:

> When the Commission's findings in regard to these specifications did differ from the Masters', they reflected the ***commission's quite proper determination to focus on an objective appraisal of petitioner's conduct in terms of the effect of such conduct on the administration of justice.*** The Masters were more concerned with the subjective motivations of petitioner in engaging in specified conduct, and with the subjective appraisal of his motivations by the person directly affected by the specified conduct. (Emphasis added) *Geiler v Commission on Judicial Qualifications*, 10 CAL3d 270, 110 Cal Rprtr 201, 515 P2d 1, 5 (1973).

Similarly, in *Matter of Crutchfield*, 289 NC 597, 223; SE 2d 822, 826 (1975), the North Carolina Supreme Court commented:

> Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute ***depends not so much upon the judges' motives but more on the conduct itself***, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. (Citations omitted, Emphasis added)

The JTC rejected the master's arbitrary conclusion that Respondent's acceptance of the tickets "did not rise to the level of an impropriety and/or the appearance of impropriety as defined by Article VII [sic], Sec. 30, of the Michigan Constitution or the Code of Judicial Conduct, Canons 1, 2A, 2B, 2C, 5C(4)(C), or MCR 9.104." (MR 6) The JTC properly applied an objective standard in concluding Respondent committed actionable misconduct.

II. RESPONDENT'S ACCEPTANCE OF FOOTBALL TICKETS FROM AN ATTORNEY APPEARING BEFORE HIM WAS NOT PERMISSIBLE "ORDINARY SOCIAL HOSPITALITY"

A. A Judge May Not Accept A Gift From A Party Or Other Person Whose Interests Have Come Or Are Likely To Come Before The Judge Under Any Circumstances

The Michigan Code of Judicial Conduct ("MCJC") provides that a judge should not accept a gift from anyone, subject to the following exceptions:

> (a) A judge may accept a gift or gifts not to exceed a total value of $100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.
>
> (b) A judge or a family member residing in the judge's household may accept ***ordinary social hospitality***; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.
>
> (c) ***A judge*** or a family member residing in the judge's household ***may accept any other gift***, bequest, favor, or loan ***only if the donor is not a party or other person whose interests have come or are likely to come before the judge***, and if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6C. [MCJC Canon 5C(4) (emphasis added).]

The only exceptions that could apply in this matter are 5C(4)(b) – ordinary social hospitality, and 5C(4)(c) – donor is not a party or person likely to come before the judge. Respondent fits neither category.

B. Ordinary Social Hospitality Exception, Canon 5C(4)(b)

Michigan has not defined the term "social hospitality" in the context of the Code of Judicial Conduct. California and Illinois, however, have had occasion to do so. California defines "social hospitality" as a gift that is so common among people in the judge's community that no reasonable person would believe that

(a) The donor intended to or would receive any advantage; or

(b) The donee would believe that the donor intended to obtain any advantage.

Adams v Commission on Judicial Performance, 10 Cal4th 866, 880; 897 P2d 544 (1995).

Illinois defines "social hospitality" as "routine amenities, favors, and courtesies, which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer." The test is objective and should include the following factors:

(a) Monetary value of the gift;

(b) Relationship, if any, between the judge and the donor;

(c) Social practices and customs associated with gifts; and

(d) The particular circumstances surrounding the gift.

In re Corboy, 124 Ill2d 29, 42-43; 528 NE2d 694 (1988).

The Illinois Supreme Court's test of whether a gift constitutes "social hospitality" is very fact-specific. In its Decision and Recommendation, the JTC noted there may be some factual scenarios in which a judge is offered tickets to a sporting event that may or may not constitute a gift of "social hospitality," and therefore limited its holding to the facts in this matter. It noted that in this case, three of the four factors enumerated in *In re Corboy, supra,* militate *against* finding that the gift was one of "ordinary social hospitality."

(a) **Monetary value of the gift.** This factor did not play a role in the JTC's determination; (Decision and Recommendation. p. 10)

(b) **Relationship, if any, between the judge and the donor**. The testimony established that Respondent and Benedict did not frequent each other's home and did not socialize together. Respondent candidly admitted that he had no social relationship with Mr. Benedict. T 348 (Respondent). The JTC concluded that their relationship was a professional one only; *Id.*

(c) **Social practices and customs associated with gifts**. The testimony established that Mr. Benedict had never given the Respondent football tickets – or any other type of tickets – either before or after this event. The JTC concluded that the giving of such gifts was ***not*** within their social practices and customs; (*Id.*) and

(d) **The particular circumstances surrounding the gift**. This gift was made while the Respondent was still hearing the case in which Mr. Benedict was appearing as the attorney. Respondent then made an abrupt decision to sentence Mr. Benedict's client on the spot, an action he could have done, but did not, ***before*** accepting the gift of the tickets. The JTC specificaaly found that the circumstances surrounding this matter militate against a finding that the football tickets were ordinary social hospitality. *Id.*

As noted above, the *Corboy* case is very fact-specific and the case at bar is also very fact-driven. Respondent accepted a gift from an attorney with a case before him, while presiding over that very case, sitting on the bench wearing the robes of judicial office. The JTC has concluded that these football tickets, given under these particular circumstances, were not "ordinary social hospitality" and that Respondent's acceptance of them constitutes judicial misconduct. (Decision and Recommendation, pp. 10 - 11)

C. Gifts From Disinterested Persons Exception, Canon 5C(4)(c)

Judges should not accept gifts "from a party or other person whose interests have come or are likely to come before the judge." Canon 5C(4)(c). Mr. Benedict appears frequently before the Respondent. (TR VOL 1, p. 147) Respondent should not have accepted this gratuity; his having done so constitutes judicial misconduct.

Respondent's acceptance of the tickets was improper.[4] Respondent has maintained that there was no impropriety here because he accepted the tickets on the record in open court. However, taking the tickets – whether openly or secretly – is the gravamen of the improper act.

[4] The master found that taking the tickets was "inappropriate." MR 5. The JTC found no distinction between "improper" and "inappropriate," a conclusion supported by both the dictionary and the thesaurus. (Decision & Recommendation, FN3, p. 11)

Whether the defendant in the underlying matter received special consideration is irrelevant to a determination of the impropriety of Respondent's accepting a gift from her attorney and the appearance of impropriety it created. Such conduct necessarily gives rise to suspicions by the public about the impartiality and integrity of the judiciary. Respondent's acceptance of the football tickets constitutes judicial misconduct, and the JTC properly so concluded.

III. RESPONDENT'S CONDUCT WAS IMPROPER AND CREATED AN APPEARANCE OF IMPROPRIETY

A. A Judge Must Avoid Impropriety And The Appearance Of Impropriety

Canon 2A notes public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny and must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Canon 2B provides, in part, that at all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary.

Respondent's actions constitute impropriety and an appearance of impropriety in violation of the Code of Judicial Conduct, Canon 2 and disciplinary case law.

> ***The appearance from which favored treatment can be deduced, even without real foundation, can be harmful*** to the administration of justice. Likewise, is providing the opportunity from which an implication of impropriety could be drawn. ***No matter how innocent Respondent's conduct may have been,*** it unnecessarily and unwisely puts a burden of explanation and justification not only on himself but on the judiciary of which he is an officer. *In re Suglia*, 320 NYS2d 352, 354 (1971).

Conduct which gives the "appearance of impropriety" is "clearly prejudicial to the administration of justice." *In re Laster*, 404 Mich 449, 460 (1979) The Court noted that Judge Laster's activities gave the appearance of impropriety in that they appeared to have involved favoritism and partiality, regardless of his motivations. The Court also found that good faith is not an affirmative defense to charges of misconduct, but may be considered as a mitigating factor when considering discipline. *Id.* at 461 and see *In re Lawrence*, 417 Mich 248, 267, fn 14; 335 NW2d 456 (1983).

Respondent's conduct was improper. It directly violated the Michigan Code of Judicial Conduct, Canon 5C(4)(c):

> ***Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone*** except as follows:
>
> (c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan ***only if the donor is not a party or other person whose interests have come or are likely to come before the judge,*** and if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6C. (Emphasis added)

None of the exceptions, and in particular subsection (c) of Canon 5C, apply to Respondent. His defense that the defendant did not receive any special consideration is irrelevant to the appearance of impropriety created by his acceptance of the tickets from the defense attorney in the case before him. The Ohio Court found no merit to the same defense in *Office of Disciplinary Counsel v Lisotto*, 94 Ohio St3d 213, 761 NE2d 1037 (2002), in which the judge accepted football tickets from an attorney who appeared before him but there was no evidence of any favor, preference or improper action between the judge and the attorney in any of the cases.

Strict compliance with the letter and spirit of the court rules and canons is required to maintain public confidence in the integrity and impartiality of the judiciary, without which our judicial system would fail. *In re Ferrara*, 458 Mich 350, 372 (1998). An honorable and independent judiciary is an indispensable feature of justice in American society. Michigan Code of Judicial Conduct ("MCJC"), Canon 1. A judge should always avoid a situation tending to cast a doubt upon judicial integrity. An impartial judiciary - in both fact and appearance - is essential to our system of justice.

B. There Is No Merit To Respondent's Position That It Is The Public Who Determines Whether A Judge's Conduct Creates An Appearance Of Impropriety

Respondent incorrectly asserts it is the public that determines the appearance of impropriety and seems to suggest, correspondingly, that if no one sees an improper act, no misconduct occurs. (Resp. Brief, pp. x, 18 - 23) Respondent ignores the fact that his act of accepting the tickets was prohibited and thus improper on its own (Canon 5C(4), besides creating an appearance of impropriety. Respondent's conduct is thus clearly prohibited by Canons 1 and 2A because it could reasonably lead a knowledgeable observer to question the integrity of the judiciary and lose confidence therein. Determining impropriety involves evaluating whether a judge fails to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot. *In re Johnstone*, 2P.3d 1226, 1235 (Alaska 2000). See also, *In re Flanagan*, 240 Conn 157, 189; 690 A2d 865, 880 (1997).

The JTC clearly found Respondent failed to use reasonable care to avoid creating the appearance of impropriety, which he himself admitted.[5] Nonetheless, Respondent suggests that

[5] Respondent: "And frankly, in retrospect, there were a lot of other options, and with the benefit of hindsight, I would have done it differently." (TR VOL 2A, 381) and "In hindsight, I would not have handled it the same way. With hindsight, I would have said to this judge – to Mr. Benedict 'Take these away. What are you doing this for on

no one but deputy Skurnit thought he did anything wrong, or alternatively that Skurnit exposed him even though he knew there was nothing improper. (TR VOL 2A, 380, Resp. Brief, p23, 30) His position is contradicted, however, by some of the very witnesses he attempts to rely on, witnesses who, for the most part and in all candor, are predisposed to testify favorably as they are work closely with, or under, Respondent.

Defense witness Ronald Jolly, a Traverse City radio morning talk show host, was introduced by Respondent as someone who represented the public. He testified he did not think it was appropriate or proper for Judge Haley to accept the tickets. (TR VOL 1B, 246 – 247) After an objection by Respondent's attorney, Mr. Jolly qualified his answer, stating he had a problem with the words "proper" or "appropriate." He became more nervous but nevertheless concluded:

> I think it was poor judgment, because if it was – I don't know what the rules of the court are. I imagine the attorneys and the judges involved do, and know if that's proper or appropriate or not. So I just think maybe it was not good judgment or it was – well, I guess, yeah, I guess I have to say sitting as a judge, if someone offers you something, I'm not sure what all the rules are, but if, you know, if you don't turn it down, I guess that you could say that was not good judgment." (*Id.* at 248)

The Examiner cross-examined Mr. Jolly further, who acknowledged he had been brought by Respondent to testify as the "voice of the community." *Id.* The Examiner then asked Mr. Jolly if it would have been proper if, instead of two football tickets, it had been a hundred-dollar bill that the judge accepted. Mr. Jolly responded with an unequivocal "No." *Id.* at 248 – 249. Interestingly, Mr. Jolly counters Respondent's claim that it is the community that determines appearance of impropriety, and not the commission, by stressing that as a layperson, he is unfamiliar with court rules and ethical standards.

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the record? This is a dumb thing for you to do.' And had nothing to do with it . . . It was just a totally inappropriate place and time for that to happen." (TR VOL 2B, 495 – 496).

Judge Philip Rodgers, another of Respondent's witnesses, was asked by the Examiner: "Is that an appropriate thing for a judge to do, accept any type of gratuity from an attorney while a matter is pending before –. " Judge Rodgers replied, simply and accurately, "No." (TR VOL 2A, 318)

The tendency on the part of Respondent and his witnesses to place the blame solely on Mr. Benedict was evident. When questioned, prosecutor Charles Koop admitted being surprised by what had transpired, stating: "I was surprised that Dick Benedict produced the tickets to Judge Haley at that point. (TR VOL 1B, 190) When asked why, he stated:

> I had known Dick Benedict for 25 years. He had always been a judge who was very conscious about the appearance of impropriety, to the extent, at one point he posted his driving record in the probation office because there was a rumor that he had a drunk driving conviction. And so he was always extremely cautious about the appearance. And for him to take the tickets out, I was surprised that he had done that." *Id.*

Respondent's former court recorder, Donna Cottrell, who was in the courtroom, testified she did not think anything improper was going on, but thought, in looking back, Mr. Benedict "might have said, 'may I speak to you in private, rather than in the courtroom." (TR VOL 1B, 226) Respondent himself testified:

> I think I was embarrassed that this personal matter was taking place in the courtroom, and it shouldn't have taken place in the courtroom. I knew that. Thought process about – I thought, well, this is just Benedict, you know. What a dumbhead thing to do." (TR VOL 2A, 381)

Respondent further admitted:

> Canon 2 states that the judge is to avoid impropriety and must avoid impropriety and all appearance of impropriety. *And I agree with that.* What I'm saying is that *when these tickets came down on the bench, that was an appearance of impropriety* right in and of itself, before I even did

anything. *That looks bad, period.*" (emphasis supplied)
(TR VOL 2B, 496)

It is incongruous for Respondent to admit that there was a definite appearance of impropriety in the giving of the tickets to him, and then for him to accept the tickets, all the while absolving himself completely from the transaction and the appearance of impropriety it created.

Clearly, Respondent and the master misunderstand the significance of the impact of improper conduct on the public. It is not necessary for the public at large to become aware of the actual misconduct, nor does the fact that "but for" someone's public "outing" of a judge's conduct, it would not have become public, mean that if it had not been made public it would not be misconduct. When examining a judge's conduct, what must be considered is "the impact it might reasonably have upon knowledgeable observers." *Flanagan, supra.*

The Ohio Supreme Court addressed this issue in *In re Complaint Against Harper*, 673 NE2d 1253 (Oh 1996). The case arose from a campaign by a sitting judge to gain election to the State of Ohio's highest court and ultimately resulted in a reprimand of the judge. The Court held that it was not necessary in disciplinary cases to use public opinion polls or "outside testimony" from witnesses who claimed they had been misled to prove that a judge's campaign commercial diminished public confidence in the judiciary. *The Court further noted the absence of case authority to the contrary in other jurisdictions. Id.* at 1259.

There is no case authority requiring this type of proof in Michigan's judicial disciplinary proceedings. To the contrary, *In re Bennett*, 403 Mich 178, 193 (1978), states:

> Judge Bennett's use of obscene and profane language on the bench and in his professional contacts with persons dealing with the court, *necessarily demeaned the office he holds and the judiciary in general.* His public disparagement of certain attorneys, county commissioners, and of the

> judicial system itself, *must have prejudiced and left many doubtful of the impartiality and effectiveness of the administration of justice in Branch County and in this entire state.* (Citations omitted) (Emphasis added).

The finding of misconduct carries with it implicit determination of harm to the public and the judiciary. The above case authority clearly refutes any claim the Commission must introduce proofs concerning the impact of Respondent's conduct on the public and the judiciary.

The master seems to have accepted Respondent's convenient and subjective interpretation of disciplinary law. Respondent suggests that just violating some act "without consequences" is not actionable and that just because Respondent did not reject the tickets, there is no misconduct because in his opinion there was no impact on the community. (TR VOL 1A, 129) It is not clear what Respondent considers "impact" on the community. When asked by the Examiner whether there would be anything improper with Respondent accepting the use of a condominium in Florida from attorney Benedict, he replied, "Well, Canon 3 would govern this. If it was not – unless Canon 2 might. In other words, was it observed or not observed. If it was observed, I'd be more concerned about the appearance of impropriety." *Id.* at 493. Respondent's position in this regard, repeated throughout his testimony, is flawed. If a judge commits a crime and no one discovers it, does that mean there was no crime? This is not to suggest that Respondent's conduct was criminal in any way, but rather that his thought process coincides with the dangerous notion that it is all right to do the wrong thing if no one finds out.

C. Respondent Offers No Cognizable Defense

Respondent's misconduct arose from his acceptance of a gift from an attorney who appears frequently before him, exacerbated by the fact that it occurred in the courtroom, on the bench, while he was wearing his judicial robe, during a hearing in which the attorney was

appearing before him. Respondent has had to employ various tactics to obfuscate the real issue and attempt to prop up an obviously weak, if not non-existent defense. He insinuates, for example, that he is defending against a charge of bribery that was never alleged. After admitting he thought there was a difference depending on whether someone witnessed the ticket exchange, his attorney attempted to rehabilitate him and invited him to explain. Respondent replied "As I understand the question, it had to do with the distinction between someone actually being in the courtroom observing this whole thing and somebody being asked in the abstract on the street, what do you think about a judge taking bribes. And the critical difference, I've always felt, is that any observer who is in the courtroom to see that there was nothing improper going on at the bench, from my standpoint." (TR VOL 2B, 481) Respondent goes on to describe what occurred as "just insane, ridiculous, unheard of, improper... all those things" on the part of attorney Benedict, but claimed "no one with a brain in their head could have inferred – who was in that courtroom – that something improper was going on . . . nothing improper by the person who was the judge at that time. ." *Id.* at 482. He apparently was successful in misleading the master to forget the actual issue and make an irrelevant finding on a matter that was never charged, *i.e.* that "no one believed that Judge Haley had taken a bribe."

Respondent also tried to claim the football tickets were not a gift, but rather an "accommodation." *Id.* at 387. Respondent's main "defense," however, is to blame others. Thus he questions, "How is a judge to avoid somebody out of the blue throwing something on the bench?" and insists the impropriety occurred when the tickets were placed on the bench: "And so I did not cause that impropriety. I did not cause that impropriety." *Id.* at 388 – 389. Respondent just ignores the impropriety he *did* cause – when he accepted and kept the tickets.

Respondent makes much of the fact that he was taken by surprise. The tone and nature of his conversation with Mr. Benedict tends to negate any sense of a surprise element. (Exhibit 1, p. 11) Further, this "defense," that he was so shocked by Mr. Benedict's action that he simply accepted the tickets, falls flat in light of his testimony that he knew about the offer a week before. (TR VOL 2A, 372 – 373, 376 - 377, 388)

IV. RESPONDENT'S REFERENCE TO SETTLEMENT NEGOTIATIONS IS INACCURATE, INAPPROPRIATE, AND INADMISSIBLE

On pages xii and 25 of Respondent's brief, he improperly refers to settlement negotiations which are not part of the record. Specifically, he claims that he "attempted to resolve this matter privately" and that "the Commission refused, and thereafter filed a formal complaint." *Id.* at 25.

Respondent must be well aware that evidence of offers to compromise or possible concessions and negotiations are inadmissible. MRE 408. Thus Respondent's arguments on this point should be ignored by the Court. The fact that Respondent may have tried to resolve the matter by negotiations does not prove acknowledgement of wrongdoing or remorse.

Despite Respondent's effrontery in raising clearly improper matters, the Examiner is constrained not to reveal what may or may not have happened during any settlement discussions. Suffice it to say that if a hearing were conducted on the matter, there would be evidence and testimony directly contradicting Respondent's story.

V. RESPONDENT CANNOT ARBITRARILY ENLARGE THE RECORD BY FILING AN APPENDIX WITH LETTERS WRITTEN MONTHS AFTER THE HEARING

A. Respondent's Appendix Must Be Based On The Record

Pursuant to MCR 9.224 (1), regarding review by the Supreme Court, within 28 days after being served with the Commission's Decision and Recommendation and Certification to the Supreme Court, a respondent judge is provided with the opportunity to file a petition to reject or modify the commission's recommendation, which *must be based on the record*, specify the grounds relied on, be verified, and include a brief in support. Sub-rule (2) provides that a respondent may file an appendix *presenting portions of the record not included in the commission's appendix* that the respondent believes necessary to fairly judge the issues.

Respondent disregarded the court rule and improperly attempts to expand the official record by including an appendix that has nothing to do with the record in this matter. The appendix consists of four letters in the nature of character references. One is from a retired judge for whom Respondent once worked as a law clerk, two are from attorneys from Smith Haughey Rice & Roegge, a Traverse City law firm, and one is signed by three former local bar association presidents. The letters were never offered or admitted and in fact did not exist at the time of the hearing. The JTC objects to the supplementation of the record in this matter with letters written by individuals with no personal knowledge of the facts, who were not witnesses and who cannot be examined by the Commission. The JTC has filed a motion to strike Respondent's appendix and a brief in support that have been filed simultaneously with this brief, and which are hereby incorporated by reference.

B. Even if Admitted, Character References Have No Probative Value

Even if the appendix did not contravene the court rule, it contains nothing more that character references, which bear little or no weight in considerations of misconduct. In *Kloepfer v Commission on Judicial Performance*, 782 P.2d 239, 263 (Cal. 1989), the Court held the testimony of persons who were not present during the alleged incidents of misconduct, and thus cannot assess the serious nature of those incidents, but nonetheless believed the judge to be fair and patient and possessed of appropriate judicial temperament, is not probative. Similarly, testimony which does not deal in depth with the specific conduct complained of is of little value. *In re Elliston,* 789 SW2d 469, 480 (Mo. Banc 1990)

The value of character evidence in attorney disciplinary proceedings is reviewed in Charles Wolfram's book, MODERN LEGAL ETHICS. His analysis is equally applicable to judicial disciplinary proceedings. He notes many courts:

> [w]isely reject such (character) evidence as valueless in all events because it is often given for reasons of human appeal but without sufficient regard for the needs of lawyer discipline. Still other opinions applaud the motives of the persons giving testimonials but disregard their import. Approaches that heavily discount or entirely reject the evidence are sound. *Character testimonials are often the result of personal friendship, bar politics, antipathy to bar discipline, or ignorance of the facts.* Their acceptance in evidence simply invites turning the proceeding from a deliberative process into a bench and bar plebiscite." *Id.* at 121-122. (footnotes omitted, emphasis added)

VI. CASE AUTHORITY UNIFORMLY UPHOLDS THE COMBINATION OF INVESTIGATIVE AND ADJUDICATIVE FUNCTIONS IN JUDICIAL DISCIPLINARY PROCEEDINGS AGAINST DUE PROCESS CHALLENGES

Respondent raises the oft-discredited argument that the combination of functions in the JTC is unconstitutional as violative of due process. (Respondent's Brief, pp. vii and 24 - 26) Respondent's attack on the JTC's combined functions lacks merit and is not supported by any authority. It is particularly surprising that Respondent raises this tired argument yet again, when Respondent's counsel is well aware he failed to persuade this Court when he raised the identical argument in *In re Chrzanowski*, 465 Mich 468, 483 - 487 (2001).

This Court has repeatedly upheld the constitutionality of the combined investigative and adjudicative functions of the JTC. In *In re Mikesell*, 396 Mich 517, 531 (1976), the Court quoted approvingly from *In re Hanson*, 532 P.2d 303, 306 (Alaska, 1975):

> Regarding petitioner's contention, the Commission points out that procedures similar to Alaska's are currently in effect in at least twenty-four states and the District of Columbia. Research discloses that petitioner's due process argument has been rejected by all courts which have considered the question. *Keiser v Bell,* 332 F Supp 608 (ED Pa. 1971); *In re Haggerty*, 257 La 1; 241 So 2d 469 (1970); *In re Kelly* , 238 So 2d 565 (Fla, 1970); *In re Diener & Broccolino*, 268 Md 659; 304 A2d 587 (1973). These courts have elected to adopt the majority position as stated by Professor Davis in his treatise on administrative law. According to Professor Davis,
>
> > "State courts, like federal courts, generally hold, with only occasional exceptions, that due process does not forbid the combination with judging of such functions as prosecuting, investigating and accusing." * * * (Footnote omitted.)
>
> We find no constitutional violation as alleged.

Again in *In re Del Rio*, 400 Mich 665 (1977), this Court categorically stated:

> However, the authority is legion in support of the proposition that *combining the investigative and adjudicative roles in a single agency does not necessarily violate due process in administrative adjudication's such as judicial fitness hearings*. See *inter alia, Halleck v Berliner*, 427 F Supp 1225, 1242-1244 (D.C., 1977); *Roy v Jones*, 349 F Supp 315, 322 (WD Pa., 1972), aff'd on other grounds, 484 F2d 96 (CA 3, 1973); *Keiser v Bell*, 332 F Supp 608, 617-619 (ED Pa., 1971); *In re Rome*, 218 Kan 198, 204-205; 542 P2d 676, 683-684 (1975); *In re Hanson,* 532 P2d 303, 306 (Alas, 1975); *In re Diener,* 268 Md 659, 677-679; 304 A2d 587 (1973), *cert den, sub nom Broccolino v Maryland Comm on Judicial Disabilities*, 415 US 989; 94 S Ct 1586; 39 L Ed 2d 885 (1974). *In re Kelly*, 238 So 2d 565 (Fla. 1970), *cert den* 401 US 962 (1971), *reh den* 403 US 940 (1971). See generally, 2 Davis, Administrative Law Treatise, §§ 13.01-13.11, pp 171-249. (Emphasis added) *Id* p 690. See also *Matter of Mikesell*, 396 Mich 517, 531 (1976).

The Court reviews the JTC's recommendations *de novo*. *In re Hathaway*, 464 Mich 672, 684; 630 NW2d 850 (2001); see also *In re Ferrara*, 458 Mich 350, 358-359; 582 NW2d 817 (1998). The Court also reviews the JTC's findings of fact *de novo*. *In re Jenkins*, 437 Mich 15, 18; 465 NW2d 317 (1991); see also *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971). In *Del Rio* the Court referred to its own review of the JTC's adjudication before imposition of a sanction as a significant protection for the rights of judges. *Del Rio, supra,* at 690. The Court also spoke of the role of the master in the adjudicative process. It concluded, as did the United States Supreme Court in *Withrow v Larkin*, 421 US 35, 58; 95 S Ct 1456; 43 L Ed 2d 712 (1975), there is no reason to believe that the combined roles of the JTC "creates even a risk that due process guarantees could be violated." *Del Rio, supra,* at 691.

Case authority from other jurisdictions is unanimous in upholding the constitutionality of the unitary system in judicial disciplinary proceedings against challenges of the sort raised by Respondent. See: *Mississippi Commission on Judicial Performance v Russell,* 691 So.2d 929,

945-946 (Miss. 1997). *Inquiry Concerning a Judge,* 462 S.E.2d 728, 732 (Ga. 1995); *In re O'Dea*, 622 A.2d 507 (Vt. 1993); *In Re Elliston*, 789 S.W.2d 469 (Mo. 1990); *In re Cunningham*, 538 A.2d 473, appeal dismissed, 109 S Ct 36 (1988); *Matter of Deming*, 736 P.2d 639, as amended by 744 P.2nd 340 (Wa. 1987); *In re Nowell*, 237 S.E.2d 246 (N.C. 1977); *In re Rome*, 542 P.2d 676, 683 (Kan. 1975); *In re Brown*, 512 SW2d 317 (Tex. 1974); *McCartney v Commission on Judicial Qualifications*, 526 P.2d 268 (Cal. 1974).

Respondent maintains the incorrect premise that the JTC lacks impartiality because it functions simultaneously as investigator, prosecutor and adjudicator. (Respondent's Brief, p. 24) The JTC does not function in a prosecutorial capacity. It clearly oversees the investigations of complaints of judicial misconduct pursuant to its constitutional mandate. In some respects, the JTC is not unlike a grand jury. If the inquiry develops information evidencing the existence of serious misconduct, the JTC authorizes the filing of charges, which brings its active involvement in the matter to a temporary conclusion. At this juncture, the Examiner, whether it be the Executive Director or outside counsel retained for that purpose, presents the case. The Examiner functions independent of the JTC and makes all decisions pertaining to the conduct of the case. Where a master is appointed, as here, it is only after completion of the public hearing, receipt of the report of the master, and the filing of objections to the master's Report that the JTC again becomes actively involved by hearing exceptions to the master's report. The JTC then performs its adjudicative function and, essentially, either dismisses the formal complaint as unproven or sends the matter to the Supreme Court with a recommendation of discipline. This is not in any accepted logical sense a prosecutorial function.

Del Rio puts to rest Respondent's claim of due process violations. The Court definitively stated:

> This Court has made a conscious effort to segregate within the Commission the investigative and adjudicative functions. We specifically require under GCR 1963, 932.10, that an independent master be appointed by this Court to preside over the adjudicative process once the Commission files a formal complaint. It is this master who also makes the findings of fact and conclusions of law upon which the Commission makes its recommendation and this Court ultimately bases its decision. Therefore, *this Court*, like the United States Supreme Court in *Withrow, supra*, 58, *does not believe that the combination of the investigative and adjudicative roles in the Judicial Tenure Commission creates even a risk that due process guarantees could be violated. Id.* at 691.

VII. RESPONDENT'S CHALLENGE TO THE JTC'S RECOMMENDATION FOR DISCIPLINE LACKS MERIT

A. The JTC Considered Appropriate Criteria In Fashioning A Recommendation for Discipline

In assessing the appropriate sanction in judicial disciplinary proceedings, the primary charge is to fashion a penalty that maintains the honor and the integrity of the judiciary, deters similar conduct, and furthers the administration of justice. *In re Hocking*, 451 Mich 1, 24 (1996) The purpose of judicial discipline is not to punish, but to maintain the integrity of the judicial process. *In re Seitz*, 441 Mich 590, 624 (1993). In view of the fact that punishment is not a purpose of judicial discipline, there is not much room, however, for mitigation. *Id.* 624-625 (1993)

The JTC considered the criteria for assessing an appropriate sanction as set forth by the Supreme Court in *In re Brown*, 461 Mich 1291, 1292-1293; 624 NW2d 744 (1999). The JTC applied the relevant Brown standards in its Decision and Recommendation, pages 12 – 13, as follows:

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

There is no evidence, and there is no reason to believe, that this was anything other than a one-time incident.

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

Respondent's acceptance of the football tickets took place on the bench, in open court. This factor militates in favor of a public sanction.

(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 acceptance of the football tickets created an appearance of impropriety, but does not seem to have had an actual effect on the administration of justice in this matter. The sentence Respondent imposed was everything the prosecutor had sought – full restitution for the damages suffered. The appearance of impropriety in this matter, however, goes right to the heart of a fair, impartial, and unbiased judiciary.

(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 acceptance of the football tickets created an appearance of impropriety *per se*.

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

The evidence established that Respondent and Mr. Benedict had discussed the tickets at least a week before their actual delivery.

Respondent challenges some of the JTC's conclusions. He argues, for example, that the JTC made inconsistent findings regarding the effect of Respondent's conduct on the administration of justice because on page six of its decision, under "Conclusions of Law," the JTC states that the conduct constitutes . . . "(b) Conduct clearly prejudicial to the administration of justice. . ." but in recommending a sanction, the JTC stated Respondent's acceptance of the football tickets "does not seem to have had an actual effect on the administration of justice in this matter." (Respondent's Brief, p. 9) The JTC's statements are readily reconcilable. Under "Conclusions of Law," the JTC finds Respondent's conduct prejudicial to the administration of justice in the broad sense. Every act of misconduct by a judge fosters mistrust and negatively impacts the administration of justice. See *In re Daghir*, 657 A2d 1032, 1037 (Pa 1995), discussed below. In its analysis of the *Brown* factors, the JTC is specifically referring to the facts *of this case*, in noting that the judge's acceptance of the tickets did not appear to have compromised his ruling *in this matter*. In fact, in the previous sentence, the JTC pointed out that the "sentence Respondent imposed was everything the prosecutor had sought – full restitution for the damages suffered." The JTC's reference to the propriety of the sentence Respondent imposed also refutes Respondent's claim that "absent from the JTC recommendation is any mention that Judge Haley imposed the sentence and the restitution urged by the prosecutor," (Respondent's Brief, p. 9) and raises a question about Respondent's understanding of these matters.

B. Related Disciplinary Considerations

Mindful of the Supreme Court's desire for proportionality with respect to sanctions for comparable conduct, the JTC considered the above criteria in connection with other factors, including Michigan disciplinary cases and various disciplinary cases from other jurisdictions. In this instance, Michigan disciplinary cases involving judges accepting gifts offer little guidance

with respect to sanction due to their factual dissimilarity, but confirm the impropriety of such conduct.

The respondent in *In re Lawrence*, 417 Mich 248 (1983), was found, *inter alia*, to have accepted free personal legal representation from, and assigned indigent criminal cases to, a particular attorney. He was publicly censured, suspended without pay for nine months and ordered to pay costs and return certain campaign funds improperly retained to contributors or to remit to the State Bar Client Security Fund the amount of $5,667.97.

In *In re Jenkins*, 437 Mich 1 (1991,) the respondent improperly accepted gifts, favors, loans, and other items of value from litigants and their representatives involved in matters before him, and failed to report them. He was removed from office, but many other egregious acts were involved, such as engaging in routine solicitation and acceptance of bribes in return for the improper disposition of matters, routine improper *ex parte* communications with litigants and their representatives, and intentionally misrepresenting his residential address on an automobile insurance application, to name a few.

Other states have been confronted with the identical ethical issue before the Court: a judge accepting a gift of tickets to a sporting event from a party or attorney who appears before him. The Pennsylvania case, *In re Daghir*, 657 A2d 1032 (Pa 1995), is one of three which bears a striking similarity to the instant case. Judge Daghir had presided over a divorce action, the property distribution portion of which was still pending when the defendant husband contacted the judge about matters unrelated to the litigation. The defendant then offered the judge four Miami v Penn State football tickets and a parking pass which the judge accepted. The Pennsylvania Court publicly reprimanded the judge and suspended him without pay for seven

days. It focused primarily on the *judge's acceptance of the football tickets* in its opinion and order for discipline, commenting:

> (a) Judge Daghir demonstrated a **serious lack of judgment in accepting Penn State Football tickets from a person who had a matter of significant financial interest pending before him**.
>
> (b) **Judges are rightly expected to conduct their professional and personal lives in an exemplary manner.** The public has a right to a judicial system in which they can have complete confidence.
>
> (C) **A judge must always be alert to situations which give rise to inherent impropriety.** The **mere giving of a gift from a lawyer to a judge**, even when the lawyer does not have a case pending before the judge, **implies that there is some string or thread attached to the gift,** unless, of course, the gift arises out of a long-standing personal friendship between the lawyer and judge.
>
> (d) Accepting gifts from litigants is one of the clearest examples of a situation that a judge must avoid, even if the judicial officer perceives the gift as one that does not have much value, and even if the judge has no intention of bestowing favorable treatment upon the donor in exchange for the gift.
>
> (e) Judge Daghir's acceptance of the tickets **demonstrated a fundamental lack of understanding of his position as a jurist and his responsibilities to the public. Judges must always be concerned with not only the presence of actual bias, but the appearance of bias and partiality as well.** Judge Daghir failed to recognize that his acceptance of the gift from a litigant created, at a minimum, the appearance of partiality and impropriety. **Such conduct results in the erosion of public confidence and increases the skepticism and cynicism with which the public often views the administration of justice**. Judge Daghir's improper conduct **has caused the image of all the members of the Commonwealth's judicial system to be tarnished, and has undermined the public's view of the administration of justice throughout the state**. (*Id.* at 1036-1037, emphasis added.)

The JTC noted there is no evidence in this matter of a long-standing personal relationship, and that in fact, the evidence supports only one conclusion: that the relationship was professional, not personal. The *Daghir* case is helpful with respect to determining an

appropriate sanction in that it involves an instance of virtually identical misconduct of a judge accepting football tickets from a party while a matter was before him. Judge Daghir was also found guilty of excessive delay in the disposition and decision in six cases. Additionally, Judge Daghir accepted the tickets directly from a party. Judge Daghir was publicly admonished and suspended for seven (7) days. By comparison, a more lenient, albeit public, sanction would be appropriate in this matter.

In *Inquiry Concerning Judge Luzzo*, 756 So.2d 76, 25 Fla. L. Weekly S343 (2000), the Judicial Qualifications Commission charged Judge Luzzo with violating judicial canons by accepting free tickets to Florida Marlins baseball games approximately fifteen times from two friends who were members of a law firm that appeared before him. Judge Luzzo stipulated that his conduct violated Canon 1 in failing to uphold the integrity and independence of the judiciary and Canon 2 in failing to avoid impropriety and the appearance of impropriety and agreed to be disciplined.

The judge waived his right to a hearing, ceased accepting free tickets, and, in order to avoid any possible embarrassment to the Florida Conference of Circuit Judges or to the integrity of the judiciary, he resigned as Chairperson-Elect of the Conference prior to his being installed at the June 1999 meeting. The investigative panel noted the judge had never had a complaint filed against him prior to the incident and took into account his candor, his expressions of remorse to the panel, his general reputation as a fair, impartial and competent judge who had repeatedly been highly rated in the bar polls, his voluntary resignation, and concluded that a public reprimand was appropriate. The Florida Supreme Court found that the judge's conduct violated the Code of Judicial Conduct in that a judge shall:

- personally observe those standards so that the integrity and independence of the judiciary may be preserved;

- avoid impropriety and the appearance of impropriety in all of the judge's activities;
- respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;
- not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment;
- not permit others to convey the impression that they are in a special position to influence the judge; and
- not accept a gift from a person who has come or is likely to come before the judge.

The Florida Supreme Court had recently concluded that "when the conduct of a jurist is so egregious as to require a public reprimand, such reprimand should be issued in person with the defaulting jurist appearing before this Court." *Id.* 79, citing *In re Frank*, 753 So2d 1228, 1242 (Fla 2000). Judge Luzzo was therefore ordered to appear before the Court for a public reprimand.[6]

In the most recent case, *Office of Disciplinary Counsel v Lisotto*, 94 Ohio St3d 213, 761 NE2d 1037 (2002), the judge accepted up to two tickets to attend a maximum of eight Pittsburgh Steeler National Football league home games per season from an attorney who appeared as counsel in numerous cases before the judge. There was, however, no evidence of any favor, preference or improper action between the judge and the attorney in any of the cases. Further, the judge himself realized his acceptance of the tickets was improper after attending a judges' conference in 1999, and gave the attorney a check for $2000 to pay for the football tickets he had received. In April 2001 the judge amended his financial disclosure forms to reflect his receipt of the tickets in the years it occurred. The Ohio Supreme Court accepted the findings, conclusions and recommendations of the Board of Commissioners on Grievances and Discipline of the

[6] The Michigan Supreme Court once required respondents to appear in court for the administering of the public censure. As the JTC noted, the Court should consider reinstating that practice. (Decision and Recommendation, FN 5, p. 17)

Supreme Court that the judge's conduct violated the Canons of Judicial Ethics in that a judge shall not accept a gift from a person who has come or is likely to come before the judge and a judge *shall avoid the appearance of impropriety* in all of the judge's actions. In mitigation the panel received letters from over fifty judges, attorneys, and members of the community attesting to the good character of the judge, and *noted he submitted payment for the tickets as soon as he discovered his error.* The Supreme Court adopted the panel's recommendation and publicly reprimanded the judge.

The JTC found the above cases provide excellent guidance in fashioning a sanction recommendation. (Decision and Recommendation, p. 17) Respondent, like the judges in the above cases, accepted tickets from an attorney who had a matter pending before him at the time. As the JTC noted, this conduct necessarily "results in the erosion of public confidence and increases the cynicism with which the public often views the administration of justice." *Daghir*, supra, at 1037.

In light of the foregoing, the Examiner is at a loss to understand Respondent's argument that even if the Court concludes the Examiner has met his burden of proof (which he clearly has) and accepts the JTC's finding that Judge Haley violated the Canons, he should not be sanctioned. (Respondent's Brief, p. 26) Significantly, Respondent has found it convenient to completely ignore the *Daghir*, *Luzzo* and *Lisotto* cases in his brief, presumably because they are directly on point and refute his entire defense.

C. Lack Of Remorse Is A Relevant Consideration In Judicial Discipline

In at least two of the three cases described above, the judges stipulated to the misconduct and the conclusions of law involving violations of the Code of Judicial Conduct. Respondent, on the other hand, has persistently failed show remorse or to appreciate the negative impact his

conduct has had on the public's perception of the judiciary and the administration of justice. He has tried to diminish his misconduct by disparaging the officer who reported it and blaming attorney Benedict for offering the tickets. He has consistently denied his conduct was wrong or created an appearance of impropriety, necessitating a formal hearing, and, his conduct occurred on the bench. For these reasons, Respondent's conduct merits public censure.

CONCLUSION

The record firmly establishes that Judge Michael Haley, while on the bench and wearing his judicial robe, knowingly accepted a gift of two University of Michigan football tickets from a defense attorney appearing before him. Such conduct undermines the effectiveness of the courts and engenders public disrespect. Public perception of our judicial system is directly affected by such conduct, which prejudices more than Judge Haley's ability to administer justice.

> *The appearance from which favored treatment can be deduced, even without real foundation, can be harmful* to the administration of justice. Likewise, is providing the opportunity from which an implication of impropriety could be drawn. *No matter how innocent Respondent's conduct may have been,* it unnecessarily and unwisely puts a burden of explanation and justification not only on himself but on the judiciary of which he is an officer. (emphasis added) *In re Suglia, supra.*

Despite the seriousness of the conduct and its damage to the judicial system, this appears to have been an isolated instance on the party of Judge Haley. It is, however, exacerbated by his continued refusal to acknowledge that his actions were improper, necessitating a formal hearing.

Even if all the facts are viewed in Respondent's favor, as the master apparently did, an objectively reasonable person would be compelled to conclude that an impermissible appearance of impropriety existed which Judge Haley created and could have easily avoided. Judge Haley can argue all he wants that the impropriety occurred when Mr. Benedict placed the tickets on the

bench and slid them over to him, but he cannot escape the fact that judicial impropriety occurred when Judge Haley picked the tickets up.

The charges against Respondent in Count I have been substantiated by a preponderance of the evidence, including the record, exhibits, and Respondent's own admissions. The Respondent, Honorable Michael J. Haley, has improperly accepted a gift from an attorney who regularly appears before him, in violation of Canon 5C(4)(c). By so doing he has failed to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved in violation of Canon 1, engaged in conduct involving impropriety and the appearance of impropriety, thereby eroding public confidence in the judiciary in violation of Canon 2A, and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2B. Judge Haley is guilty of misconduct in office and conduct clearly prejudicial to the administration of justice within the purview of Article VI, Section 30 of Michigan Constitution, as amended, and MCR 9.205. His conduct warrants a public censure.[7]

[7] The Commission concurred regarding the findings of fact and conclusions of law. Seven commissioners recommended the sanction of public censure. Two commissioners dissented as to sanction only and recommended a suspension of 30 days without pay in addition to public censure.

WHEREFORE, the Michigan Judicial Tenure Commission respectfully requests that the Michigan Supreme Court deny Respondent's "Petition To Reject The Judicial Tenure Commission's Decision And Recommendation." The Commission urges the Court to find Judge Michael Haley guilty of conduct clearly prejudicial to the administration of justice and misconduct in office, and impose the recommended discipline: PUBLIC CENSURE.

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JUDICIAL TENURE COMMISSION

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DATED: October 31, 2005

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