STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Hon. Debra Nance **FC 106**
Forty-Sixth District Court
Southfield, MI
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OBJECTION TO RECOMMENDATION TO DISMISS COMPLAINT

In December 2022 the Judicial Tenure Commission filed[1] FC 106 charging Hon. Debra Nance with intentionally making false statements under oath about an incident in which she was involved with Hon. Demetria Brue on Mackinac Island in August 2019. In order to file the complaint, the Commission had to determine that there was sufficient evidence of the misconduct charged in FC 106 to hold a public hearing. One aspect of the Commission's determination was necessarily whether Judge Nance intended to deceive when she made the charged false statements.

The Master recently disagreed with the Commission's determination and recommended that the Commission summarily dismiss FC 106 *without* any evidentiary hearing.[2] The Master did so solely on the bases that a) Judge Nance

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[1] The Master's recommendation attributes filing the December complaint to disciplinary counsel rather than the Commission, (Attachment 5: Official Report and Recommendation FC106 ["Report"] p 2), although disciplinary counsel have informed the Master on several occasions that it is the Commission, not disciplinary counsel, that files the complaint. (See, e.g., Attachment 12: Tr 4/1/24 p13/9; Attachment 13: Response to Motion to Stay filed in FC 105, pp 1,3; Attachment 14: Surreply to Motion to Stay in FC 105, p. 2). Disciplinary counsel did later file amended versions of the complaint that had no substantive changes.

[2] The Supreme Court appointed Hon. Alexander Lipsey as Master in March 2023. The Master first met with the parties in early May 2023. In early August 2023, Judge Nance filed a motion to dismiss the complaint. Disciplinary counsel answered. The Master did not hold a hearing at that time, perhaps delaying because Judge Nance was then attempting to seek counsel—Judge Nance has had five attorneys (one of whom filed appearances on two separate occasions) during the investigation and public proceedings and has been without counsel since her fifth attorney ceased representing her in September 2023.

Judge Nance filed a pro per supplemental brief for her motion to dismiss in February 2024, to which disciplinary counsel responded in April 2024. The Master held a hearing on May 14, 2024, during which he indicated that he intended to recommend that the Commission dismiss FC 106.

claims that she did not intend to mislead and disciplinary counsel provided no evidence to the contrary, and b) she claims that certain important evidence is not authentic. Disciplinary counsel object to the Master's recommendation because it rests on fundamental mistakes of fact and law:

- The Master should not have second-guessed the Commission's determination that there is enough evidence of Judge Nance's intent to hold a hearing.
- It is improper to summarily dismiss a complaint when intent is at issue.
- There is substantial evidence that Judge Nance *did* intend to mislead, which the Master improperly disregarded.
- The Master's recommendation relied on a purported "fact" that is not true and is not in the record, and created an element of the misconduct that does not exist.

Any one of these errors, standing alone, is a compelling reason for the Commission to reject the Master's recommendation to dismiss.

Background

While on Mackinac Island in August 2019 for a judges conference, Judges Nance and Brue[3] had an interaction with Ira Green, the proprietor of a bike rental business. FC 106 alleges that while Judge Nance watched, Judge Brue argued with Green about the cost of bike rental; Judge Brue grabbed a piece of paper from Green's hand, then falsely accused *Green* of having assaulted *her*; Judge Brue warned Green of the consequences of assaulting an African American judge; and Judge Brue falsely told a police officer that Green had assaulted her.

FC 106 charges that when Judge Nance was interviewed under oath by Commission staff less than a year later about Judge Brue's interactions with Green and the Mackinac Island police, she falsely denied knowledge of Judge Brue's

He issued his written recommendation on May 20, 2024, and delivered that recommendation to the Commission and disciplinary counsel on July 15, 2024.

[3] Judge Brue is charged with related misconduct in FC 105.

misconduct even though she watched as Judge Brue committed it. To buttress her denial, she fabricated claims that Kenneth Hardy, the police officer who first came to the scene, would not even speak with or acknowledge her and Judge Brue.[4] She also fabricated claims that Officer Hardy insultingly told her and Judge Brue to "wait by the curb" of a Mackinac Island street (along with the smell of horse dung) while he reviewed video of the interaction between Judge Brue and Green—a command to which Judge Nance ascribed racist intent.[5] Judge Brue later made her own statements about the incident that were strikingly similar to the falsehoods in Judge Nance's statements.[6]

The Commission authorized FC 106 in part based on security video (no audio) of the interactions between Judge Brue and Green with Judge Nance watching, and between Judges Nance and Brue and Officer Hardy. The Commission also authorized FC 106 on the basis of anticipated testimony of Green, two of his staff, Officer Hardy and two other police officers, expert witnesses who can articulate the comments Judge Brue made during her interaction with Green,[7] and two members of the public

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[4] The significance of this in the context in which Judge Brue made this false statement was that if Officer Hardy refused to even talk with the judges, Judge Nance could deny that Judge Brue told Officer Hardy that Green had assaulted her.

[5] If true, Judge Nance's story would have implied racism or other disrespect by Hardy that was part of a pattern she alleged of him mistreating the judges. If he disrespected them by telling them to wait by the curb, that would have supported Judge Nance's claim that Hardy also refused to talk to the judges when he first came to the bike shop. That is, the pattern of disrespect explained Hardy's otherwise inexplicable refusal to talk with the judges when he first arrived.

[6] Judge Brue's false statements are similar, but not identical, to Judge Nance's false statements. They mostly differ with respect to whether Officer Hardy refused even to speak with Judges Brue and Nance. With respect to this difference, disciplinary counsel note that unlike Judge Nance, Judge Brue had a chance to see video of the ten minute interaction she and Judge Nance had with the officer *before* she made her first statements about interacting with Officer Hardy. That video was not available to Judge Nance (or to Commission staff) before Judge Nance made her own false statement.

[7] The experts are certified deaf interpreters who can read Judge Brue's lips from the video, as they would during an in-person conversation.

who were concerned enough about Judge Brue's conduct that they offered to testify if necessary.[8]

Objections to Recommendation to Dismiss FC 106

The Master's recommendation to dismiss FC 106 is based on his belief that under MCR 2.116(C)(10), Judge Nance's motion to dismiss put the burden on disciplinary counsel to provide evidence that Judge Nance intended her false statements to deceive. The Master concluded that disciplinary counsel did not (and perhaps could not) meet this burden.

Dismissal on the Basis of Insufficient Evidence is Improper After the Commission Has Already Deemed the Evidence Sufficient

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[8] Jared Scott was an employee of the bike shop who will testify to his interactions with Judge Brue and Judge Nance that preceded their meeting with Ira Green. He will also testify about what he heard Judge Brue say to Ira Green.

Gunner Libby was as an employee of the bike shop who will testify to his interactions with Judge Brue and Judge Nance that preceded Judge Brue's interaction with Ira Green. He will also testify about what he heard Judge Brue say to Ira Green.

Ira Green will testify to the interaction that led to Judge Brue falsely accusing him of assault and threatening him with consequences for having assaulted an African American judge, as Judge Nance stood nearby and watched.

Police Officer Kenneth Hardy will testify that he was directed to the bike shop by another person. He will testify that the first thing he did upon his arrival was speak with Judge Brue and Judge Nance for about ten minutes to get their version of what had happened, prior to even getting information from Ira Green. He will also testify that neither he nor anyone else instructed Judge Nance and Judge Brue to wait by the curb or in the street while he reviewed security video with Ira Green.

Police Officer Joshua Smyth will testify that he was present when Judge Nance and Judge Brue tried to enter Ira Green's office and were asked to stay outside and will testify that neither Ira Green nor anyone else instructed Judge Nance and Judge Brue to wait by the curb or in the street.

Retired Michigan State Police Trooper Daniel Bergsma will testify that he was called to the scene by Officer Hardy. He waited with Judge Nance and Judge Brue on the sidewalk while Officers Hardy and Smyth reviewed the security video with Ira Green. No one told the judges to wait by the curb.

Either John Taminski or Thomas Dilger will testify that a woman, identified as Judge Brue by other evidence, spoke in such a loud voice during her interaction with Mr. Green that their attention was drawn to the incident – for one of them, their attention was drawn from across the street.

In addition, disciplinary counsel will call experts to interpret Judge Brue's words as captured by the security video.

When the Commission filed FC 106 it was asserting that it had determined that enough evidence existed to establish every element of each charge of misconduct to warrant a public hearing on the charges. The Master's recommendation second-guesses the Commission's determination. This is problematic as a matter of the procedure that should govern discipline proceedings.

One element of the charges in FC 106 is that Judge Nance intended that her false statements would deceive. As noted both above and below, the core reason the Master recommends dismissal is because Judge Nance denies that she intended to deceive, and the Master believed that her denial put the burden on disciplinary counsel to show that she did intend to deceive. But Judge Nance's answer to the complaint was already her denial that she intended to deceive, and the fact that she denied an element of the charges in her answer to the complaint is hardly a basis to dismiss the complaint. Rather, her answer sharpens the issues to be resolved by a hearing on the complaint.

Just as it makes no procedural sense for the Master to second-guess the Commission's decision to have a hearing in the first place, it makes no procedural or substantive sense for Judge Nance's motion to dismiss, which denies her intent in the same way as does her answer to the complaint, to result in dismissal of the complaint when her answer alone would not do that.

It is not at all clear that the rule on which the Master relied to recommend dismissal is even applicable to this situation. The Master relied on MCR 2.116(C)(10), a rule of civil procedure. MCR 9.333(A) directs that the public hearing in Commission proceedings "must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court."

A motion to dismiss for insufficient evidence is not a circumstance contemplated by the phrase "as nearly as possible" in Rule 9.233(A). Rule 2.116(C)(10) is designed for civil cases in which there has not yet been a judicial determination that the evidence is sufficient to support a complaint. In contrast, there can be no complaint in discipline proceedings until the Commission *has* determined that there is sufficient evidence. Whatever the merit of applying any

other rules of civil procedure prior to a hearing on a Commission complaint,[9] there is no merit to applying this particular rule to a decision the Commission has already made. Indeed, if Judge Nance can invite the Master to recommend dismissal merely by denying the evidence that gave rise to the complaint in this case, then *every* respondent in *every* Commission public complaint can do the same. Again, that is a procedure that makes no sense, and is not dictated by the rules, so the Commission should reject it here.

Rule 2.110(C)(10) Does Not Authorize Summary Dismissal When Intent is Disputed

Judge Nance's intent to deceive is the main issue to be resolved by the public hearing. She argues that the complaint against her should be summarily dismissed because disciplinary counsel cannot produce "independent evidence" that she intentionally made any false statement.[10]

Michigan's courts have long recognized that when intent is disputed it is improper to dismiss a complaint on the basis of insufficient evidence prior to an evidentiary hearing. *See*, *e.g.*, *Brown v. Pointer*, 390 Mich. 346, 354 (1973); *Jewett v. Mesick Consolidated School District*, 332 Mich. App. 462, 476–77 (2020); *Wurtz v. Beecher Metro. Dist.*, 298 Mich. App. 75, 90 (2012), decision rev'd on other grounds, 495 Mich. 242 (2014). The Michigan Court of Appeals noted long ago, "[i]n cases involving state of mind, such as scienter requirement in fraud, summary judgment will hardly ever be appropriate because it will be difficult to foreclose genuine dispute over this factual question." *Whalen v. Bennett*, 67 Mich. App. 720, 725 (1976). The Court reiterated the point recently: "when a witness's credibility is at issue, summary disposition is inappropriate." *Taylor Estate v Univ Physician Group*, 329 Mich App 268, 284 (2019).

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[9] As noted, MCR 9.233(A) applies the civil rules of procedure to "the hearing." The Master invoked Rule 2.116(C)(10) prior to "the hearing." This was outside the use of the civil rules that is explicitly authorized by Rule 2.333(A).

[10] Supplemental Motion for Dismissal p. 6 Filed February 26, 2024

The Court of Appeals has spoken even more pointedly to the very situation this case presents: "To the extent that [Michigan Court of Appeals] decisions seem to apply an absolute exception to the application of summary disposition premised on the mere possibility that a jury might disbelieve an essential witness, . . . the application of that rule is limited to those situations where the moving party relies on subjective matters that are exclusively within the knowledge of its own witness and those in which the witness would have the motivation to testify to a version of events that are favorable to the moving party." *Franks v. Franks*, 330 Mich. App. 69, 90-91 (2019). *Franks* might as well have been speaking about this case: a) Judge Nance was the "moving party"—the person who moved for summary dismissal; b) the primary basis on which the Master relied to recommend dismissal was Judge Nance's claim that there is no direct evidence to show that she had an intent to deceive, while she denies that she had that intent—which is a purely subjective matter; and c) Judge Nance relied only on her own affidavit as direct evidence that she lacked the intent to deceive, which evidence is exclusively within her own knowledge and as to which, as the person charged with misconduct, she has a motive to provide information that is favorable to her.

The Attorney Discipline Board determined that summary dismissal is not appropriate when intent is at issue in attorney discipline proceedings in *GA v Fieger*, 94-186-GA. The respondent sought summary dismissal of a complaint that charged him with making malicious false statements in violation of the Rules of Professional Conduct. The grievance administrator did not offer evidence to rebut respondent's affidavit in support of dismissal, and a hearing panel dismissed for that reason. The Board reversed the hearing panel. At pp 10-11 of its opinion the Board noted that in Michigan, summary disposition is inappropriate when motive and intent are predominant issues, as they were in *Fieger*.

Franks, *Fieger*, and the other cases just cited make clear that summary dismissal is improper as a matter of law in cases such as this one, in which the relevant issue turns on a party's subjective intent.

Judge Nance Did Not Meet Her Initial Burden, as Required Before Disciplinary Counsel Must Produce Any Evidence

The Master recommends dismissing the complaint on the basis that disciplinary counsel did not provide admissible evidence to respond to Judge Nance's motion to dismiss.[11] For the reasons just noted, summary dismissal is inappropriate here whether or not disciplinary counsel offered any evidence in response to Judge Nance's claim. It is also inappropriate because Judge Nance did not meet her threshold burden of showing that there is no disputed issue of fact, and therefore disciplinary counsel had no obligation to produce any evidence.

Before a party has any burden to produce evidence in response to a motion to dismiss under MCR 2.116(C)(10), the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact" and must support that position with authority. MCR 2.116(G)(4). The Court of Appeals emphasized this point in *Meyer v. City of Center Line*, 242 Mich. App. 560 (2000), when it reversed a grant of summary disposition even though the non-moving party had not offered evidence to rebut the motion to dismiss. *Meyer* reversed because the motion to dismiss had not specifically identified the undisputed issues. The Court noted that when the moving party did not meet its burden, the non-moving party "had no duty to respond to the motion."

The only issue that Judge Nance specifically identified in her motion as being undisputed is whether disciplinary counsel can present direct evidence that she intended to deceive.[12] Judge Nance's claim is that FC 106 should be summarily dismissed because no witness other than her could testify to what *she* perceived and remembered concerning the events on Mackinac Island—i.e., that she alone is able to provide direct evidence of her intent. (Attachment 3: Supplemental Motion to Dismiss pp 2-3). Her claim did not give disciplinary counsel any duty to respond because, as

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[11] Attachment 5: Report p. 2

[12] Judge Nance also claims that certain video evidence, discussed below, is not authentic, but she does not claim that this is undisputed. (Attachment 2: Motion for Dismissal pp 7-8).

just noted, summary dismissal is inappropriate when intent is at issue. *See*, *e.g.*, *Whalen*, *Franks*, and *Meyer*, *supra*.

But even if summary dismissal *were* permissible when intent is at issue, Judge Nance's argument still would not have placed any burden on disciplinary counsel to respond, because her argument is specious. It is *always* true—in *every* case that alleges fraud, false statement, intentional infliction of emotional distress, and intent of every other type—that no witness can directly testify to what another person perceived and remembers. Yet, as every judge is well aware, those cases nonetheless proceed to trial because those states of mind can *only* be determined by circumstantial evidence.[13] *Cf.* 10A Wright, Miller & Kane, *Federal Practice & Procedure* §2730 p 238 (" . . . information relating to state of mind generally is within the exclusive knowledge of one of the litigants and can be evaluated only on the basis of circumstantial evidence . . . .").

There is substantial circumstantial evidence of Judge Nance's intent to deceive. It includes the statements she made, the way she made them, the truth about the events she falsely described, and the other circumstances in which those events occurred. But except in one narrow way, Judge Nance never challenged the circumstantial evidence of her intent to deceive—she merely argues that it doesn't count because it is not direct evidence of what she was thinking and perceiving.[14] Indeed, during the hearing on the motion to dismiss, the Master *accepted* that disciplinary counsel's witnesses would testify as disciplinary counsel had represented that they would.[15]

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[13] Judges and juries are commonly asked to determine whether a speaker deliberately lied by considering circumstantial evidence rather than direct evidence, precisely because a person's intent cannot be proved by direct evidence. *See*, *e.g.*, MI Crim JI 2.6 and MI Crim JI 4.16.

[14] The evidence disciplinary counsel proffered that Judge Nance does challenge is whether or not she and Judge Brue were told to "wait by the curb" at one point during the interaction on Mackinac Island. (Attachment 3: Supplemental Motion for Dismissal pp. 3, 4, and 6). This is discussed below at pp 23-24. This evidence relates to only a part of FC 106.

[15] Attachment 6: Tr. May 14, 2024, p 44/2-5.

It should have been fatal to Judge Nance's motion for summary disposition that she has not challenged the circumstantial evidence of her intent to deceive that disciplinary counsel proffered. That circumstantial evidence creates an issue of fact regarding her intent and therefore makes summary dismissal inappropriate.

The Master's written report (in contrast to his comments at the hearing) does *not* acknowledge that disciplinary counsel's witnesses would testify as claimed. Rather, it rejects disciplinary counsel's proffer of what those witnesses will say on the basis that we did not provide affidavits to substantiate our claims about their testimony.[16] But because Judge Nance never challenged that testimony, the Master should have accepted that it would be as proffered and the burden of producing affidavits never should have shifted to disciplinary counsel.

The impropriety of the Master requiring disciplinary counsel to provide affidavits of what our witnesses would say is underscored by the tangled history of Judge Nance's motion to dismiss. When she first filed her motion it said nothing about any weakness in the evidence of her intent to deceive.[17] Rather, it argued for dismissal almost exclusively on the ground that the Commission had committed misconduct during the investigation.[18] Nothing in that motion would have triggered any burden on disciplinary counsel with respect to intent.

Judge Nance then filed a supplement to her motion to dismiss. Pages 1-2 of her supplement noted that the Master had barred consolidation of her case with FC 105 against Judge Brue.[19] She claimed that "consequently," disciplinary counsel had no witnesses to establish the case against her. This argument is patently wrong. The decision not to consolidate means that disciplinary counsel's witnesses will have to testify twice, but it does not mean that those witnesses are somehow unavailable to

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[16] Attachment 5: Report p 3.

[17] Attachment 2: Motion for Dismissal.

[18] Judge Nance's motion also argued without support that one piece of evidence—the bike shop security video—was not authentic. That argument is discussed further below.

[19] The Master's decision not to consolidate these two nearly identical complaints is discussed further below at pp 26-28.

testify in the case against Judge Nance. Judge Nance's supplemental motion also alleged several other wholly unfounded bases for dismissal (*Id*. at pp 3-end); bases the Master did not address in his report.

As noted, at the hearing on Judge Nance's motion, the Master even *accepted* disciplinary counsel's proffer. In effect, his acceptance acknowledged that witnesses would contradict Judge Nance's sworn interview testimony about what happened. It was not until the Master issued his written recommendation that he suggested that he was disregarding the proffer and doing so on a basis he had not previously mentioned.[20]

In short, nothing that took place during the proceedings relating to Judge Nance's motion to dismiss triggered any obligation under MCR 2.116(C)(10) for disciplinary counsel to produce evidence, nor suggested that the Master felt such evidence was necessary; even if the evidence concerning Judge Nance's intent *could* be a basis for summary dismissal, which, as discussed above, it cannot.

If the Master perceived the lack of affidavits to bar his considering the evidence disciplinary counsel proffered, and had he raised that concern to the parties, it would have been exceptionally easy to obtain the affidavits he ultimately concluded were necessary. It was especially appropriate for him to alert the parties to his concern in this case, given the tangled history of Judge Nance's motion to dismiss. But the Master did not even explore the option of obtaining affidavits before recommending dismissal of very serious charges of judicial misconduct.

The Master's inconsistency regarding whether he accepted disciplinary counsel's proffer regarding the evidence, and his ultimate unreasonable refusal to consider that proffer, are additional reasons to reject his recommendation.

<u>*The Master Wrongly Ignored Evidence that Disciplinary Counsel Proffered*</u>

In past public complaints, disciplinary counsel have never filed affidavits in response to motions to dismiss under MCR 2.116(C)(10). See, for example, the responses to the motions to dismiss that were filed in FC 15, FC 20, FC 26, FC 37,

[20] Attachment 5: Report pp 3, 4.

FC 45, FC 52, FC 61, and FC 88. When disciplinary counsel discussed the evidence in those cases, they did so merely by summarizing it. This practice comports with the procedural status of a public complaint as discussed above, in which the Commission has already determined that sufficient evidence exists to warrant an evidentiary hearing.

Disciplinary counsel followed that precedent here.[21] It was sufficient here, just as it has been in the past.

The Master Arbitrarily Refused to Consider Video Evidence That Shows Judge Nance's Intent to Deceive

As one part of disciplinary counsel's proffer to the Master, we provided him with video of two of the interactions about which Judge Nance is accused of making false statements—Judge Brue grabbing a paper from Green and then accusing Green of assaulting her, and the ten-minute conversation that Officer Hardy had with Judges Brue and Nance as soon as he arrived on the scene, soon after Judge Brue's interaction with Green. The video shows that Judge Nance's statements under oath about the events were false, and in the case of the interaction with Officer Hardy, were blatantly false. That is, the video shows Judge Nance standing by as Judge Brue grabbed at Green and then said he assaulted her, and as she warned Green of the consequences of assaulting an African American judge. The video also shows Judge Nance participating in the ten-minute conversation with Officer Hardy, a conversation that Judge Nance testified repeatedly did not take place.

The Master refused to consider the video when concluding that there was no disputed issue of fact about Judge Nance's intent to deceive. The entirety of the Master's reasoning is: "…disciplinary counsel has provided video or at least a portion of video proceedings from the incident, which the Court has not reviewed, quite frankly, because it is the documents which at least there is some question as to its completeness as to the authenticity of the testimony, so at this point it would not be

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[21] Atttachment 7: Reply to Supplemental Response to Motion to Dismiss p 4.

permitted as evidence at trial."[22] It appears that the Master was trying to say the video would not be admissible because 1) disciplinary counsel had not authenticated it for him and 2) because there may be or may have been *other* video of *other* times during the overall interaction that disciplinary counsel and Judge Nance do not possess. (Attachment 5: Report p 3).

These are troubling and wrong rationales for disregarding the video. Judge Nance has never provided evidence that seriously challenges its authenticity. Her only basis for claiming the video is not authentic is that her then-attorney obtained a copy of it from disciplinary counsel.[23] This is another specious argument. Discovery is routinely provided through counsel, so an allegation that the video was provided through counsel hardly calls its authenticity into question.

Judge Nance also claims that there may be video in addition to the video that disciplinary counsel possess. But that is not a challenge to "authenticity," which is a determination whether an item is what it purports to be.

Though Judge Nance never raised a credible challenge to the authenticity of the video and though the Master never hinted during the hearing on Judge Nance's motion that he was concerned about its authenticity,[24] his written recommendation refused to consider the video because disciplinary counsel had not established its authenticity. This was error, because Judge Nance's affidavit did not put a burden on disciplinary counsel to establish the authenticity of the video.

The other reason the Master gave for rejecting the video is that Judge Nance suggested that there might be *additional* video. But Judge Nance never supported this claim with any particularity.[25] On that basis alone, the Master should have disregarded her claim.

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[22] Attachment 6: Tr. May 14, 2024, p 4.

[23] Exhibit 6 – Affidavit in Support of Supplemental Motion to Dismiss, p. 5 Filed February 26, 2024

[24] Had the Master dropped such a hint, disciplinary counsel could have easily obtained an affidavit from Green, the proprietor of the bike shop whose security system captured the video.

[25] Attachment 4: Affidavit in Support of Supplemental Motion to Dismiss, pp 3, 5.

The Master should also have rejected Judge Nance's claim because it has nothing to do with the admissibility of the video that does exist. It should first be noted that disciplinary counsel are not aware of any additional video and there is no evidence of any additional video. But Judge Nance suggests there *may* be video of what took place during the time when Officer Hardy reviewed the video of the interaction between Judge Brue and Green.

Judge Nance does not provide any substantial basis for her suggestion that such video actually does exist, nor did she suggest how that video, if it did exist, would call into question the video of the *other* interactions—the ones that the Master rejected. Nor did the Master's recommendation try to grapple with how the possible existence of video of a different event has any bearing at all on the admissibility of the video that disciplinary counsel proffered. Rather, his recommendation merely states his unsupported conclusion that the video is inadmissible. For the reasons stated below, the Master is incorrect.[26]

The August 2019 interaction that Judge Nance and Judge Brue had was with various persons at The Mackinac Island Bike Shop. The interaction lasted a total of about an hour. The bike shop had security cameras that recorded much of what happened during the interaction.

While Judges Nance and Brue were at the bike shop, they instigated or participated in the events that are relevant to the charges in FC 105 and FC 106. The judges rented bikes, and the bike shop's security videos show that they returned to the shop at about 7 p.m. (Attachment 11: Video of initial drive up and test ride at 18:58:14). After some conversation with shop staff, they spoke with Green, the proprietor, and went near the shop's counter about four minutes after they arrived. Both judges talked with Green. Green's employee arrived with Judge Nance's

[26] The Master's recommendation asserts that "both sides agree that there may be additional footage beyond that presented which is not in disciplinary counsel's possession." (Attachment 5: Report, p 1). That is a technically correct statement but quite misleading in the context in which the Master made it. Disciplinary counsel have made clear that to their knowledge there is *no* additional video, while acknowledging that the ultimate source of that information is Green, the owner of the bike shop, and it is theoretically possible that Green could find additional video. Disciplinary counsel have *not* acknowledged any reason to think there actually is additional video.

allegedly defective bike during the judges' conversation with Green, after taking the bike for a test drive.[27] (Attachment 11: 1st part File Hut 2.mp4, at 19:05:05 to 19:05:20).

Though there is no audio, the video conveys that the conversation between Green and Judge Brue escalated, with Judge Nance occasionally interjecting. (Attachment 11: lst part File Hut 2.mp4, at 19:05:29 to 19:07:58). About six minutes after Judges Brue and Nance began to speak with Green at his counter, the video shows that Judge Brue suddenly snatched at a paper in Green's hand, stepped back, and accused Green of assaulting her.[28] (Attachment 11: lst part File Hut 2.mp4, at 19:08:03).

Officer Hardy arrived at the bike shop about eight minutes after Judge Brue grabbed at Green. Immediately upon his arrival, Officer Hardy spoke with Judges Brue and Nance—alone and uninterrupted—for almost six minutes, then for another three and a half minutes during which Green briefly interjected a few times. During their conversation, Officer Hardy took notes and Judge Brue showed and handed Officer Hardy what appeared to be her credit card, which he then returned to her. (Attachment 11: 1st part File Hut 2.mp4 at 19:16:02).

There is no video of the ensuing 25 minutes. That is the period for which Judge Nance claims the video is "missing." Other evidence shows that during that time, Green and Officer Hardy went to Green's office at the bike shop to review the security video that was relevant to Judge Brue's claim that Green had assaulted her, while Judges Brue and Nance waited outside. Other evidence also shows that there were no security cameras for this area. There is then brief video of an interaction between Judges Brue and Nance, Officer Hardy, and two other officers, that took place after Officer Hardy reviewed the security video. The interaction after the review lasted

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[27] The employee will testify that he briefly test drove the bike and determined that it was in working condition.

[28] Judge Brue faced the camera as she spoke. The video makes it possible to read her lips. In addition, three certified deaf interpreters are prepared to testify to her words at this time.

about four minutes. (Attachment 11: 2nd part File Hut 2.mp4 from 19:22:24 to 19:26:18).[29]

In a nutshell, the available video captures an incident during which Judge Brue grabbed a paper from Green, then falsely accused him of assaulting her. The video also captures a lengthy conversation between the judges and Officer Hardy. Officer Hardy will testify that during this conversation Judge Brue told him that Green had assaulted her. The video shows that Judge Brue watched or stood nearby as this took place.

The Commission's investigation was triggered by these events. Green believed that but for his security video that contradicted Judge Brue's allegation, he could have been falsely charged and would have had a hard time defending himself against such a charge by a judge. Green therefore provided to the Mackinac Island Police the few seconds of the overall video that showed Judge Brue grabbing at Green and therefore contradicted Judge Brue's claim to Officer Hardy that Green had assaulted her.

The Mackinac Island police recommended that Green alert the Commission, since Judge Brue is a judge, so Green filed a request for investigation that was focused on that few seconds of interaction. At the start of the Commission's investigation, Commission staff obtained the few seconds of video Green had provided the police.

Eleven months after the incident, Commission staff interviewed Judge Nance under oath, intending to focus on Judge Brue's false allegation that Green had assaulted her. During that interview, Judge Nance injected a version of the interaction that she and Judge Brue had with Green and with the Mackinac Island police that was very passionate and very inflammatory, saying in so many words, on eleven separate occasions during her testimony, that the Mackinac Island police treated her and Judge Brue as though they did not exist and going so far as to suggest

[29] The time stamps on the video taken from different cameras may not be synchronized with each other.

that they were treated like "runaway slaves."[30] That is, she indignantly claimed nine times that Officer Hardy would not even bother to speak with her and Judge Brue when he first arrived, and she heatedly claimed twice more that she and Judge Brue were commanded to "wait by the curb" while the police met with Green, giving Judge Nance the feeling of being treated like an escaped slave. Judge Nance "injected" this information into her testimony in the sense that it was not directly responsive to the questions she was asked—rather, it was information she was clearly eager to impart to explain her answers to other questions. And the information she injected served to complement and reinforce a similar narrative of mistreatment she gave about Green and his staff.[31]

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[30] (Attachment 1: Nance Tr. July 28, 2020, p.28).

[31] One example of Judge Nance's dramatic interpretation of events was inspired by the following: When Judges Brue and Nance were interacting with bike shop staff, the staff could not initially find the record of the bike rental in their computer system. It later turned out that Judge Brue's name had been entered as "Ms. Demetria" rather than "Ms. Brue." Judge Brue had rented the bikes with a credit card, and in the course of searching for her rental record, Green asked Judge Brue whether she might have used a different credit card. During her testimony eleven months later, Judge Nance turned this straightforward confusion and Green's question into an allegation that Green had accused her and Judge Brue of committing credit card fraud.

> [Judge Brue] then pulled out her driver's license and showed it to [Green]. He says, well, there's nothing here with that name. You must have used a credit card that doesn't have your name on it. You must have used something else because there's nothing here with that name. At this point his voice is starting to raise. Initially it wasn't. He just said no free rides. So now his voice is starting to elevate. I wouldn't say that he was yelling, but his voice was elevated. There's nothing here with your name on it. You used somebody else's card or something's wrong. So she says, well, it's my card. It has my name on it. I have no reason to use anybody else's card.

(Attachment 1: Nance Tr. July 28, 2020, pp 13/15-20 & 14/1-4).

Judge Nance was asked a clarifying question about a "card" she referenced. "A credit card. So [Judge Brue and Green are] now speaking. I'm not engaging because I didn't pay for the transaction. So [Green] went back to the first guy, and the first guy came out and found the paperwork. And then [Judge Brue] said, well, I think you owe me an apology. You just accused me of using somebody's else's card or having a fraudulent card. That's fraud. I'd never do that." (Attachment 1: Nance Tr. July 28, 2020, p 14/10-17).

Later in her testimony Judge Nance was asked what she and Judge Brue were discussing as they waited for the review to be complete. She said: "That [Judge Brue] asked for an apology after they couldn't find the paperwork, and [Green] didn't give her one, that he accused her of fraudulently using somebody else's credit card because he didn't find the paperwork." (Attachment 1: Nance Tr. July 28, 2020, p 28/16-20).

In other words, from the mere fact that Green could not find a record of the rental in the name of "Brue" and for that reason said Judge Brue must have used a card with another person's name on it, Judges Brue and Nance concluded that Green was accusing them of credit card fraud, rather

Until Judge Nance provided her testimony during the interview, the investigation was focused solely on the few seconds of Judge Brue's interaction with Green during which she had made the false allegation (later repeated to Officer Hardy) that he had assaulted her and for which Commission staff had been provided video. As a result of, and to verify, Judge Nance's dramatic story of mistreatment at the hands of Mackinac Island law enforcement, Commission staff asked Green whether he had additional security video of the interaction.

A year after the events Green was still able to provide about 30 additional minutes of video of Judges Brue and Nance at the bike shop, first talking with Green and his staff for about 10 minutes, then talking with Officer Hardy for ten minutes, then talking with several officers and Green for several minutes after Hardy reviewed the security video of Judge Brue's interaction with Green. Green represented to Commission staff that the additional 30 minutes of video was all the video of the interaction that remained at that time. He also explained the location of his security cameras, which made clear that he had no cameras with a view of his office where he and Officer Hardy reviewed the security video during the 25 minutes for which Judge Nance claims video is "missing." In short, there is no *evidence*—just Judge Nance's and the Master's speculation—that any additional video of the judges' post-ride interactions at the bike shop ever existed.

The Master's report did not explain why any video that either no longer exists or never existed in the first place has any bearing at all on the admissibility of the video that Green did provide. There is no suggestion by the Master or Judge Nance that the nonexistent video of a different part of the interaction at a different time would change the substance or perception of what is shown on the video that disciplinary counsel do have and that we provided to the Master.

Nor did the Master cite any authority to support his assertion that the absence of additional video makes the proffered video inadmissible. In fact, the authority is to

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than the normal inference that Green simply thought they used a card that had someone else's name, with no suggestion of any impropriety.

the contrary. *See*, *e.g.*, *People v Berkey*, 437 Mich 40, 52 (1991) ("It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly."); *Michigan v. Alexander*, 2021 WL 942187, at *19 (Mich. Ct. App. 2021); *cf.* 31 Cal. Jur. 3d Evidence § 163 ("The fact that a tape-recorded statement is not audible and intelligible in its entirety does not of itself require its exclusion from evidence. It is not necessary that all the conversation be heard in order that the witness may testify as to part.").

In short, there appears to not have been even an arguable basis for the Master to have concluded that the video is inadmissible.

What the Master may have been concerned with was not admissibility, but the Rule of Completeness, MRE 106. That rule provides that if part of an item is admitted into evidence, the rest of it must also be admitted if admitting it is necessary to a fair understanding of what has been admitted. Assuming that was the Master's concern, he misapplied the rule, because that rule is not a basis for *excluding* evidence, as the Master did with the video. *See*, *e.g.*, *People v Thomas*, 2016 WL 6902021 at 3 (2016); *People v McGuffey*, 251 Mich App 155, 161 (2002). The Rule of Completeness would only come into play, if at all, if there were additional video, which Judge Nance has not demonstrated to be the case. *Thomas* at 3.

Because the Master mistakenly considered the video inadmissible, he disregarded it when considering the evidence of Judge Nance's intent to deceive. Had the Master considered the video as he should have, he would have seen that it shows that Judge Nance was immediately nearby and was watching Judge Brue as she grabbed a paper from Green and then falsely stated that she had been assaulted by him. It is clear that Judge Nance was in a good position to hear the words stated by Judge Brue. It is also clear from the video that Judge Nance was present during, and participated in, Judge Brue's ten-minute conversation with Officer Hardy during which Officer Hardy took notes and was shown an item by Judge Brue.

Had the Master then compared the video with Judge Nance's testimony, he would have seen how dramatically Judge Nance's version of events differed from the reality. That is, he would have seen that Judge Nance alleged facts that were central to her narrative of mistreatment on Mackinac Island but that were completely false. He would have seen that, contrary to Judge Nance's nine separate and indignant statements during her testimony that Officer Hardy did not bother to speak with her and Judge Brue, in fact Officer Hardy spent his first ten minutes on the scene listening almost exclusively to them. Had the Master reviewed Judge Nance's testimony in light of the video and the proffered testimony that he considered "not relevant" during the hearing, he would have seen that Judge Nance injected into her testimony her false claim that Officer Hardy ignored her, and the Master also would have seen from the context in which she did so that she presented herself as having a solid memory of what she asserted to be true.

The Master's refusal to consider the video was an abuse of his discretion that is yet another reason to reject his recommendation.

Judge Nance's Testimony Alone Created an Issue of Fact Regarding Her Intent

As discussed above, the Master rejected all of disciplinary counsel's proffered evidence that contradicts Judge Nance's statements and provides circumstantial evidence that she intended to deceive. During the hearing he rejected the testimony because he considered it irrelevant to Judge Nance's intent, and he rejected it in his report because the evidence was not in the form of affidavits. He rejected the video because it was not authenticated by affidavit and because there might once have been additional video.[32]

The Master was then left with only Judge Nance's own statements to consider with respect to her intent to deceive. He found that "while there may be contradictions and confrontations in her testimony it falls far short of establishing the fact that a

[32] Among the evidence that Judge Nance's statements were deliberately false that the Master refused to consider were Judge Brue's own false statements about the events that were strikingly similar to Judge Nance's—a coincidence that is unlikely unless both had a similar intent to falsify.

false statement was made at [her] deposition much less that any false statement was intentionally made."[33]

The Master was wrong about the evidence of Judge Nance's intent to deceive, even if he only had Judge Nance's own statements and pleadings to demonstrate that intent. That is because her pleadings include her clearly inadequate and questionable justifications for her admittedly false statements during her testimony. The nature of her testimony coupled with her inadequate justifications are themselves sufficient to create an issue of fact with respect to her intent to deceive.

For example, Judge Nance gave multiple explanations for her misrepresentations about whether Officer Hardy ignored her and Judge Brue. Initially, she claimed that she had a "lack of recall" because she was unable to refresh her recollection about the interaction, causing her to misremember that Officer Hardy did in fact talk with both she and Judge Brue.[34] But the passionate nature of her testimony that Officer Hardy ignored her and Judge Brue, which she injected into her answers, shows that she was clearly not "failing to recall" anything.[35] Rather, she presented herself as someone who had been aggrieved by Officer Hardy's treatment from the moment he allegedly ignored her and Judge Brue.

Next, Judge Nance argued that she was not *misrepresenting* about Officer Hardy ignoring her and Judge Brue; rather, she was just using hyperbole and colloquialisms to describe the interaction with him.[36] To the contrary, the nine times she claimed that Officer Hardy ignored her and Judge Brue included the following:

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[33] Attachment 5: Report pp 3, 4.

[34] Attachment 6: Tr. May 14, 2024, p 20/2-5.

[35] The audio version of Judge Nance's testimony is Attachment 8 to these objections. The audio version communicates much more clearly than do the dry words of the transcript just how offended Judge Nance claimed to be by these events that—as we later learned—never actually happened.

[36] Attachment 6: Tr. May 14, 2024, p 32/17-19.

A couple of Judge Nance's references to the interaction with Officer Hardy *could* be considered mere hyperbole, *if* seen in isolation and not in the context of her remaining testimony that Officer Hardy ignored them. For example, Judge Nance testified, "[Officer Hardy] didn't give us the time of day until he came out and determined that [Judge Brue] was the one who committed the assault." (Attachment 1: Nance Tr. July 28, 2020, p 36/22). She later testified that "[Officer Hardy]

- Judge Brue did not say very much to Officer Hardy "because he wouldn't speak to her." (Attachment 1: Nance Tr. July 28, 2020, p 34/3-5). This was a particularly important false statement by Judge Nance, because it was in response to a question whether Judge Brue had told Officer Hardy (falsely) that Green had assaulted her. Judge Nance's answer would have been non-responsive to the question, were she invoking a mere colloquialism.
- When asked what happened when Officer Hardy arrived, Judge Nance said, "when the police officer arrived, [Judge Brue] approached him. I was walking behind her. She started to explain that the vendor wouldn't give her a receipt, and he walked right past her as if she hadn't said anything…" (Attachment 1: Nance Tr. July 28, 2020, p 23/9-12).
- When asked how many officers were at the scene, Judge Nance indicated that she wasn't sure, then went on to say, "if [an officer] was there, he didn't interface with us at all. So there was [Officer Hardy] who asked to see the video, who just brushed by---" (Attachment 1: Nance Tr. July 28, 2020, p 87/17-20).

These were statements of objective fact, not "colloquialisms" or "hyperbole."

Third, Judge Nance claimed that it was just her "perception" and her "cultural experiences" that caused her to state that Officer Hardy did not speak with her and Judge Brue.[37] But cultural experience doesn't cause someone to make up an objective fact, such as the objective claim that Officer Hardy did not even speak with her and Judge Brue. In short, even apart from the evidence that the Master refused to consider, Judge Nance's sworn interview testimony coupled with her implausible efforts to explain the false parts of that testimony suffice by themselves to create an

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didn't speak to us long enough to give us the time of day." (Attachment 1: Nance Tr. July 28, 2020, p 63/16-17).

But of course, Judge Nance's statements can*not* be taken out of the context in which she made them.

[37] Attachment 3: Supplemental Motion for Dismissal pp 2-3, 14.

issue of fact whether Judge Nance intended to mislead the Commission into believing that Officer Hardy did not speak with she and Judge Brue.

The Master's recommendation to dismiss did not try to grapple with the fact that it was Judge Nance who injected her false statements into her testimony—until *she* complained during the interview about her interactions with Officer Hardy, Commission staff did not ask her to try to recall those interactions. The Master's recommendation did not try to grapple with the fact that Judge Nance repeated her most inflammatory false statements—several times, in the case of her claim that Officer Hardy wouldn't speak with her and Judge Brue—in different ways, removing the possibility that the false picture she created was somehow an accident. Nor did the recommendation try to grapple with the fact that Judge Nance expressed indignation at the wrong that Officer Hardy allegedly did to her and Judge Brue (that she now admits was not done), or grapple with the fact that she was unlikely to "mistakenly" have carried, for almost a year, her indignation at something that never happened.

The Master Took Notice of a "Fact" That Was Not In the Record

The Master first announced his intent to recommend that the Commission dismiss the complaint during the hearing on the motion to dismiss. One of the charges against Judge Nance was that she falsely claimed that when Officer Hardy reviewed the security video, he instructed Judges Nance and Brue to "wait by the curb."[38] Disciplinary counsel's proffer to the Master regarding this charge was to the effect that Judges Brue and Nance were told they could not go into Green's *office* during Officer Hardy's review of the security video. That office is a small part of the overall property that makes up the bike shop. No one suggested to the Master anything other than that Judges Brue and Nance were told they could not enter the *office*.

[38] When she testified, Judge Nance was aware that Officer Hardy had made a record of Judge Brue's false allegation that Green assaulted her. Judge Nance's testimony characterized Hardy's alleged directive to wait by the curb as very disrespectful. In context, Judge Nance's claim that Hardy told the judges to wait by the curb was central to her theme that Hardy's record of Judge Brue's statement that Green assaulted her could not be trusted—in part, it could not be trusted because Hardy treated the judges with such alleged disrespect.

At the hearing the Master explained why he intended to recommend to the Commission that there was insufficient evidence to show that Judge Nance intended to mislead when she said she and Judge Brue were told to "wait by the curb." In doing so, he took judicial notice that on Mackinac Island either a person stands on a vendor's property or they stand in the street.[39] The Master's clear and stated implication was that even if the judges were not literally told to "wait at the curb,"[40] on Mackinac Island telling them to leave the property was comparable to telling them to wait by the curb, and therefore Judge Nance's statement that they were told to wait by the curb was not "false" so much as just another way of characterizing being told to leave the property.

But there was no evidence to support the Master's finding to that effect, not even from Judge Nance. No part of the proffer or the allegations in the complaint suggested that anyone told Judge Nance to leave the "property," rather than to not enter Green's "office." Further, there *is* sidewalk on Mackinac Island that is not in the street. The Master made what appears to have been a central finding about Judge Nance's "curb" claim without any foundation and without even inviting any discussion from the parties concerning the accuracy of his judicial notice.

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[39] Attachment 6: Tr. May 14, 2024, p 42/12-24.

[40] Contrary to the Master's inference that Judge Nance may have been told something that was merely comparable to being told to "wait by the curb," it actually was important to Judge Nance's narrative that the judges were *literally* told to "wait by the curb." She testified as follows about those exact words:

> The way that it's described where [Officer Hardy] never mentions that he told me to go stand in the street by the curb, and those words were chilling to me because I've never ever in my life been told to stand by the curb. I'll never forget those words as long as I live, and that's what, again, put me on high alert that we needed to get somebody else involved. (Attachment 1: Nance Tr. July 28, 2020, p 62/15-21).
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> So we stood in the street or off the street at the curb, and I'm sure you've been to Mackinac Island. Its streets are filled with horse dung, the sweet smell of horse dung. And that's what we did. (Attachment 1: Nance Tr. July 28, 2020, p 25/11-15).
>
> I could hear testimony in my ears from all the cases I've had in my court where officers have testified about telling suspects to stand at the curb. This whole thing about the curb was just ringing in my ears. I have never in my life been told to stand at the curb. I've never been arrested. I've never been told to stand at the curb. (Attachment 1: Nance Tr. July 28, 2020, pp 25/23-26/2).

The Master Improperly Created a New Element of the Charged Misconduct

At the hearing (but not in his written recommendation) the Master asserted his belief that disciplinary counsel could provide no witnesses to establish that Judge Nance's false testimony was designed to "further a particular purpose."[41] This was a peculiar burden for the Master to create, because knowingly false statements by a judge are misconduct whether or not they are designed to "further a particular purpose." Though the Master did not mention this rationale in his brief written recommendation, neither did he disavow it. It is impossible to know the extent to which this mistake of law influenced his decision to conclude that the evidence was insufficient to create an issue of fact, but his apparent reliance on it is another reason to reject his recommendation to dismiss.

Stay of Proceedings & Refusal to Consolidate Hearings

The Master has made two other significant prehearing rulings that have a significant impact on the Commission and that are hard to explain on the basis of the facts or the law: 1) the Master refused to consolidate FC 105 and FC 106 for the public hearing even though both cases are nearly identical; and 2) the Master indefinitely stayed the proceedings in both cases for the purely speculative reason that the ongoing review of the Commission's dispositions might produce evidence that the Commission has treated white judges in the same position as Judges Brue and Nance more favorably than it treated Judges Brue and Nance, who are black.

The Master barred consolidation and indefinitely stayed the proceedings in November 2023. Disciplinary counsel are bringing these matters to the Commission's attention now, rather than at the time of the Master's rulings, because until the Master recommended dismissing FC 106 there was no vehicle for alerting the Commission to the Master's earlier rulings. That is because the court rules that govern public complaints do not authorize disciplinary counsel to appeal a Master's

[41] Attachment 6: Tr. May 14, 2024, pp 42/12-44/1.

rulings unless the Master submits a recommendation to the Commission, and the Master's earlier rulings were not a recommendation to the Commission.

Now the Master's recommendation to dismiss the complaint is before the Commission. Because his refusal to consolidate and his indefinite stay of proceedings have a very material impact on the Commission and its mission, and because the Master's treatment of consolidation and the stay is relevant to understanding his recommendation to dismiss as well, disciplinary counsel are also bringing those decisions to the Commission's attention at this time.

Refusal to Consolidate Hearings

As the Commission knows, complaint FC 106 against Judge Nance arose out of the same facts as FC 105 against Judge Brue. MCR 2.505 provides that complaints may be consolidated for trial if an action involves substantial and controlling common questions of law or fact. In August 2023 disciplinary counsel asked the Master to consolidate the complaints against Judges Brue and Nance under that rule because:

- Every witness in FC 106 is also a witness in FC 105.
- The witnesses will have to travel a substantial distance to testify, so shouldn't be asked to make those trips twice unless there are strong reasons for them to.
- The facts in the two cases are essentially identical except that FC 106 will focus more heavily on Judge Nance's false statements about those facts.
- It is a large duplication of resources to try the same case twice.
- The Master's job is to produce a record for the Commission to review, and it's much easier for the Commission to review one record than two separate but nearly identical records.

Rather than consolidate, at Judge Nance's request the Master *barred* consolidation of FC 105 and FC 106.[42] His only basis for rejecting consolidation was

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[42] A motion to consolidate was filed August 11, 2023. A hearing with respect to consolidation and other issues took place on November 1, 2023, at which the Master denied the request for consolidation. (Attachment 9: Tr. Nov. 1, 2023, pp 78/14-79/2). On November 13, 2013, the Master entered an order barring consolidation and instructing that the matters be heard independently.

that the two proceedings have a different "focus," in that FC 105 focuses on Judge Brue's actions and her credibility about those actions, and FC 106 focuses on Judge Nance's credibility with respect to "the events." (Attachment 9: Tr. Nov. 1, 2023, p 78/1-13).

Missing from the Master's analysis was any recognition that "the events" are the same in both cases. "The events" that are relevant to FC 105 were Judge Brue's actions and the context in which they took place, and Judge Brue's statements about those actions that are false in ways that are very similar to the way Judge Nance's statements are false. All of these same things are also relevant to the charges in FC 106 that Judge Nance lied about these events.

In refusing to consolidate the proceedings because they have a different "focus," the Master seems to have ignored the standard he should have applied. The standard is not whether the "focus" of each proceeding is different,[43] but whether there is a "substantial and controlling common question of law or fact." MCR 2.505. A question of fact is "substantial and controlling" if it must be established in order to sustain a theory of the claim.[44] In this case, every witness and the great majority of the significant facts that will establish misconduct charged in FC 105 will also be necessary to sustain the charges in FC 106.

The exception to consolidation of similar claims is if consolidation would significantly prejudice a substantial right of a party.[45] But no one – not Judge Brue,

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Disciplinary counsel filed a motion for reconsideration on December 29, 2023. Judge Nance filed a pro se response on January 3, 2024. The Master denied reconsideration on January 24, 2024.

43 Indeed, in any two actions that are consolidated there will be *some* difference in focus. If a difference in focus was a basis to deny consolidation, the rule allowing consolidation would be largely superfluous. And in this case, the difference in focus between FC 105 and FC 106 is very narrow.

44 § 2505.4 Nature of consolidation—Substantial and Controlling Common Question, 3 Mich. Ct. Rules Prac., Text § 2505.4 (7th ed.).

45 § 2505.4 Nature of consolidation—Substantial and controlling common question, 3 Mich. Ct. Rules Prac.,Text§ 2505.4 (7th ed.) Accessed via Westlaw at

https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0288609357&pubNum=0130117&originatingDoc=N88EE463033AC11DB939AD224E78C99B1&refType=SA&originationContext=document&transitionType=DocumentItem&ppcid=43eea888248242b186aa269621316795&contextData=(sc.Search) on July 1, 2024.

not Judge Nance, and certainly not the Master—even tried to identify any unfair prejudice to either Judge Brue or Judge Nance that would result from consolidation. Nor would consolidation cause any confusion between the cases, because the Master and Commission can surely keep separate the simple allegations of the two complaints as they apply the straightforward evidence to those complaints.

Neither the facts nor the law supported the Master's decision to bar consolidation, while the factors that militate in favor of consolidation are very strong here. It is not clear what motivated the Master to deny disciplinary counsel's motion to consolidate, but it is clear that his decision was a mistake.

Stay of Proceedings

The complaints in FC 105 and FC 106 were filed in late 2022. Nearly a year later, in late 2023, the Master ordered that the public hearings for both complaints be delayed indefinitely at the request of Judges Brue and Nance.[46] The basis for their request was that the Commission's dispositions would be (and now are) undergoing a review for evidence of racial disparity. Judges Brue and Nance argued that the results of that review might show that they were treated unfavorably compared with their Caucasian counterparts, and if the review showed that, these proceedings would be invalid. The Master granted their request to stay the proceedings indefinitely—the stay has now lasted nine months and appears destined to last at least until the review is over. The Master granted the stay even though:

- Judges Brue and Nance cannot point to any evidence that suggests that *they* have been treated in disparate fashion.
- Judges Brue and Nance never identified with any particularity the information they seek as a result of the stay. They did not even assert with particularity that similarly situated Caucasian judges have *not* been

[46] Motion to Stay/Adjourn the Hearing filed in FC 105 on August 11, 2023; Disciplinary Counsel's Response to the Motion to Adjourn filed September 1, 2023; Judge Brue filed a response on September 15, 2023; Surreply to Motion to Adjourn filed September 29, 2023; Motion and Brief for Reconsideration filed by disciplinary counsel on December 29, 2023; Attachment 9: Tr. Nov. 1, 2023 p. 69/7-15, in which the Master granted Judge Brue's Motion to adjourn the hearing and stay the proceedings, effectively staying any evidentiary hearing in both cases.

charged with making false statements under circumstances comparable to those in these cases.[47] Rather, their argument to the Master rested on racially inflammatory generalizations, unsupported by evidence, about the Commission's treatment of black judges compared to white judges, and merely speculated that review *might* show that the Commission treated the two races differently.

- The review is focused on the big picture statistics of Commission dispositions. It is not designed to provide evidence that would be relevant to the claim Judges Brue and Nance are trying to make. That is, it's not designed to show whether any Caucasian judges who made false statements under oath as Judge Nance did, or made false statements to the police and under oath as Judge Brue did, when there was substantial evidence to substantiate that the falsehoods were made intentionally, were nonetheless *not* pursued publicly.
- The question whether Judges Brue and Nance have been treated in disparate fashion is entirely separate from the facts that gave rise to the complaints against them. That means that the Master could do his job—develop in a hearing the facts that gave rise to the complaints—and the ability of Judges Brue and Nance to defend against the charges in the complaints would not be impacted in the least by the possibility that other judges were treated differently.
- Under the rules that govern the Commission's activities both the Commission and the Supreme Court review all evidence de novo and have the ability to remand for further factfinding if appropriate. That means Judges Brue and Nance could raise their claim of disparate and unfair treatment at *any* stage of the proceedings, up to and including if and when

[47] Judge Nance has claimed that Caucasian judges who did what she did were not charged in public complaints, but she based this claim on selectively chosen and incomplete facts from matters that are listed in the Commission's public reports. (Attachment 3: Supplemental Motion for Dismissal pp 10-11, 14).

the case is before the Supreme Court, *if* there is ever evidence of relevant disparate treatment for them to present. In other words, there is no need to delay the Master's hearing on the facts that are charged in the complaints in order to preserve whatever arguments Judges Brue and Nance may someday have with respect to equal treatment. The Master could hold the hearing, and Judges Brue and Nance could still bring to the Commission or Supreme Court any evidence of disparate treatment.

- The events in the case happened three and a half years before the Commission filed FC 105 and FC 106, and nearly five years ago now. The delay only causes witnesses to have to work harder to provide reliable testimony, and also risks the loss of the evidence that now exists and that is necessary to establish the charges of misconduct.
- The events in this case have cast a cloud over Judges Brue and Nance for a very long time. The public is poorly served by that cloud.

Although the Master's order for a stay rests on the "present unavailability" of allegedly material evidence, the order does not even try to demonstrate why there is any reason to believe, beyond mere speculation, that material evidence that Judges Brue and Nance were treated in disparate fashion will result from any review of the Commission's records.[48] Neither the Master's order nor his comments at the hearing on the motion to stay so much as tried to explain why any review of the Commission's actions in other cases has any bearing at all on the facts and misconduct that are charged in FC 105 and FC 106.

Further, the Master's order to stay proceedings did not cite any authority in support of the stay. It did not explain why the Master believed that the factors cited above that argue in favor of proceeding with the hearing did not suffice— either singly or in combination—to outweigh whatever benefit the Master found in a stay. The Master's order did not even address any of the considerations listed above.

[48] Attachment 10: order entered 11/13/2023.

Before incurring the costs of lengthy delay for the purpose of possibly obtaining what is purely speculative evidence, the Master should have at least offered a theory for how the hoped-for evidence might affect the proofs regarding the charges in the complaints. But the Master did not find such a link or try to grapple with that question. Again, neither the facts nor the law seem to explain the Master's decision to stay the proceedings.

During the hearing at which he denied the motion to consolidate and decided to stay the proceedings indefinitely, the Master made a gratuitous but perhaps revealing comment about his perception of FC 105 and FC 106:

> As has been noted several times, this case has, I will say, languished for an extended period of time. This Court is – in some ways this Court is frustrated because what the underlying events that gave rise to particularly Case 105 involves what I would characterize as a trivial interaction involving whether payment of $23 to a vendor should have occurred, did occur, and whether, in fact, was worth the pain and agony of a dispute that arose which ultimately has resulted in, I suspect, bitter feelings on all sides.[49] That kind of dispute clearly is the classic mountain out of a molehill circumstance.
> (Attachment 9: Tr. Nov. 1, 2023 pp 66/18-67/4).

In context, the Master's comment conveyed his impression that the events charged in the complaint were trivial, even though they included abuse of authority and false allegations of assault by Judge Brue.[50] Most tellingly, the Master's comment conveyed his belief that the incident remained trivial even after Judges Brue and Nance made false statements about it. The Master's comment appears to indicate a feeling that the Commission never should have filed the complaints in the first place. That sentiment is wholly consistent with the Master's analysis in his

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[49] The Master's comment about "bitter feelings on all sides" ignored what is apparent from the pleadings and hearings—that *all* of the vitriol to which he referred had been expressed only by Judges Brue and Nance. The hard feelings are very much *not* an "all sides" thing.

[50] The analogy disciplinary counsel presented to the Master—and that the Master apparently rejected—is to assume two drivers compete for a parking space, and during the rage that follows from the competition, one driver shoots the other dead. The incident may have begun as a "molehill" (arguing over a parking place) but it became a mountain once there was a homicide as well. In FC 105 and FC 106, the molehill of a dispute over a bike rental became a mountain once Judge Brue falsely accused Green of assault and once both judges chose to lie about the incident.

recommendation to dismiss the complaint against Judge Nance and his decisions to stay the proceedings indefinitely and to bar consolidation of the proceedings.

CONCLUSION

For the reasons stated above:

- There are issues of material fact about Judge Nance's intent when she made false statements about the events on Mackinac Island that the Master must decide and that can only be resolved after a hearing.
- The Master abused his discretion by not consolidating the proceedings in FC 105 and FC 106.
- There is no credible basis to stay the proceedings and no significant prejudice to Judges Brue and Nance if the complaints proceed to hearing.

Accordingly, disciplinary counsel respectfully request that the Commission DENY the Master's recommendation to dismiss the complaint in FC 106. Additionally, we ask that the Commission lift the stay of the proceedings in both FC 105 and FC 106, consolidate both cases, and require that the Master promptly schedule hearings in both of these matters.

Respectfully submitted,

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/s/ Rebecca Jurva-Brinn
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Dated: August 6, 2024

Attachments and Citations Reference:

Attachment 1
Sworn Testimony, Debra Nance Taken July 28, 2020
Referred to as "Nance Tr. July 28, 2020"

Attachment 2
Motion for Dismissal, Filed August 4, 2023

Attachment 3
Supplemental Motion for Dismissal. Filed February 26, 2024

Attachment 4
Exhibit 6 – Affidavit in Support of Supplemental Motion to Dismiss

Attachment 5
Official Report and Recommendation, Filed May 20, 2024
Referred to as "Report"

Attachment 6
Transcript of Hearing on Motion to Dismiss, May 14, 2024
Referred to as "Tr. May 14, 2024, page/line"

Attachment 7
Disciplinary Counsel's Reply to Supplemental Response to Motion to Dismiss, Filed April 15, 2024

Attachment 8
Audio of Sworn Testimony of Hon. Debra Nance, July 28, 2020

Attachment 9
Transcript of Hearing On Motions in FC 105 and FC 106, November 1, 2023

Attachment 10
Signed Order from Hearing on November 1, 2023, entered on November 13, 2023

Attachment 11
Cited Videos

- Video of Initial Drive Up and Test Ride
- 1st part File Hut 2.mp4
- 2nd part File Hut 2.mp4

Attachment 12
Transcript of Hearing
Referred to as "Tr. April 1, 2024, page/line"

Attachment 13
Response to Motion to Stay filed in FC 105

Attachment 14
Surreply to Motion to Stay in FC 105